Many hats in trust administration

Historically, the traditional trust had a trustee and beneficiaries. The modern trust may have four, five, or more fiduciary and non-fiduciary positions that might include: administrative trustee, distributions trustee, trust protector, investment advisor, loan director, charitable designator, person holding a power to add beneficiaries, persons holding powers of appointment, person holding the power to swap or substitute assets, and more. Many of these positions, because they are relatively new, are known by different names. Different state laws might use different terminology, and there are wide variations in how different attorneys draft the provisions governing these positions. Thus, trustees, beneficiaries, and anyone involved with a trust should review the specific terms of each instrument governing each position and not presume that a particular title has a specific meaning without verifying.

Administrative and general trustee. An institutional administrative and general trustee may be designated, typically a bank trust department or trust company. This position will hold all trustee powers in the governing instrument that have not been allocated to other fiduciaries. For example, if the trust names a trust protector and investment trustee, the general and administrative trustee will have all trust authority not given to those other two positions.

Distribution trustee. The trust could name a person, or group of persons acting as a committee, to be responsible for trust distributions. Caution should be exercised as the power to distribute is a tax sensitive power that could cause trust assets to be included in the power holder's estate if not properly handled. The settlor may be safer in terms of accomplishing trust goals by leaving this function under the auspices of an independent institutional general trustee.

Insurance trustee. A person could be designated to be responsible for life insurance decisions of the trust. This person should not be the insured. By providing for a separate person to be responsible for insurance decisions, and including prohibitions against the settlor/insured being involved in these decisions, the trust can hold both life insurance and other assets. Some of the advantages of this include the ability to use a single trust to hold business interests and life insurance, instead of multiple trusts, and the ability to use income generated by trust investments to pay for life insurance premiums.

Trust Protector. This is a person appointed to hold important powers over the trust and, perhaps, to perform certain other defined roles. The protector may be given the power to remove and replace existing trustees, correct scrivener's errors, modify administrative provisions, change trust situs and governing law, and other powers depending on the circumstances and goals.

Substitutor. This person, who may be the settlor or another person, can be given the power to exchange or "swap" assets of the trust for assets of equivalent value. The common application of this technique is to swap highly appreciated trust assets back into the grantor's estate so that on death they will qualify for a step-up in income tax basis. Provisions should be added to the client's durable power of attorney to address this power in the event of disability. It also is prudent to arrange lines of credit to facilitate acting on this swap power in an emergency situation.

Charitable designator. One of the means of creating grantor trust status is to empower a person to add to the class of beneficiaries, such as a charity. With the new restrictions on income tax benefits of itemized deductions, perhaps it is advisable to include a mechanism to add charitable beneficiaries in more trusts to provide flexibility for settlors to make contributions out of irrevocable trusts if that proves advantageous in the future.

Modern trust drafting, tax uncertainty, longevity, and a range of other factors are transforming how trusts are planned, drafted, and administered. The wide array of positions, fiduciary and non-fiduciary, that may be included in a trust instrument are among the most affected areas. Creative and careful selection of these positions, and the persons named to serve in them, can infuse substantial flexibility into trust planning.

(April 2018)