The Secret's Out: Silent Trusts Are Worth Shouting About in Delaware

Ever since December of 2010, lifetime gifts to irrevocable trusts have risen substantially in the United States. At the foundation of this trend lies the increase in the amount that individuals may transfer free of estate and gift taxes to $5,000,000 per individual, adjusted for inflation. This increase prompted many people to make transfers during life that they otherwise would have deferred until death, and in the process, substantially reduce the estate taxes that otherwise may be due. However, as with many benefits, this upside has corresponding downsides. One such problem involves an individual's desire for privacy, specifically privacy involving trusts that they have created.

Generally speaking, a settlor of a trust expects that the trust's existence will remain private. Fortunately for those establishing trusts in the United States, this desire for privacy is, for the most part, fulfilled. Jurisdictions within the United States generally do not require trustees to register or file trusts in any way and prohibit trustees from revealing trust details to unauthorized parties. However, much to the surprise of many settlors, most jurisdictions in the United States require trustees to disclose the existence of a trust to the trust's beneficiaries. In the litigious society in which we live, trustees would be foolish to ignore this obligation, even when a settlor desires that no information be provided to the beneficiaries. Often, this disturbs a settlor because the beneficiaries are the very persons with whom the settlor wishes to maintain the highest level of secrecy.

The reasons that a settlor may desire that the trust's beneficiaries not know about the trust are varied. For example, a settlor might not want a beneficiary to know about the trust to protect that beneficiary from persons who may attempt to take advantage of them. Another reason a settlor might not want a beneficiary to know about the trust is that the settlor is concerned that the beneficiary might become less motivated to pursue his or her education or career path. Still other settlors fear that they will lose their influence over a beneficiary if that person knows that the gift has already been made.

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The conflict between a trustee's duty to inform beneficiaries and a settlor's desire for secrecy raises a problem for the settlor. Enter the silent trust, a form of trust authorized by the statutes of several states, including Delaware. As the name implies, a silent trust is one under which no one, including the beneficiaries, need be informed of the trust's existence because the trustee is relieved of its duty to inform the beneficiaries. This allows the trustee to comply with a settlor's desire for secrecy without violating a duty that it otherwise would owe to the beneficiaries of the trust.

As noted, a silent trust is created pursuant to statutes enacted in various states; this means that the extent to which a trust is private depends upon which state's laws govern the trust. Delaware's statute, for example, allows a trust instrument to expand, restrict, eliminate or vary the commons law duty to inform beneficiaries. This gives a great deal of flexibility to settlors who desire secrecy. For example, a Delaware trust may properly require that no one be informed of the trust's existence until after the settlor's death, that no one be informed of the existence of the trust until they reach a particular age, or that the trust remains secret until a specific date in the future. Almost any variation can be used.

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As an alternative to relying upon the statute governing silent trusts, a trust could also remain secret indefinitely if a beneficiary representative is appointed who can enforce the beneficiaries' rights in their stead. This simply entails appointing someone who will receive information concerning the trust on behalf of the beneficiaries and who, for all intents and purposes, takes the beneficiaries' place for purposes of obtaining information concerning the trust.

By taking advantage of Delaware's flexible statutes, a settlor of a trust can meet his or her estate planning goals, including maintaining the utmost privacy concerning his or her estate planning. Coupled with Delaware's laws concerning directed trusts, which allow a settlor to keep some level of control over the trust assets, establishing a trust in Delaware can solve two common hurdles that settlors face. These two benefits are just a small sampling of what makes Delaware an incredibly favorable jurisdiction in which to establish a trust, and two great reasons to speak with your attorney about whether or not you should establish a trust in Delaware.

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