Strafford

Presenting a live 90-minute webinar with interactive Q&A

Non-Grantor Trusts in Elder Law Planning: Specific Trust Strategies and Key Tax Considerations

THURSDAY, DECEMBER 10, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Regina M. Spielberg, Partner, **Schenck Price Smith & King, LLP**, Paramus, N.J.

Shirley B. Whitenack, Partner, **Schenck Price Smith & King, LLP**, Florham Park, N.J.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

Non-Grantor Trusts in Elder Law Planning

Specific Trust Strategies and Key Tax Considerations

Strafford
December 10, 2020

Regina M. Spielberg, Esq.
Shirley B. Whitenack, Esq.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

GRANTOR TRUST

- Grantor retains an interest and/or control
- Interest or control can be retained individually or through a trustee
- Result-grantor is treated as the owner of the income and/or principal of the trust.

Grantor trusts are pass-back entities with trust income and/or capital gain deemed to be owned by and taxed back to the individual grantor.

WHY do this??

Income Tax Brackets: 2020

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

Tax Rate	*Taxable Income (Single Individual)*	*Taxable Income (Married Individual Filing Jointly)*
10%	Up to $9,875	Up to $19,750
12%	$9,876 to $40,125	$19,751 to $80,250
22%	$40,126 to $85,525	$80,251 to $171,050
24%	$85,526 to $163,300	$171,051 to $326,600
32%	$163,301 to $207,350	$326,601 to $414,700
35%	$207,351 to $518,400	$414,701 to $622,050
37%	Over $518,400	Over $622,050

Income Tax Brackets: 2020

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

Tax Rate	***Taxable Income (Trusts and Estates)***
10%	Up to $2,600
24%	$2,600 to $9,450
35%	$9,450 to $12,950
37%	Over $12,950

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

The Grantor Trust Rules are found at IRC Sections 671-678

Including provision(s) from those sections, causes a trust to be taxed to the grantor.

POWERS USED TO ACHIEVE GRANTOR TRUST STATUS

Power of substitution [§675(4)(C)] in which a nonfiduciary (grantor) can reacquire assets by substituting assets of equivalent value, without the approval or consent of any person in a fiduciary capacity

Grantor holding a reversionary interest (of 5% or more) will result in the grantor owning that portion of the trust (income or principal, or both) over which the grantor has a reversionary interest. IRC § 673

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

POWER TO CONTROL BENEFICIAL ENJOYMENT

If a grantor or a nonadverse trustee retains the power to alter the beneficial enjoyment of income or principal will produce a grantor trust. IRC §674(a)

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

EXCEPTIONS FOR CERTAIN POWERS TO CONTROL BENEFICIAL ENJOYMENT

- Power to apply income to support dependent
- Power affecting beneficial enjoyment only after occurrence of an event
- Power exercisable only by Will
- Power to allocate among charitable beneficiaries
- Power to distribute corpus to a beneficiary or a class of beneficiary under a defined standard
- Power to withhold income temporarily
- Power to withhold income during disability

IRC Section 674(b)

Administrative Powers

- Power to deal for less than adequate and full consideration IRC §675(1)
- Power to enable the grantor to borrow money or assets from the trust without adequate interest or security. IRC §675(2)
- Borrowing of the trust funds IRC §675(3)
- General powers of administration IRC §675(4)

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

Power to revoke and revest held by the grantor (or grantor's spouse or another nonadverse person) will result in the grantor owning that portion of the trust over which the power to revoke and revest can be exercised IRC §676

Income for the benefit of the grantor

There is discretion to distribute the income from any portion of a trust to the grantor or grantor's spouse or to accumulate same for future distribution to the grantor or grantor's spouse. IRC §676

42 U.S.C. 1396p(d)(3)

(A) In the case of a revocable trust

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c).

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

42 U.S.C. 1396p(d)(3)

(B) In the case of an irrevocable trust

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income— (I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

Purpose of an intentionally defective grantor trust or "IDGT"):

- transfers to trust are completed gifts;
- exclude trust assets from the grantor's tax or custodial care planning estate and
- preserve the income and capital gains benefits that can be derived from having the grantor treated as the trust owner for income tax purposes only

The IDGT will essentially remove assets from the grantor's estate but by utilizing one of the provisions designed to achieve grantor trust status allowing the grantor to maintain income tax liability

Gift Trusts

- Trusts established to hold gifts to a beneficiary made by Grantor (or other third parties)
- Can be structured as a Grantor Trust causing the income to be included on the Grantor's personal income tax return
- Could be structured as a complex trust, whereas the trust would file its own income tax return

Income-Only Trusts (IOT)

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

An irrevocable trust created by a Medicaid applicant or the applicant's spouse (the grantor).

