TOTAL RETURN UNITRUSTS[1]

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Introduction

Most trust agreements create two types of beneficiaries: "current beneficiaries" who can receive trust distributions now, and "remainder beneficiaries," who can receive distributions later (for example, after the death of the current beneficiaries). Standard trust provisions generally require that the trustees distribute all income to the current beneficiaries of a trust, with the remainder beneficiaries receiving the balance of trust assets after the rights of the current beneficiaries have terminated. The trustees of a trust have a fiduciary obligation to the trust beneficiaries to generate current income that can be distributed to the trust's income beneficiaries and still provide for appreciation of trust assets to satisfy the interest of the remainder beneficiaries. Thus, a trustee who is administering a trust containing such provisions must invest at least some trust assets in income-producing vehicles, such as fixed income securities (which over time have tended to produce a lower total return than equities), in order to meet income obligations to the current beneficiaries. This can produce a conflict between the interests of the current beneficiaries (who will want to maximize the current income realized by the investment of trust assets), on the one hand, and the remainder beneficiaries (who will want trust assets invested for maximum appreciation), on the other hand.

Resolving the Inherent Conflict

One method of addressing this inherent conflict is by employing "total return" provisions in a trust. A "Total Return Trust" is a trust which provides for the distribution of a specified percentage of the trust's value each year to the trust beneficiaries. By providing that a specified percentage of the value of the trust is to be distributed each year, the trustees can invest trust assets to maximize "total return," rather than having to balance the competing interests of the income and remainder beneficiaries when investing trust assets. As a result, the inherent conflict between trust income and remainder beneficiaries, and the related pressures on the trustee to recognize the interests of both parties, can be eliminated because distributions to both groups of beneficiaries can be maximized by investing for total return.

Another option to consider is a "discretionary trust," whereby the trustees are given the authority to decide how much income and principal to distribute to the current beneficiaries. Typically, such distributions are limited by an "ascertainable standard" (i.e., distributions are permitted for the beneficiaries' health, support, maintenance, and education). A discretionary trust also gives the trustee investment flexibility (since both income and principal can be distributed to the current beneficiaries) and also allows the

[1] **We cannot guarantee that this information is consistent with current law. Please contact Willms, S.C. for current information on this topic.**

trustee to accumulate income which is not needed by the current beneficiary, which in turn could reduce the estate taxes at the current beneficiary's death. Many clients prefer discretionary trusts when the person who is the primary beneficiary of the trust is also allowed to serve as his or her own trustee.

Conclusion

In summary, if you would like to have your family's inheritance invested and distributed by a third party (such as a trust company) after you die, then you may want to include total return provisions in your trust document. Please call us if you would like to learn more about total return trusts, or you may contact us by e-mail at "firm@willmslaw.com".