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678 TRUSTS: PLANNING STRATEGIES AND PITFALLS

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Typically, when a client is considering options to help reduce estate taxes, the client must consider techniques that require the client to part with assets he or she has accumulated over the years. For example, many estate planning techniques involve gifting and/or selling the client's assets to trusts that benefit the client's children. As a result, the client permanently parts with the assets, as well as all of the future appreciation and the income stream from the assets. Understandably, clients reach a resistance point. In these situations, it can be difficult to balance the client's desire to reduce estate taxes with the client's need to retain sufficient assets to maintain his or her standard of living.

One vehicle that allows the client to combine asset protection, estate tax savings associated with "estate freeze" techniques, and the continued ability to benefit from assets he or she has accumulated over the years is the "678 Trust" (sometimes also called a Beneficiary Defective Irrevocable Trust or "BDIT.") The 678 Trust is named after the Internal Revenue Code Section upon which it is based, which states that a beneficiary who has a withdrawal right under a Crummey trust will be treated as the owner, for income tax purposes, of the portion of the trust over which the withdrawal power lapsed.

A 678 Trust can be a useful tool under two fact patterns. The first is when the client is contemplating purchasing an asset or starting a new business venture that has high appreciation or income-generating potential. The second is when the client has significant assets that are already material in value, which the client wants to transfer to the 678 Trust. Structuring the transfer of the assets to the 678 Trust in both fact patterns are discussed in more detail below.

A. STRUCTURE OF A 678 TRUST

The 678 Trust is established by the client's parents, sibling, or close friend with a gift of \$5,000. Generally, this is the only gift that should ever be made to the Trust. It is important that the \$5,000 contribution to the Trust be a true gift and that the creator of the Trust receive no quid pro quo payments or benefits as a result of making the gift. The client/beneficiary must never make a gift to the Trust.

The Trust is structured as a "Crummey" Trust, so the beneficiary has a period of time to withdraw the \$5,000 gift. If the beneficiary does not demand the gift, his withdrawal right lapses after a certain period of time (e.g., thirty days).

The client is the primary beneficiary of the 678 Trust and can receive distributions for health, education, maintenance, and support purposes. The client can also be named as the trustee. When the client is given a withdrawal right over the initial \$5,000 contribution, the 678 Trust becomes a grantor trust as to the client/beneficiary (under the authority of Section 678 of the Code). After the withdrawal right lapses, the 678 Trust continues to be a grantor trust as to the client/beneficiary. Thus, from that point forward, the 678 Trust will not be deemed a taxpayer separate from the client/beneficiary.

While he is treated as the owner of the Trust for income tax purposes, the client will be responsible for paying the income tax on the income generated by the Trust's assets. Assets outside of the Trust can be used to pay the income taxes, allowing the Trust assets to grow without being depleted by income taxes. This also allows the client to "spend down" assets that would otherwise be includable in his or her estate and subject to estate taxes at death. If the time came that the client were unable to pay the income taxes out of his or her own assets, the 678 Trust could make a distribution to the client in the amount of the income taxes under the health, education, maintenance, and support standard.

B. BENEFITS OF THE 678 TRUST

As discussed above, the assets owned by the 678 Trust will not be subject to estate taxes at the client's death. While the client is living, he or she will continue to have access to the funds for health, education, maintenance, and support purposes and can serve as trustee of the 678 Trust.

In addition, the assets owned by the 678 Trust will not be subject to the claims of the client's creditors. Texas law provides that a Trust that contains "spendthrift" language that is created by a third party will not be subject to the creditors of the Trust beneficiary. This is true even if the Trust is structured as a Crummey Trust and the beneficiary is given a right of withdrawal over the Trust assets. Section 112.035 of the Texas Trust Code specifically states that a Trust beneficiary is not treated as a settlor of a Trust merely because of a lapse of withdrawal rights, provided that the withdrawal right does not exceed the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Code or Section 2503(b) of the Code (the "5 and 5" rule). As a result, the lapse of a withdrawal right will not cause the Trust assets to be subject to the reach of the beneficiary's creditors. This very clear legislation makes Texas particularly well suited for 678 Trust planning.

