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COMMON USES OF PRIVATE TRUSTS IN THE UNITED STATES

by

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EVERYDAY USES OF TRUSTS IN THE UNITED STATES

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I. Introduction: This paper will discuss the common, everyday uses of trusts in the United States from the perspective of a practicing lawyer who works in the areas of estate planning and fiduciary administration.

II. Basic Trust Concepts:

A. The trust is a device which creates a fiduciary relationship with respect to property. It typically separates the responsibility for management of the trust assets from the beneficial ownership of those assets. The one establishing the trust is generally called a "settlor," "trustor," or "creator." The property manager is characterized as a "trustee." The persons for whose benefit the trust is created are called the "beneficiaries." The separation of management from beneficial ownership is not unique to a trust; it is a relationship common to all agency arrangements. The unique qualities of a private trust are (1) the ability to create both concurrent and successive beneficiary interests and (2) the broad grant of discretion to the trustee with respect to the needs of the various beneficiaries, including those beneficiaries who will not have a present interest in the trust until some time in the future.

B. Concurrent Interests: A trust may create concurrent beneficial interests, *i.e.*, beneficial interests in a number of separate beneficiaries, all to be enjoyed at the same time. For example, the trust may be set up for the benefit, during my wife's lifetime, of the group of beneficiaries consisting of my wife and my descendants (which would include both my children and my grandchildren).

C. Successive Interests: The trust may also create successive beneficial interests. For example, the trust may be for the benefit of my wife during her lifetime; then for the benefit of my children during their lifetimes; with distribution to my grandchildren upon the death of the survivor of my children.

D. Trustee Discretion: The trustee may be given discretion as to the making of distributions of income or corpus for the benefit of a particular beneficiary. For example, the trust may be established for my wife during her lifetime with discretion in the trustee to distribute so much of the income to or for her benefit as the trustee may determine to be necessary or advisable for her support and maintenance, with any undistributed income added to corpus. Similarly, the trustee may be given discretion to invade corpus during my wife's lifetime for her benefit under a particular standard (*e.g.,* to maintain the same standard of living which we enjoyed prior to my death).

In addition, the trustee may be given discretion as to how to distribute income and corpus among a class of beneficiaries. For example, the trustee may be given the discretion, during the lifetime of my wife, to distribute so much of the income among the group of beneficiaries consisting of my wife and my descendants, in equal or unequal shares (with the discretion to omit one or more beneficiaries entirely) as the trustee deems necessary or advisable for the support and maintenance of the beneficiaries. See Model Trust § 3.02(3).

The trustee might also be given discretion regarding the invasion and distribution of corpus to and among members of the class of beneficiaries. If the trustee makes discretionary distributions to one or more of the members of a class of beneficiaries, then the trust instrument should specify whether or not such distributions are to be charged against the ultimate distributive share of the respective beneficiaries. See Model Trust §3.02(3).

The trust instrument should also instruct the trustee as to whether there is a duty to inquire as to the other income and assets of the beneficiaries prior to making a discretionary distribution. See Model Trust § 4.04(5).

E. The language of the trust instrument may create limitations on the beneficial enjoyment of the property so long as the limitations are not against public policy. For example, the trust instrument may provide for distributions of income to my wife until the event of her remarriage, with a distribution then to my children. The limitation on beneficial enjoyment while unmarried is generally not against public policy. A provision that the trustee may make distributions to a beneficiary only in the event that he or she forsakes a particular religious practice and affiliation would, however, probably be invalid as against public policy.

F. A trust may also be used to create a beneficial use of property which might otherwise be prohibited by strict legal restrictions. Historically, in England trusts were used to create beneficial interests in real estate in women where the law prohibited women from outright ownership of real estate. Similarly, trusts were used to create beneficial interests in religious organizations where the law at the time forbade outright ownership of property by religious institutions under certain circumstances.

G. Tax related benefits will be discussed below. The trust device can be used to achieve certain income and transfer tax benefits which would be unavailable or less valuable if a gift was made outright rather than in trust. Trust use in the United States in integral to estate planning, that is to the transmission of wealth from one generation to the next at the least cost, including the avoidance or minimization of wealth transfer taxes.

