

Briefly

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Asset Protection

Is a Family Wealth Preservation Trust Right for You?

by Robert B. Sartin

The Oklahoma Legislature recently passed the Family Wealth Preservation Trust Act. The act authorizes the creation and funding, with up to \$1 million in qualified assets, of an asset



Robert Sartin

protection trust, known as a "preservation trust." This article summarizes the provisions of the act, and addresses the benefits from creating a preservation trust as a part of an overall estate and asset protection plan.

The grantor (creator) of a preservation trust must be an individual, but need not be an Oklahoma resident. Each person can only form one preservation trust. However, for a married couple, each spouse may have his or her own preservation trust, and each spouse can fund his or her separate trust with up to \$1 million in qualified assets.

A preservation trust may be either revocable or irrevocable. If a grantor forms a revocable preservation trust and later revokes it, that same grantor can then create a new preservation trust.

The trustee of a preservation trust must be a bank or trust company either chartered in Oklahoma or federally chartered with a physical location in Oklahoma.

The only permissible beneficiaries of a preservation trust are: 1) the

grantor's spouse; 2) the grantor's natural children; 3) the grantor's adopted children if they were under age 18 at the time of the creation of the preservation trust; 4) grandchildren; 5) issue of deceased natural children or grandchildren of the grantor; or 6) a nonprofit charitable organization. Note that the definition of a qualified beneficiary does not include the grantor of the preservation trust. That should not be of great concern to a grantor wishing to form a revocable preservation trust because the grantor could reacquire the assets of the preservation trust upon revocation.

The assets of a preservation trust must be qualified assets, which means they must consist only of "Oklahoma assets," defined to include a stock, bond or debenture issued by an "Oklahoma-based company," Oklahoma state or local municipal bonds or other obligations, accounts in Oklahoma-based banks, and Oklahoma real estate. An Oklahoma-based company is a corporation, limited liability company or limited partnership formed or domesticated in Oklahoma and having its principal place of business in Oklahoma.

A preservation trust may be funded with up to \$1 million in assets. The act provides that both the assets and the income of a preservation trust are exempt from attachment or execution by a creditor, and no judgment, decree or execution can be a lien on the trust for the payment of the grantor's debts. The creditor

protection provided is independent from and in addition to other exemptions under Oklahoma law, such as the homestead exemption and the creditor protection given to life insurance and retirement plan assets.

The act also states that any incremental growth derived from income retained by the trustee above the \$1 million limitation is also protected from judgment. The act does not specifically address growth in value resulting from appreciation of the trust assets and not from income. However, presumably, the intent of the act is for both capital growth and growth from income to be protected so long as the value of the assets funded into the preservation trust is not in excess of the \$1 million limit.

Transfers to a preservation trust are subject to Oklahoma's existing fraudulent transfer laws. Thus, clients with existing creditor claims must exercise caution in considering the creation of a preservation trust, and an Oklahoma corporate trustee should inquire as to whether the

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Oklahoma Capital Gains Tax Exclusion

by William E. Farris

The Oklahoma personal income tax on capital gains resulting from a sale of Oklahoma based property that is held for five years or more (three years in the case of an Oklahoma company) is eliminated for tax years beginning in 2005. A deduction from the Oklahoma adjusted gross income of any individual taxpayer is allowed for qualifying gains receiving capital treatment and included in Federal taxable income of the taxpayer.



Will Farris

The "qualifying gains capital treatment" means the net capital gains for Federal income tax purposes which was earned by the taxpayer on real or tangible personal property located within Oklahoma that has been owned

by the taxpayer for at least five years prior to the date of sale, or earned on the sale of stock or on the sale of an ownership interest in an Oklahoma company, limited liability company, or partnership where the stock or ownership interest has been owned by the taxpayer for at least three years prior to the sale. The "holding period" means an uninterrupted period of time. An "Oklahoma company, limited liability company, or partnership" means an entity whose primary headquarters has been located in Oklahoma for at least three uninterrupted years prior to the date of the transaction from which the capital gains arise.

Please let us know if we can assist you in determining whether you qualify for the new capital gains exclusion for individual taxpayers beginning in 2005.



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grantor of a preservation trust has any existing claims before accepting a preservation trust for administration. Further, any transfer of assets into a preservation trust by a grantor who then files bankruptcy within three years shall be presumed to be a fraudulent conveyance. This presumption does not apply in the event of an involuntary bankruptcy proceeding being commenced against the grantor.

In conclusion, a preservation trust should become a very popular asset protection vehicle among those interested in protecting their assets from the claims of unforeseen creditors. Of course, whether a preservation trust is right for you will depend on your individual circumstances. If you are interested in learning more about preservation trusts, or asset protection and estate planning in general, please contact the author to schedule an appointment.



Thought of the Day

"Political ability: It is the ability to foretell what is going to happen tomorrow, next week, next month and next year. And to have the ability afterward to explain why it didn't happen."

- Sir Winston Churchill

Schiavo Case Highlights Importance of Living Wills

by Christopher A. Barrow

The recent legal battle that has embroiled the family of Terri Schiavo is a reminder that it is wise to specify in advance what medical treatment one wants if he or she is severely incapacitated or in a persistent vegetative state. Oklahoma law allows a competent person 18 years of age or over to make legally-binding advance decisions, at any time, about what should be done if he or she becomes persistently unconscious or suffers a



Chris Barrow

terminal condition and is unable to make decisions regarding medical care.

