Special Interview with Guest Expert:
Steven J. Oshins, Esq. on Dynasty Trusts
Part 2 of 3

I had the pleasure of interviewing Steve Oshins on Dynasty Trusts in our May Newsletter. In this newsletter, we are featuring Part 2 of this 3-part interview. Enjoy!

Phil Kavesh: In the first installment of this interview, we talked about the benefits of utilizing a lifetime irrevocable Dynasty Trust in order to protect gifted assets from estate taxes, as well as from beneficiaries' creditors and divorcing spouses. Are the Dynasty Trust assets always protected from all creditors, or does it depend upon the terms of the Dynasty Trust?

Steve Oshins: It depends upon the terms of the Dynasty Trust. For example, some attorneys draft Dynasty Trusts with mandatory income distributions to the trust beneficiaries. This makes the income distributions attachable by the creditors of the beneficiaries and thus should not be recommended to clients who are concerned with creditor protection.

Many Dynasty Trust "forms" follow this mandatory distribution philosophy which is why it is important for an experienced attorney to draft the trust. Because attorneys are generally taught to work within the confines of their forms, less experienced drafting attorneys often don't recognize that better provisions can be drafted into a Dynasty Trust.

Phil Kavesh: You and I have talked in the past about two different ways to draft a stronger Dynasty Trust. You have referred to them in the past as the "best way" and the "second best way". Please start by describing the best way to draft a Dynasty Trust for creditor protection purposes.

Steve Oshins: You're correct. There are two basic options. With both of these options, the Dynasty Trust can be drafted as a Beneficiary Controlled Trust, which is a term that I use to describe a trust that is controlled by the primary beneficiary of the trust.

The best way to draft a Beneficiary Controlled Dynasty Trust for creditor protection purposes is to draft the trust as a purely Discretionary Trust. For maximum creditor and divorce

ABOUT THE AUTHOR

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Steve Oshins, Esq. is an attorney specializing in advanced level estate tax and asset protection planning at the Law Offices of Oshins & Associates, LLC in Las Vegas, Nevada. He is listed in the Best Lawyers in America and protection, an independent trustee is used to make discretionary distributions and other tax sensitive decisions. The primary beneficiary can be given the power to remove and replace the independent trustee, with or without cause. Additionally, the primary beneficiary can be the investment trustee and thus can make all investment decisions over the trust assets.

Because of this drafting approach, the primary beneficiary has the control over and use of the trust property as though he owned it free of trust even though the trust assets are protected from estate taxes and from the beneficiary's creditors, including divorcing spouses. This co-trusteeship, although slightly more complex than having just one trustee, provides the ultimate combination of control, estate tax savings and creditor protection.

Phil Kavesh: That is a great approach and one that our clients should all consider. Now please describe the “second best” approach that you can use to provide creditor protection.

Steve Oshins: The second approach is to draft the Dynasty Trust as a Support Trust. With this option, the primary beneficiary can be the sole trustee so long as his distribution powers are limited to an ascertainable standard. The ascertainable standard approved by the tax code (without causing the trust assets to be included in the beneficiary’s taxable estate) is one which allows distributions for the beneficiary’s health, education, maintenance and support.

Although a Support Trust is simpler to administer than a purely Discretionary Trust, certain creditors of the beneficiaries of a Support Trust may access the trust assets, so it is less protective from creditors than is a Discretionary Trust. One such creditor that can often pierce through a Support Trust is a divorcing spouse of a beneficiary which is why the Discretionary Trust is the superior option. The creditors that can pierce through a Support Trust can do so either by specific state statute or as determined judicially.

The reason the Discretionary Trust doesn’t have this problem is that it doesn’t need to rely solely on its spendthrift provision to obtain its creditor protection. Rather, its assets are protected because of the full discretion given to the distribution trustee. Because the distribution trustee has full discretion over distribution decisions, the Dynasty Trust beneficiaries do not have a property interest over the trust assets and thus the creditors of those beneficiaries cannot obtain a property interest.

Note: In the third installment of this article, which we will publish next month, Steve will focus on using a technique called Opportunity Shifting to shift “hot” investment and business opportunities to a Dynasty Trust in order to protect those opportunities from estate taxes, creditors and divorcing spouses.

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