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Silent Trusts: Informing Beneficiaries of Wealth Access at the Appropriate Time

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Generally, a trustee is required to provide certain information and accountings to the beneficiary of an irrevocable trust. However, there is an exception to this duty, which gives rise to what is often called a “silent trust”. A silent trust is an irrevocable trust in which the terms of the trust agreement direct the trustee to withhold certain information concerning the trust’s administration from the beneficiary or to withhold disclosure of the trust’s existence altogether. The ability to utilize a silent trust varies by state, but, where available (such as in Ohio), it can be a helpful option for settlors.

Reasons for Implementing a Silent Trust

Many estate planning techniques involve the transfer of assets to an irrevocable trust for the benefit of younger beneficiaries. While there can be considerable tax benefits associated with these transfers, there are important non-tax issues that ought to be considered as well, including how the knowledge of the transfer may impact the beneficiary.

The ability to use a silent trust, and thus limit the information available to a beneficiary, can have considerable advantages, including the following:

- Protecting the privacy of the settlor’s financial affairs and estate planning choices.
- Limiting scrutiny from a beneficiary regarding the administration of the trust or the investment and management of trust assets, especially where a family business may be involved.
- Reducing the potential negative impact of a trust on a beneficiary’s career drive and motivation.

- Discouraging potential fiscal irresponsibility by a beneficiary.
- Reducing potential for disruptions caused by a beneficiary's mental health problems or substance abuse.
- Protecting the safety and financial interests of beneficiaries who may be careless with trust information and may become subject to fraud scams, identity theft, frivolous lawsuits, or other damaging schemes.

Selection of a “Beneficiary Surrogate”

While a silent trust can alleviate a trustee's duties to provide information to a beneficiary, a trustee cannot be altogether relieved of the duty to inform and report. In Ohio, for example, to use a silent trust, the settlor must appoint a “beneficiary surrogate” to receive required notices, information, and reports on behalf of the beneficiary. The settlor has broad discretion in selecting a beneficiary surrogate and may select any person other than the trustee. Potential candidates to fill the role may be a settlor's spouse or a trusted advisor.

The beneficiary surrogate must act in good faith to protect the interests of the beneficiary for whom the notices, information, or reports are received. Other than such requirement, the law is mostly silent regarding the role of a beneficiary surrogate and any liability it may entail. A person who agrees to serve as beneficiary surrogate should be well-informed about the role and the risks associated with it.

Future Disclosures

There may come a time when some disclosure to the beneficiary becomes necessary or may result. For example, a beneficiary may need to know of his or her beneficial interest when entering into a contract that requires full disclosure of beneficial interests, such as in a loan transaction or in connection with a prenuptial agreement. A beneficiary may also inadvertently learn of a trust's existence, in which case the trustee's directive to report only to the beneficiary surrogate may conflict with statutory duties to the beneficiary. The potential for such situations can be addressed in the trust, which may include alternatives for disclosure of limited information and instructions to the trustee and trust advisor in such situations.

Conclusion

If the use of a silent trust may be appropriate for you and your family, your Vorys attorney can assist you in considering the option, as well as other possible alternatives to achieving your goals.