A living will, also known as an advance directive, is a broad term covering various forms of formal documents which may be designed to set forth specific instructions about the particular treatments that a patient may or may not want under given circumstances, such as a terminal condition or permanent unconsciousness. Further, Oklahoma law permits the appointment of a health care proxy with authority to make health care decisions on the appointing person's behalf when the declarant has been determined to be persistently uncon-

scious. A living will or health care proxy may be revoked at any time.

In addition to providing peace of mind to the declarant, a living will allows family members to avoid an often bitter and emotional battle should a loved one become terminally ill and unable to make decisions regarding medical treatment. The attorneys at Barrow & Grimm, P.C. encourage clients to consider signing an advance directive for health care in connection with the preparation of their estate plan.



The Value of “No Contest” Provisions in Wills and Trusts

by Adam K. Marshall

A no contest provision, also known as an *in terrorem* clause, in a will or trust is used primarily to dissuade the devisees of a will, or beneficiaries of a trust, from challenging bequests made therein. A no contest provision declares that one who attacks the will or trust forfeits any interest they may have. This threat of forfeiture written into a will or trust seeks to minimize family bickering concerning the confidence and capacity of the testator, as well as the amounts bequeathed, and thereby protect estates from costly, time-consuming and vexatious litigation. While no contest provisions are generally ineffective in discouraging those challengers with little or nothing to lose under a will or trust, such provisions may effectively discourage those beneficiaries at risk of losing a significant share of their interest, provided that testator’s and grantor’s pay special attention to the language used in a no contest provision.



Adam Marshall

Forfeiture of property is generally considered a harsh result under the law and, while no contest provisions are generally valid in Oklahoma, the legal construction of such provisions generally favors the beneficiary. In Oklahoma such provisions must be strictly construed, and forfeiture avoided, if possible. However, a decedent’s intent, as expressed in a will or trust, shall guide a court’s interpretation above all else.

A typical no-contest provision might provide as follows:

If any person shall, in any manner, directly or indirectly, contest the validity of this will [or trust], or

any part thereof, that person or persons shall take nothing from this will [or trust] and distribution shall be made as though that person or persons did not exist.

Most litigation involving no contest provisions, such as the one above, focuses on the meaning of “contest.” In Oklahoma, a “contest”, for the purposes of no-contest provisions, is “any legal proceeding designed to result in the thwarting of the testator’s wishes as expressed in the will.” There must be a clear and unequivocal attack made on the will before the penalty of forfeiture contained in a no-contest provision will be invoked. Whether there has been a contest within the meaning of the language used in the clause is decided according to the circumstances in each case. Furthermore, most courts generally hold that action brought in good faith and for probable cause will not cause a beneficiary to lose his or her interest in an estate or trust, even though the instrument contains a no contest provision.

While courts have wrangled with will and trust contests on a case-by-case basis, the practical application of no contest provisions raises issues regarding their effectiveness. For example, those with nothing to lose will not be deterred from challenging a will. If an heir, who is also a devisee, brings a successful will contest that invalidates the will, the no contest provision therein will be invalidated as well. The same heir that successfully contests the will would likely be entitled to receive his or her own intestate share of the decedent’s estate. In fact, an heir that has been devised less than his or her intestate share in a will, or who has been expressly disinherited, may actually have an incentive to challenge a will despite the presence of a

no contest provision.

Despite the practical application issues, and an underlying judicial policy to avoid forfeiture of a beneficiary’s interest, there is still a place for no contest provisions in a modern will or trust. Remember, the purpose is to discourage challenges to a will or trust. In both wills and trusts, beneficiaries with something to lose will think twice about challenging a will. While legal heirs may have a second chance at an estate via intestacy, ancestors, collateral heirs, as well as non-heir devisees and legatees, who are named in a will or trust, but will not benefit from intestacy, will carefully consider the prudence of challenging a will because they stand to lose their entire beneficial interest. However, where trusts are concerned no contest provisions are more effective. This is because trusts are not susceptible to the same formal challenges to validity that wills are under Oklahoma law. Therefore, a trust beneficiary will face a tougher time invalidating a trust thereby increasing the risk of forfeiture of the beneficiary’s interest.

To ensure the effectiveness of a no contest provisions, a testator or grantor should consider explicitly setting forth in their will and/or trust specific events or actions by a beneficiary that would or would not be considered “contests” under the instrument. Because Oklahoma court’s interpret no contest provisions to reflect a testator’s, or grantor’s, intent above all else, the more clearly and specifically that intent is spelled out in the will or trust, the more effectively a no contest provision will put beneficiaries on notice that challenges to a will or trust could adversely effect their interest thereunder.



Briefly is published for the clients and friends of Barrow & Grimm, PC. Its intent is to address current trends and issues as they relate to business, personal and legal concerns.

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IN BRIEF...

- William R. Grimm is currently serving as President-Elect of the Oklahoma Bar Association for 2005. Upon completion of his term as President-Elect, Mr. Grimm will serve as the 2006 President of the Oklahoma Bar Association.
- Robert B. Sartin was elected to a 3 year term on the Oklahoma Bar Association Board of Governors. He is also currently serving as Chairperson of the Advisory Board of OU-Tulsa.
- William E. Farrior is currently serving as the Budget Director of the Tulsa County Bar Association. Mr. Farrior has recently been elected to serve as the next year's Treasurer of the Tulsa County Bar Association.
- Wm. Brad Heckenkemper has been appointed by the President of the Oklahoma Bar Association to serve as a member of the OBA's Professional Responsibility Commission. Mr. Heckenkemper also recently completed his term on the Oklahoma Court on the Judiciary.



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The articles presented in Briefly are not complete discussions of all legal issues. Because recommendations will vary in every situation, please request a personal legal consultation.



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