III. Classification of Trusts: Trusts may be created during lifetime or by a document, such as a will, which is effective upon death. A trust created during lifetime is called a “living trust” or an “inter vivos trust.” Trusts created by wills are generally characterized as “testamentary trusts.”

An inter vivos trust may either be revocable or irrevocable. If the settlor of the trust reserves the right to amend or revoke the trust, then there is generally no completed gift for either property law, creditor law, or tax law purposes. If the inter vivos trust is irrevocable, then generally speaking there is a completed gift for both property and tax law purposes. Testamentary trusts, by their nature, are irrevocable.

IV. Commonly Created Testamentary Trusts Trusts are commonly created in wills in different ways to meet various objectives.

A. Protection of Minor Children Assume the case of a young couple with a modest estate (which does not require estate tax planning) and several small children. The objective is for each spouse to leave his or her estate to the survivor and secondarily to provide for the children in the event of a common disaster or otherwise where the second death occurs while the children are still young. The common solution is to draft a will which provides disposition of the estate in favor of the surviving spouse, but with a contingent trust for the children. A copy of the format of such a trust used in the author's law office is attached to illustrate common, every day trust drafting and use. This trust is referred to in this paper as the "Model Trust." In such a case the trust is often a discretionary or "pot" trust for the benefit of the children until the youngest living child reaches a certain age, perhaps 18 or 21. During this period the group consisting of the decedent's children are discretionary beneficiaries with power in the trustee to apply income and corpus within the beneficiary group on a need basis. The trust would also authorize the trustee to make discretionary distributions to the guardians of the children so that the guardians would not suffer an out-of-pocket financial detriment for having custody of the children. See Model Trust § 4.04(3). At a point when the youngest child has had the same support and educational benefits or opportunities as the older children, the trust would divide into equal shares, with one share for each child. Each trust would then be a discretionary trust for the benefit of that child and his or her descendants, and the trust would terminate at a fixed time, perhaps when that child has attained the age of 25 years. In designing the termination provisions the creator of the trust, particularly if there are substantial assets involved, may wish to provide for staggered distributions so that a child would not receive the entire trust fund at the same time (unless in the context of a discretionary total distribution of corpus by the trustee). In such case a typical pattern of distribution might be one-third at age 25, half of the balance at age 30, and the remaining balance at age 35.

B. Marital Trust: Assume that there is a second marriage with grown children from a prior marriage. The testator may wish to provide for his or her surviving spouse during the spouse's lifetime in trust, with the trust terminating at the death of the surviving spouse and the trust remainder then being distributed in equal shares to the settlor's then living descendants (*i.e.*, his or her children from the first marriage together with their children). If, as in this case, the surviving spouse is the sole beneficiary (and is entitled to all of the income and is the only discretionary beneficiary of distribution of corpus) the trust will qualify for the federal estate tax marital deduction with the result that the assets are taxed in the estate of the surviving

spouse and not the original spouse. This kind of trust, known as a Qualified Terminal Interest Trust (QTIP), has the following benefits: (1) the protection of the surviving spouse; (2) estate tax deferral; and (3) the ability of the creator of the trust to control the ultimate disposition of the trust property at the death of the surviving spouse. Thus, there are a mix of tax and non-tax benefits.

Where marital deduction qualification is desired, but where the creator of the trust wishes the ultimate disposition of the assets to be determined by the surviving spouse at his or her death, the surviving spouse can be given a power (known as a power of appointment) to direct the ultimate distribution of the trust assets. Where there are children (who most likely would be children of both the decedent and the surviving spouse), the testamentary trust may be drafted to give the surviving spouse a special power of appointment, that is a power to direct the passage of the trust assets among the group limited to the descendants of the husband and wife. Such powers of appointment are commonly provided in trusts to the lifetime beneficiary so as to give him or her an opportunity to assess the family situation at the second death and to re-allocate the family estate, taking into account differing needs within the family, bad behavior, disabled family members, family members with marital or creditor problems, and the like.

