Published on *The National Law Review* https://natlawreview.com

Gimme Shelter: General Trust Planning for Future Generations

Article By:

Jennifer V. Boyer

Some are quick to dismiss asset protection trust planning as too complex or unnecessary. For those not in a "certain tax bracket," this type of planning may seem like an over-reach by an estate planning attorney. There are many reasons, however, to incorporate asset protection trusts into even the simplest estate plan – especially in the context of passing assets to children and grandchildren. Asset protection trusts can provide crucial benefits to even the most financially responsible beneficiaries. Dismissing the topic too quickly might result in missed opportunities to provide loved ones with financial shelter from future storms.

It is an understandable reaction: The phrase "asset protection trust planning" conjures up images of a complex web of shelter trusts, holding companies, off-shore entities, or other intricate structures meant to hide wealth from the unwanted, prying eyes of creditors or tax authorities. And it is true, there are a number of planning techniques that families – not just the super-wealthy – can use to proactively protect their own assets from potential future creditors.

But this article is focused instead on general trust planning for *future* generations in light of the ever-present threat of the unknown. Planning professionals hear a common refrain from clients: "*We don't need any complex trust planning… I am confident that my spouse can handle everything when I'm gone without any strings attached to their money – and our children are all very responsible and financially savvy*."

And those clients are usually right – their surviving spouse capably manages things and the children are responsible, savvy, and ready to handle their eventual inheritance. But life has a way of throwing us curveballs. Even the most financially savvy beneficiary may still find themselves staring down a divorce or medical emergency, or dealing with a failing business – whether that's due to a global pandemic or just run-of-the-mill bad luck. Assets that were inherited outright by those financially savvy beneficiaries are, unfortunately, at a much higher risk of being lost to creditors, divided in a divorce proceeding, or drained by the unforeseen emergency; risks that could be mitigated with trust planning.

In its simplest form, an asset protection or spendthrift trust is a trust funded by one person for the benefit of another. Assets that remain in the trust are protected from the claims of the beneficiary's creditors, because the law respects the distribution standards set by the trust's creator. In other words, if a parent decides that distributions from a trust can only be made for their child's health, education, maintenance or support, then the child's creditors have no claim to those trust funds while they remain in trust, since payments to the creditors meet none of those thresholds.

Spendthrift trusts have a reputation for imposing onerous restrictions. Historically, of course, there have been spendthrift trusts designed to protect a beneficiary from their own mismanagement, and the name does conjure up that history. But the basic structure does not require any onerous restrictions: merely a trustee and some guidance for that trustee to follow in making distributions to the beneficiary. For a vast majority of clients who want to avoid putting too many "strings" on their assets, asset protection trusts can still be used, retaining both flexibility and the creditor protection benefits.

If a trust creator thinks it is appropriate, they might add even more flexibility by naming the beneficiary to serve as their own trustee. Often, this occurs after a beneficiary has reached a certain "responsible" age set by the trust creator. Even this added layer of flexibility does not eliminate the asset protection benefits provided by the trust – as long as the beneficiary-trustee still has an articulated standard to follow when deciding whether to make distributions to themselves, the structure is respected and creditors are kept at bay.

In summary, these types of trusts need not be feared: far from being a lawyer's over-reach, they can provide a basic, relatively-uncomplicated layer of protection for assets passing to beneficiaries.

As the last few years have made abundantly clear, it is impossible to plan for every contingency, catastrophe, or future storm. The pandemic has taken loved ones, caused even wildly successful businesses to close in high numbers, and has strained countless relationships. It is perhaps more important now than ever to remember and implement the simple planning tools that are available to shield loved ones from unnecessary financial risk. Asset protection trusts are one of those tools for providing shelter from the uncertainties that the future may hold.

National Law Review, Volume XIII, Number 249