

33rd Annual  
*Tax Symposium*

**APPOINTING THE BENEFICIARY  
AS TRUSTEE – WAIT, WHAT?!?**

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# OVERVIEW

- Trustee's role:
  - Manage assets
  - Make distributions
  - Deal with the beneficiary
- Serving as trustee is not easy



# OVERVIEW

- Selecting a trustee is not easy
  - Family member or friend
  - Professional
- Attributes
  - Trustworthy
  - Financially adept



# OVERVIEW

- “It’s too hard to find someone, why can’t I just appoint my daughter as trustee and let her take the money whenever she wants?”



# OVERVIEW

- Trend toward lifetime trusts
  - No outright distribution ages or events

- Lifetime trusts can provide:
  - Asset protection
  - Leverage of gift, estate, and generation-skipping transfer tax exemptions

# CONTEXT



- Revocable living trust or irrevocable trust
- Usually parent is the grantor and a child is the beneficiary, but apply to any donor/donee arrangement

# FRAMEWORK

- Can you appoint the beneficiary as trustee?
- If yes, what are the risks?
- If yes, should you?



# SHOULD THE BENEFICIARY BE TRUSTEE?

- Will your beneficiary simply take the assets and ignore the trust terms?
- If so, end of discussion
- If not, you must consider creditor and tax issues





# CREDITOR ISSUES – SPENDTHRIFT PROVISIONS

- Spendthrift provisions:  
An absolute must
- Prohibits a beneficiary from assigning, voluntarily or involuntarily, a beneficial interest in the trust
- What does this mean?



# CREDITOR ISSUES – SUPPORT TRUST

- “Shall” distribute
- For “health, education, support, or maintenance” (HEMS)
- These provisions give a beneficiary an enforceable right to distributions



# CREDITOR ISSUES – SUPPORT TRUST

- What can a creditor reach?
- Nothing unless (i) a distribution is actually made directly to the beneficiary; and (ii) the distribution exceeds what is necessary for the beneficiary's health, education, support, or maintenance



# CREDITOR ISSUES – DISCRETIONARY TRUST

- Trustee has any amount of discretion
- Regardless of whether a HEMS or other standard is expressed
- Basically, anything other than a support trust