C. Charitable Remainder Trust: The decedent may have interests both in providing at death for a charity (perhaps the decedent's church or university) while at the same time providing for his or her family, perhaps the surviving spouse. Again, a split interest (successive interest) trust may be commonly employed to achieve both of these objectives. For example, the will may create a trust for the support of the surviving spouse during his or her lifetime, and upon her death the remainder interest would be distributed to the charity. A variation would be to give the surviving spouse the power by his or her own will to designate (or appoint) the trust's remainder to a charity or charities of the surviving spouse's choice. In this case the assets would probably be protected from estate taxation in the first estate by the marital deduction and in the second estate by the federal estate tax return charitable deduction.

V. Common Uses of Inter Vivos Trusts: There is a wide variety of uses of trusts which a client establishes during his or her lifetime. The trusts may or may not be tax motivated.

A. To Avoid Probate: There is significant variation among the states as to the costliness and extent of court involvement in connection with the probate of wills and the administration of decedents' estates.

In states which have adopted the Uniform Probate Code, percentage fees for personal representatives and their attorneys have generally been abolished, and the involvement of the court in connection with the administration of the estate can be minimal. Initially, the decedent's successors have a choice between "formal probate" and "informal probate." "Formal probate" involves a hearing before the court, following notice to all interested parties, regarding the validity of the decedent's will,

and the result is a court order which is fully binding against all persons who were given notice. Under "informal probate," if the will does not appear to have any defects on its face, it will be admitted to probate by a clerk or administrative officer with no notice to interested parties and no hearing. In England these distinctions were known as "probate in the solemn form" and "probate in the common form." Following the opening of the estate, the decedent's successors can elect "unsupervised administration" and can elect "informal closing" of the estate. This means that the court has no involvement in connection with the administration of the estate, except as requested by the personal representative or the successors. No inventories or accountings are filed, and the personal representative does not need to obtain the authority of the court to take any actions.

In non-Uniform Probate Code states the court may be involved in an intrusive way. Inventories and accountings will need to be placed on the public record; there may be delays in taking action until court authority is obtained; and the process of court involvement may tend to slow the proceedings and make them more expensive. Non-Uniform Probate Code States include important states such as New York, Massachusetts, California, and Illinois. In those states an inter-vivos trust is commonly utilized by attorneys as a substitute for a will so as to avoid the probate process. Commonly the client creates a revocable trust during his or her lifetime. He or she, and possibly the spouse, serve as trustees. During the creator's lifetime the trust, to the extent that it is actually funded with property, is managed for the sole benefit and at the direction of the settlor of the trust. Should the settlor become incapacitated, an independent trustee will take over and manage the trust assets and income for the benefit of the settlor and the settlor's family. In connection with the death of the settlor, the trust has dispositive provisions which are identical to those of a will.

Generally speaking, the same opportunities for estate and tax planning exist through the use of a revocable trust as with a will. In large estates there is a slight tax disadvantage in using a revocable trust since, for fiduciary income tax purposes, all trusts must be on a calendar year basis, while an estate can be on a non-calendar, fiscal year basis. This provides some flexibility in connection with the timing of distributions so as to defer the ultimate payment of tax on estate income (which income passes out to the beneficiaries under complex provisions of law regarding the income taxation of estates and trusts).

In cases where a revocable trust is established as a will substitute, this does not eliminate the need for a will. A so-called "pour-over" will is prepared which generally names the person serving as the trustee of the trust as personal representative of the estate and which names the trust as beneficiary under the will. The reason for this is that, in most cases, not all of the decedent's assets get placed in the trust prior to the decedent's death and the use of a pour-over will serves to combine the probate assets with the assets which have already been transferred into the revocable trust.

B. To Facilitate Gifts: As discussed below, there may be tax reasons to make gifts by means of a trust. There are also, however, non-tax reasons for using a trust in this area of gifting.