During the lifetime of the grantor, income is payable to the grantor or the grantor's spouse, or payable in the trustee's discretion to other beneficiaries, and principal is retained or payable in the trustee's discretion to beneficiaries other than the grantor or the grantor's spouse.

At the death of the grantor, the trust may continue with income payable to the grantor's spouse and principal retained or paid to beneficiaries other the grantor's spouse, or the trust terminates and is paid to remainder beneficiaries.

Income-Only Trusts (IOT)

The principal of IOTs that pay income only to the Medicaid applicant and his or her spouse or income to other beneficiaries in the discretion of the trustees will not be deemed an available resource.

The funding of an IOT is deemed an uncompensated transfer for Medicaid purposes and will result in a period of ineligibility if a Medicaid application is filed within 60 months of the trust funding.

Payouts from the trust to beneficiaries other than the grantor or the grantor’s spouse will not be deemed uncompensated transfers.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

- A mechanism for sheltering resources to benefit individuals with disabilities.
- Provide assets for the disabled beneficiary's special needs so that the beneficiary can live a more productive and comfortable life
- Avoid having trust assets count as a resource to the beneficiary
- Avoid having trust distributions count as income to the beneficiary

Special Needs "Payback" Trust

- 42 U.S.C. §1396p(d)(4)(A)

Third Party Special Needs Trust

Also known as supplemental benefits trust

Sole Benefit Trust

- Transfer of assets from person who needs Medicaid to trust for someone who needs Medicaid
- Payback provision required or
- Payments must be on actuarially sound basis
- 42 USC § 1396p(c)(2)

42 U.S.C. §1396p(d)(4)(C) –pooled trust managed by non-profit

- The beneficiary cannot be the trustee
- The beneficiary cannot compel distributions
- Supplement, not supplant, government benefits

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

Tax Treatment

- Parent, grandparent, legal guardian or court creating the trust is a "nominal grantor"
- Beneficiary is the true grantor for income tax purposes

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

Living trust

Testamentary trust created by will

Revocable or irrevocable

Tax Treatment

Irrevocable *inter vivos* SBT can be drafted as either a grantor or nongrantor trust for tax purposes.

If drafted as a grantor trust, the income from the SBT will be reportable by and taxed to the parent, spouse or other relative or third party grantor who created the trust during his or her lifetime, at least to the extent that the grantor is the contributor to the trust.

He or she also will report any trust losses, deductions and credits on his or her individual income tax returns. Upon the grantor's death (or during the grantor's lifetime, with respect to contributions made to the trust by third parties), the trust continues as a "complex" trust.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

The *inter vivos* SBT may be drafted as a “complex” trust, which typically would accumulate income and is not a grantor trust.

An *inter vivos* Supplemental Benefits Trust, which accords the trustee the discretion to distribute trust income and principal, cannot be a simple trust, which is required by I.R.C. §651 to distribute all income currently because a simple trust will impact eligibility for government benefits.

A sole benefit trust can be a grantor trust or a non-grantor trust.

Schenck Price

SCHENCK PRICE SMITH & KING, LLP

Self-settled pooled trusts are grantor trusts

Third party pooled trusts are non-grantor trusts.

Qualified Disability Trusts are allowed a deduction equal to the personal exemption amount under I.R.C. § 151(d). Under the 2017 Tax Cuts and Jobs Act this exemption was retained for any year in which there isn't a personal exemption, the amount of $4,300 in 2020.

Schenck Price

SCHENCK PRICE SMITH & KING, LLP

A trust is considered to be a "Qualified Disability Trust" if it is described in 42 U.S.C.A. 1396p and all of the beneficiaries of the trust as of the close of the tax year are determined by Social Security to have been disabled.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

A qualified disability trust may still qualify if the principal reverts to a person who is not disabled after the trust ceases to have any beneficiary who is disabled. I.R.C. §642(b).

Thank you

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

Regina M. Spielberg, Esq.
201-262-1600
rms@spsk.com

Shirley B. Whitenack
973-539-1000
sbw@spsk.com