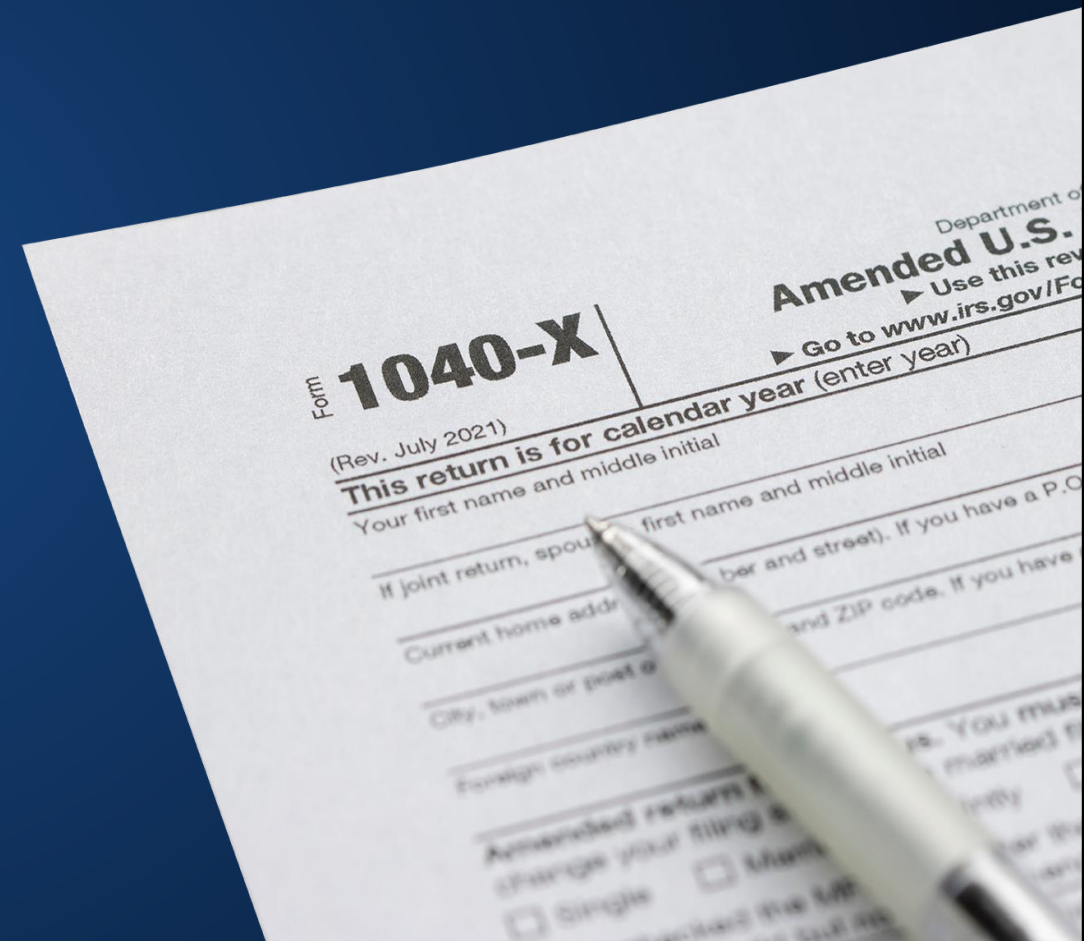
# CREDITOR ISSUES – DISCRETIONARY TRUST

- What can a creditor reach?
- Nothing until there is an actual distribution to the beneficiary
- A discretionary trust is ideal from an asset protection perspective



# TAX ISSUES – INCOME TAX

- Do not make income distributions mandatory if you are looking for creditor protection
- Income distributed to the beneficiary generally will be taxed to the beneficiary
- Income retained by the trust generally will be taxed to the trust



# TAX ISSUES – ESTATE TAX

- Will the beneficiary have a taxable estate if the trust assets are included?
- If yes, must use magic language for HEMS to avoid inclusion
- If no, don't need to worry about distribution provisions

**Form 706**  
(Rev. August 2019)  
Department of the Treasury  
Internal Revenue Service

**United States Estate (and Generation-Skipping Transfer) Tax Return**  
► Estate of a citizen or resident of the United States (see instructions). To be filed for decedents dying after December 31, 2018.  
► Go to [www.irs.gov/Form706](http://www.irs.gov/Form706) for instructions and the latest information.

OMB No. 1545-0015

<b>Part 1—Decedent and Executor</b>	<b>1a</b> Decedent's first name and middle initial (and maiden name, if any)	<b>1b</b> Decedent's last name	<b>2</b> Decedent's social security no.		
	<b>3a</b> City, town, or post office; county; state or province; country; and ZIP or foreign postal code	<b>3b</b> Year domicile established	<b>4</b> Date of birth	<b>5</b> Date of death	
	<b>6a</b> Name of executor (see instructions)	<b>6b</b> Executor's address (number and street including apartment or suite no.; city, town, or post office; state or province; country; and ZIP or foreign postal code) and phone no.			
	<b>6c</b> Executor's social security number (see instructions)				
	Phone no.				
	<b>6d</b> If there are multiple executors, check here <input type="checkbox"/> and attach a list showing the names, addresses, telephone numbers, and SSNs of the additional executors.				
	<b>7a</b> Name and location of court where will was probated or estate administered				<b>7b</b> Case number
	<b>8</b> If decedent died testate, check here <input type="checkbox"/> and attach a certified copy of the will. <b>9</b> If you extended the time to file this Form 706, check here <input type="checkbox"/>				
	<b>10</b> If Schedule R-1 is attached, check here <input type="checkbox"/> <b>11</b> If you are estimating the value of assets included in the gross estate on line 1 pursuant to the special rule of Reg. section 20.2010-2(a)(7)(i), check here <input type="checkbox"/>				
	<b>1</b> Total gross estate less exclusion (from Part 5—Recapitulation, item 13)				<b>1</b>
<b>2</b> Tentative total allowable deductions (from Part 5—Recapitulation, item 24)				<b>2</b>	
<b>3a</b> Tentative taxable estate (subtract line 2 from line 1)				<b>3a</b>	
<b>b</b> State death tax deduction				<b>3b</b>	
<b>c</b> Taxable estate (subtract line 3b from line 3a)				<b>3c</b>	
<b>4</b> Adjusted taxable gifts (see instructions)				<b>4</b>	

# CONTROL ISSUES

- Is the beneficiary age 60, 40, or 20?
- Married? How long?  
Ever been divorced?
- Will the beneficiary play ball?





# CLOSING THOUGHTS

- Can/should there be a co-trustee?
- If so, does it make sense to divide management and distribution authority?
- What if the beneficiary is sued?
- How would a judge view this structure?



# CLOSING THOUGHTS

- Balance control, asset protection, and tax considerations
- Continuing trust – yes!
- Beneficiary as trustee – maybe!



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THANK YOU



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