For example, a grandparent may wish to make a gift to a grandchild so as to provide for future educational expenses or otherwise to help with the support of the grandchild. The grandchild, being a minor, does not have legal capacity to receipt for the funds or to manage them. Therefore a common use of a trust is to facilitate the making of gifts to minors. This can either be done by an individually drafted trust, or by utilization of a statutory trust. The Uniform Transfers to Minor's Act, a uniform act which has been adopted by virtually all of the states, contains the provisions of a trust for a minor. The provisions of the statutory trust are activated by the simple act of registering an asset (such as a bank account, mutual fund, or a security) in the name of the trustee (called a "custodian") for the benefit of a named beneficiary. In this case the Social Security number of the child is used, and the income earned is taxed to the child.

A similar kind of statutory trust may be used in those states which have adopted the Uniform Custodial Trust Act. This act provides a statutory trust for an adult, whether the adult is disabled, elderly, or otherwise. This device helps facilitate a gift which an adult child might want to make to assist with the support of an elderly parent. Alternatively, a individually drafted trust might be created by the child for the benefit of the elderly parent during the parent's lifetime, with a remainder interest back in favor of the creator of the trust or in favor of his or her younger generation family members.

VI. Common Tax Motivated Trusts: Trusts are commonly utilized to assist a settlor with the transfer of wealth to individual or charitable beneficiaries in a way which minimizes, avoids, or defers the imposition of gift and estate taxes which might otherwise be due on a donative transfer. For example, the use of a marital deduction testamentary trust to defer the imposition of estate tax until the death of the surviving spouse has been described above. There are several other examples.

A. Irrevocable Gift Trust: A client may wish to diminish the size of his or her estate, for federal estate tax purposes, by making gifts to younger generation family members. Such a gift may be outright. Alternatively, the gift may be made in trust (a) so as to facilitate the process of gifting to a minor or incapacitated donee; or (b) to provide management over family real estate or business interests which need coordinated management; or (c) so that the client or someone close to the client can otherwise retain control over the assets while shifting the beneficial interests to the younger generation family members.

A common variation of this kind of gift involves life insurance policies. Life insurance policies are favored items to be gifted because one can get the full amount of the life insurance proceeds out of one's estate and the transfer, for gift tax purposes, will only be measured by the current cash value in the insurance policy

rather than the full amount of the death proceeds. The gift of a life insurance policy or policies could be outright to the client's children. In practice, however, gifts of life insurance are commonly made through the device of an irrevocable life insurance trust ("ILIT"). Ideally the trustee of the life insurance trust applies for the life insurance and becomes owner of the policies. The person who is the insured and the creator of the trust makes gifts to the trust of amounts sufficient to pay the annual policy premiums. The trust may provide that the income from the trust may be used for the benefit of the settlor's spouse during his or her lifetime (although there will normally be no income until the death occurs and the insurance proceeds are received). Upon the death of the insured, the provisions of the ILIT will generally be similar to those of his or her will, *i.e.*, a provision for the surviving spouse for life and remainder to the children. Properly designed and funded, the life insurance proceeds escape estate tax in both the estate of the insured and the spouse. The life insurance proceeds provide a separate fund for the children to help pay death taxes and other expenses in connection with the estate of the insured, and the provisions of the life insurance trust include the authority to make loans to the personal representative of the insured's estate and also, more importantly, to use the liquid life insurance proceeds to purchase illiquid assets from the insured probate estate.

A variation is funding the ILIT with a so-called "second to die" life insurance policy. The policy is on the joint lives of the husband and wife and pays only at the time of the second death. On account of estate tax free transfers between spouses (via the marital deduction) the estate tax burden tends to fall on the estate of the surviving spouse. The liquidity needs are in the second estate and, conveniently, this is when the "second to die" policy pays. Again, in properly drafted and funded "second to die" ILIT, the insurance proceeds escape tax in both estates.

B. Charitable Remainder Trust: In the United States, gifts to qualified charities are exempt from gift and estate taxation and, subject to certain limits, their value is deductible for income tax purposes.

