

OKLAHOMA FAMILY WEALTH PRESERVATION TRUSTS

On June 8, 2005, Governor Henry signed into law numerous changes to the Family Wealth Preservation Trust Act that make preservation trusts a valuable asset protection tool for individuals to protect up to \$1,000,000 plus income and appreciation within the trust from creditors.

Preservation trusts may be revocable. Previously, to achieve asset protection through a trust anywhere in the U.S. the trust had to be irrevocable. By allowing these trusts to be revocable, Oklahoma has created the most flexible asset protection trust in the U.S.

Who should consider a preservation trust?

- 1) Individuals, such as doctors, and their spouses who are in high-liability professions are prime candidates.
- 2) Anyone with concerns about creditor protection should consider a preservation trust, because we are all at risk from the unexpected.
- 3) Those who already have an asset protection plan should consider a preservation trust to provide an additional layer of protection from creditors.

Preservation trusts must meet certain requirements:

- 1) **Qualified beneficiaries** are a spouse, lineal descendants or lineal ancestors of the grantor or the grantor's spouse or a 501(c)(3) charitable organization.
- 2) **Investments** - A majority of the trust's investments must be "Oklahoma assets". Whether they are stocks, bonds, real estate, limited liability companies or others, a majority of those investments must be in "Oklahoma-based" companies or Oklahoma public entities, or located in Oklahoma or otherwise tied to Oklahoma.
- 3) **Trustee** - A trustee or co-trustee of a preservation trust must be an "Oklahoma-based bank" with a trust department or an "Oklahoma-based trust company". The grantor may be a co-trustee or appoint one or more co-trustees to serve with the Oklahoma-based bank or trust company.

Preservation trusts put another arrow in the quiver of asset protection options. Its benefits should be evaluated together with other options to determine if it fits together with each individual's estate and asset protection plans. It is a potentially valuable tool for asset protection that should not be overlooked.

**FAMILY WEALTH PRESERVATION TRUSTS
REQUIREMENTS, CHECKLIST OF PREFERRED TRUST PROVISIONS,
AND SUPPLEMENTAL DOCUMENTATION**

Trust Provisions:

The preservation trust document should address the following issues:

1. Its intent is to meet the requirements of the Family Wealth Preservation Trust Act, as it may be amended.
2. It should specifically address provisions of the Act as it relates to:
 - a. “qualified beneficiaries” (i) all beneficiaries should be identified as “qualified beneficiaries”, preferably addressing their specific qualification for this designation. (ii) Spouse — spouse can only be a beneficiary as long as the Grantor and spouse remain married. Spouse’s interest should terminate upon dissolution of the marriage. A contingent, “qualified beneficiary or beneficiaries” should become beneficiary if this occurs, thereby eliminating the potential for the trust to name a beneficiary that does not meet a requirement for being a “qualified beneficiary.
 - b. “Oklahoma assets” reference should be made to the intent to maintain a majority of the trust in “Oklahoma assets” and provide the trustee with authority to meet the “Oklahoma asset” requirement as it currently exists or as the statute may be amended.
 - c. “Oklahoma-based bank with a trust department” — the bank selected should be identified as an “Oklahoma-based bank with a trust department” within the trust agreement.
 - d. Successor Trustee Trust should specify that any successor trustee must be an “Oklahoma-based bank with a trust department” or an “Oklahoma-based trust company”.
 - e. This is the only preservation trust in existence for the Grantor under Oklahoma law and that Grantor will not create any additional preservation trust unless or until this particular trust is entirely revoked.
 - f. If the trust is revocable, which will likely be the case for all preservation trusts, the document should state that it is revocable in whole or in part.
 - g. It should provide the trustee with adequate authority to manage the assets of the trust, including, but not limited to, provisions such as:
 - i. Ability to hire outside agents, counsel, etc. and pay those expenses from the trust.

- ii. If the trust will hold real estate, ability to address any environmental issues and pay those expenses from the trust.
- iii. Ability to exercise appropriate discretion to manage assets in compliance with the Act.
- iv. Authority to retain wasting assets and indemnification for doing so, depending on the type of assets being contributed to the trust. While this may not be an issue at the time of the initial funding of the trust, it may be an issue upon subsequent contributions to the trust. It is better to have this language included initially, to prevent the need to amend the trust prior to acceptance of additional contributions of this type of asset.
- h. Distribution Provisions should provide sufficient details to tell the Trustee(s) how distributions may be made and under what circumstances.
- i. Termination Provisions — should provide sufficient details regarding termination to determine what triggers termination and what happens to the assets.
- j. Taxation — Trust must recite in its terms that the income generated from the corpus of the trust is subject to the income tax laws of Oklahoma.
- k. Fraudulent Transfers as they may relate to the Uniform Fraudulent Transfer Act and/or the Bankruptcy Code:
 - i. It might be beneficial for the Grantor and, even more so, for the Trustees if the Grantor states in the trust itself something to the effect that no transfer of monies or property by the grantor to the trust is made with intent to defraud any known or unknown creditors that may exist at the time of the initial transfer of assets to the trust and that no subsequent transfers to the trust will be made with that intent.

This would obviously be a question of fact to be determined at the time a creditor tried to attach the assets of the trust, however, it certainly would not be detrimental to a properly-intentioned Grantor and would serve as evidence that a Trustee was not knowingly a party to a transaction intended to defraud a creditor.

Supplemental Documentation:

Grantor's counsel should provide supplemental documentation addressing the following issues:

1. Untested — Address the fact that the creditor protection aspects of preservation trusts have not been tested in court.
2. Valuation of assets funded into the preservation trust:

- a. This is not an issue for marketable securities.
 - b. It is an issue for other assets, such as real estate, LLC's, LP's, or other closely held business interests. An Example: If the trust is funded with an Oklahoma LLC and the LLC owns marketable securities valued at \$1,000,000, the Grantor must be informed that additional assets can not be contributed to the trust without an independent appraisal on the LLC. The trustee cannot determine the discount to apply to the LLC, because its appraisal would not be independent.
 - c. Most trustee banks can not accept assets other than marketable securities without an independent appraisal, because we would never know when the contributions exceed the \$1,000,000 limit.
3. If the Grantor is not a resident of Oklahoma, Grantor's counsel should document the fact that there is no guarantee that a court outside Oklahoma will recognize a preservation trust's asset protection provisions.
 4. Valuation of assets distributed from a preservation trust: Independent appraisals will typically be required if there are any distributions of assets other than marketable securities.
 - a. Without such an appraisal, if the value of contributed assets has reached \$1,000,000, the Grantor may not be able to contribute additional assets.
 - b. if the Grantor refuses to have the appraisal completed at a time reasonably concurrent time with the distribution, an appraisal may not be possible at the time of a subsequent contribution thereby potentially eliminating the ability to make any subsequent contribution.

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