One approach to making a substantial charitable gift is simply to make a present outright gift. This will generate a present income tax deduction and will remove the asset from the client's estate for federal estate tax purposes. A limitation on this is that the client loses the benefit of the income from the gifted assets. A solution to this is the use of a charitable remainder trust ("CRT"). Under this trust arrangement, the client conveys investment type assets to the trustee of a trust. The trustee may be the settlor of the trust or a third party. Under provisions of the Internal Revenue Code, the settlor of the trust may reserve a lifetime income interest which is payable in a way to guarantee the protection of the trust remainder for the ultimate benefit of the charity or charities. The guaranteed income payment to the settlor is measured in terms of a fixed amount per year (an annuity trust) or a fixed percentage of the value of the trust corpus (a unitrust). This kind of trust is commonly used by a client who has substantial value in a single investment asset which has a very low income tax basis. If the client sold the asset, there would be the immediate recognition of a substantial capital gains tax. The asset is, however, transferred to the charitable

remainder trust. The asset is sold by the trustee and, because of the charitable nature of the trust, there is no immediate recognition of capital gains. The trustee may reinvest the proceeds so as to create a diversification of investments and may well increase the annual income available to be paid out to the settlor of the trust. In addition, all or a portion of the trust may be invested in tax-free municipal bonds so as to lighten the income tax burden on the settlor/life beneficiary. The capital gain, while generally not eliminated, is passed out to the settlor of the trust over a number of years, and there is a benefit in connection with the deferral of the payment of the capital gains tax. Further, in such a case, there is a charitable deduction available for the client in the year when the trust is set up, although the value of the charitable deduction is limited to the actuarial value of the charitable remainder interest.

It is possible to draft a CRT so that the charitable remainder interest will not actually be paid to the charity until the termination of successive life interests. For example, the creator of the trust may reserve a life income interest for the joint lifetimes of himself and his spouse, with the remainder interest vesting only upon the death of the survivor.

A charitable remainder trust may also be established by will. For example, the client, in his or her will, may establish a trust for the benefit of a child for the child's lifetime with the remainder to charity. In that case, the charitable deduction, for federal estate tax purposes, will be limited to the actuarial value of the remainder interest.

C. Defective Grantor Trusts: Often, when an irrevocable trust is established, the purpose is to remove the trust assets from the settlor's estate for federal estate tax purposes and also to shift the income on the transferred assets to the trust beneficiaries (who may be younger generation family members in lower income tax brackets). If the settlor of the trust retains certain interests, however, the trust income will continue to be taxed to the settlor of the trust, even though, under the terms of the trust instrument, the trust income is actually payable to the trust beneficiaries. Since payment of the income taxes by the settlor will further reduce the size of his or her estate for federal estate tax purposes and allow the trust assets and income to be maximized for the benefit of the beneficiaries, irrevocable trusts are sometimes designed so as intentionally to violate the "grantor trust" income tax rules so that the settlor will continue to pay the income taxes in connection with the trust administration. Such trusts are known as "defective" grantor trusts.

VII. Trusts to Coordinate Probate and Non-Probate Transfers:

At death, one's assets will pass to his or her successors either by a probate transfer, *i.e.*, by provisions of a will admitted to probate, or by non-probate transfers. Non-probate transfers may pass automatically by virtue of survivorship (joint tenancy) or by the terms of the beneficiary designation in a life insurance contract, an annuity contract, or a pension account designation.

The great majority of wealth in the United States passes by non-probate transfers, primarily through joint tenancies with right of survivorship, life insurance policies, and pension (and other retirement) accounts. These transfers are not inherently coordinated with the provisions of one's will (or revocable trust as a will substitute). One of the principal tasks in estate planning in the United States is to see that the probate and non-probate transfers are coordinated. This is often done by having a trust as a common beneficiary.

For example, assume the case of a single man who wishes to name his minor children as beneficiaries of his estate. Since they are minors they lack legal capacity (and practical skills) to receipt for and manage the inherited assets. Therefore, the client's will sets up a trust for the benefit of his children as the beneficiary under his will. The client also has a pension account in connection with his employment and has purchased some life insurance. His children are his named beneficiaries. At his death, the management problems are not avoided as to these assets. A conservator would have to be appointed to receipt for and manage the assets. Under coordinated estate planning, the named beneficiary under the non-probate transfer instrument would be the trustee of the trust established under the client's will. See Model Trust § 6.05.

This arrangement has incidental creditor protection benefits. First, proceeds payable to a trust under a decedent's will (as opposed to being payable to the estate itself) generally escape the claims of the decedent's creditors. Secondly, the use of a trust may help insulate the trust assets from the claims of the beneficiary's creditors (so long as the beneficiary is not also the settlor of the trust). See the discussion on spendthrift trusts below.

VIII. Selected Policy Issues:

A. Spendthrift Trusts: If a client makes an outright gift to a third party, he or she will generally not be able to control the ultimate use of the property. If the gift, however, is made in a trust, to what extent should the settlor of the trust be able to limit the use of the property? The general theory is that since the settlor was not under any obligation to make any gift at all, the gift which is made can be subject to reasonable limitations and to limitations that do not violate public policy. It is common in trust drafting for the trust instrument to provide that the interests of the beneficiaries may not be reached by their creditors. A common "spendthrift" clause is provided in Model Trust §6.05.

There is a question as to whether, as a matter of public policy, this spendthrift clause should protect against certain kinds of creditor claims. In general, the courts have held that it is against public policy to insulate the beneficiary's trust interest (usually a current income interest) from the beneficiary's child support obligation, alimony obligations, and obligations to pay for the necessities of food, clothing, and shelter.

B. "Luxury Trust": Suppose a client has a disabled child and that because of the disability the child qualifies for public assistance. In the United States the assistance would be characterized as Medicaid and social security disability income (SSI). Placing the child's share of the family estate in trust is a common approach. This

allows the assets to be managed by a trustee for the benefit of a disabled child; it reduces or eliminates the risk that the child would dispose of the trust assets and income foolishly; and it allows the settlor to control the disposition of the assets at the child's death. The problem with this approach may be that the availability of the trust assets to the child would disqualify the child from public assistance benefits. Therefore, a specially drafted kind of support trust, sometimes designated as a "luxury" or "supplemental needs" trust, is utilized. The idea is that distributions to the disabled beneficiary can be made only for those needs which are not provided for by the public benefit programs. The policy issues are similar to those involving spendthrift trusts and this is an area of considerable debate and litigation.

C. Avoidance of Marital Rights: In the United States a surviving spouse is generally guaranteed, by state statute, certain rights. These rights may be measured as a fraction (perhaps one-fourth or one-third or one-half) of the decedent's estate, including both assets which pass under the decedent's will and also non-probate assets as to which the decedent retained certain controls. Generally speaking, if the decedent, during lifetime, makes a completed gift of assets, those will not be counted as part of the estate as to which the surviving spouse has a forced statutory share. Such a gift may be in trust, such as a trust for the benefit of children by a prior marriage or for the benefit of a paramour. Completed gifts of life insurance, in trust, may be a common, and legitimate, way to protect assets from the spousal share.

D. Length of Trust: Charitable trusts may have perpetual existence. Private trusts, however, which benefit family members are generally limited by provisions of the state law provision for the Rule Against Perpetuities. This time period will be in the neighborhood of ninety years.

IX. Practicalities of Trust Administration:

A. Who Can Be Trustee: Under the statutes and practice in the United States there are very few restrictions on who can be trustee of a trust. It is a settled matter of trust law that the same person can be the settlor of the trust, the trustee of the trust, and a beneficiary of the trust. If that person is the sole beneficiary then all of the interests will merge and the trust will be eliminated, but that does not happen in practice because there is generally more than one beneficiary (because of the current and successive beneficial interests created).

There may be some tax reasons why the settlor of the trust cannot serve as trustee as well (for fear of having all of the trust income taxed to him or her or for fear of having the trust assets included in his or her estate for federal estate tax purposes).

There can be co-trustees of a trust, and a bank or trust company can be named as trustee so long as the professional trustee has authority in its business charter to act in that capacity. In the past, perhaps a majority of trusts had banks and trust companies as trustees. Today, however, perhaps reflecting uncertainties with the lack

of stability of the banking system, the majority of trusts have private trustees. An individual trustee may be given the authority to bring in a bank or trust company as co-trustee. See Model Trust § 6.09.

B. Delegation of Authority: The traditional trust law did not allow a trustee to delegate substantial authority to third persons. The rule was that "ministerial" tasks such as bookkeeping could be delegated, but major decision making could not. The Restatement of Trusts Third, Prudent Investor Rule, together with the adoption of the Uniform Prudent Investor Act by a number of states has changed this rule. Under the new rule, a trustee, if he or she uses care in the selection of an agent, can delegate investment decisions to a professional investment advisor. This may tend to increase and improve the administration of trusts by individual family members. See Model Trust § 6.06.

C. Trust Investments: Traditionally, families sought the use of banks and other professional trustees because of their expertise in the management of investments and because of their ability to minimize investment risk through diversified investing. With the advent of mutual funds it has become easier for family members to obtain, in a convenient way, both professional management and diversification of investments. Even the large professional trustees have generally created their own mutual funds, and the tendency is away from a portfolio of individually selected investments.

D. Shared Responsibility: Many families are more comfortable with the use of professional trustees if they can be assured that there will be family participation in connection with the administration of the trust. One approach is to name a family member or members as co-trustee together with a professional trustee. In the United States, professional trustees generally discourage this by taking a full trustee's fee and further burdening the trust with an additional fee for the co-trustee. One approach is to have the co-trustee participate in the exercise of discretion regarding distributions to beneficiaries but not participate in the investment decisions. Another approach is for family members to serve as "advisor" to the trustee so that there will be a formal way of providing input as to the needs and resources within the family so as to allow the professional trustee better information upon which to create an investment plan and to base exercise of discretion.

E. Special Trustees: If the settlor of the trust is aware of a certain area or issue where it would not be appropriate for the trustee to act, a provision may be made for the appointment of a special trustee. This also may occur in connection with the risk of adverse tax consequences to the named trustee. In such cases, the designation of a special trustee may be provided for in the trust instrument. See Model Trust § 6.08. The designation may be made by the settlor, by the trustee, or by some third party. Generally the activity of the special trustee ceases when the need no longer exists.

F. Trustee Accountability: As a part of the trustee's general fiduciary responsibility, the trustee should prepare an inventory of trust assets and should keep books and records

regarding the financial condition of the trust. The trust is normally a separate income tax reporting entity, and income tax returns must be filed and appropriate records kept in that regard. Generally speaking, the language of the trust instrument can specify which of the beneficiaries are to receive the inventory and the accounting information. See Model Trust § 6.06. Generally speaking it is permissible, if provided by the trust instrument, that this information be provided to the current beneficiaries, but not to the remainder beneficiaries until their interests vest in possession. There is no common practice, even among professional trustees, as to the providing of current accountings to the future beneficiaries.

In the United States the accountability of the trustee is generally to the beneficiaries and not to a court. Unless specifically required by a state statute or provided by the terms of the trust instrument, the trustee is not required to file any accountings with the court which would otherwise have jurisdiction over trust and probate matters. See Model Trust § 6.02. In states which have adopted the Uniform Probate Code, there is a provision for registering trusts (so as to determine in advance the court which would have jurisdiction over disputed issues in connection with the trust) but the trust registration system does not require filing a copy of the trust or the financial information in connection with the trust.

X. Concluding Thoughts: The private trust in the United States is an extremely flexible and useful device in estate planning. It can be used during lifetime or at death for a number of tax and non-tax reasons. It allows a settlor to perpetuate control over assets either because the assets, by their nature, require centralized management, or because the beneficiaries (on account of their youth or indiscretion) need protection. Private trusts are so popular that basic trusts have been created by statute (Uniform Transfers to Minors Act and Uniform Custodial Trust Act) for those who cannot afford or otherwise have access to individually drafted private trust instruments.