Section 112.035 of the Texas Trust Code also provides that a Trust beneficiary is not treated as a settlor of a Trust merely because the beneficiary has the power to consume or distribute Trust property to or for the benefit of himself or herself as long as the power is limited by an ascertainable standard (such as health, education, maintenance, and support). Therefore, a beneficiary's creditors will not be able to reach the Trust's assets if the beneficiary is also named as the trustee, so long as the trustee-beneficiary's distribution standard is limited to health, education, maintenance, and support.

The 678 Trust technique helps reduce estate taxes, provides creditor protection, and gives the client the ability to continue to benefit from the assets during his or her life. When compared to other estate planning techniques, such as GRATs, the 678 Trust is superior because, among other things, (i) the client does not have to survive the transaction with the 678 Trust by any period of time in order for the assets to be outside of the client's estate, and (ii) the estate tax inclusion period rules do not apply, so that GST exemption can be allocated to the Trust on its creation. The 678 Trust can be structured and customized to fit many different situations.

C. BUILDING VALUE IN THE 678 TRUST

The 678 Trust can be utilized by almost any type of client. The most obvious use of a 678 Trust is for clients who are expecting to purchase an asset that has high appreciation potential, are starting a business, or are expanding an existing business (but as discussed below, it can also be used for existing assets with appreciation potential or that are subject to valuation discounts). Some examples include buying a new business opportunity, engaging in additional drilling operations, or investing in restaurant franchises.

In those cases, the client can make a loan to the 678 Trust to enable it to buy the asset, start the new business, or expand the existing business. In order for the loan to be respected by the IRS, it must carry an interest rate equal to, at a minimum, the applicable federal rate for the type and length of the loan. As the asset or business grows in value, the loan can be repaid. The asset will continue to be owned by the 678 Trust, where it will not be subject to estate tax at the client's death. Once the 678 Trust has built up significant assets, it can simply purchase new assets using its own credit.

The 678 Trust can also be useful for clients who have existing assets that have appreciation potential or that are valued at a discount. Furthermore, with many corporations accumulating significant cash, some predict a surge in merger and acquisition activity. A closely-held business owner who might be presented with an opportunity to sell the business at some point in the future would be an ideal candidate to sell his or her ownership interest to the 678 Trust prior to such a liquidity event (the earlier, the better).

In these cases, it would be desirable for the client to sell the asset to the 678 Trust in exchange for a promissory note. For the reasons discussed below, it is important that the sale be structured so that it will be respected by the IRS as a bona fide sale under Section 2036 of the Code. The 678 Trust needs to have sufficient substance to support the sale, which can be problematic if the Trust is new and has not yet built up significant value.

To remedy this situation, the 678 Trust can have other trusts or individuals (other than the client) guarantee the note owing to the client. The assets pledged should equal at least 10% to 20% of the size of the note (the higher, the better). If no other trusts or individuals are available to guarantee the note, the client can create a separate trust for his or her children and make a gift to it. With a \$13,610,000 lifetime exemption, the client can make a gift of up to \$13,610,000 (or \$27,220,000 if the client is married) and pay no gift tax. The new trust can then provide a guarantee to the 678 Trust in exchange for a guarantee fee. To supercharge the new trust, it can be structured as a grantor trust with respect to the client for income tax purposes and as a GST exempt dynasty trust.

It is important when the client transacts with the 678 Trust that the transaction be structured at fair market value, and that **no gifts be made to the 678 Trust beyond the initial \$5,000 gift contributed by a third party**. Any additional gifts could alter the income tax and estate tax characteristics of the 678 Trust. Furthermore, if the client is treated as having made a gift to the 678 Trust, then at least a portion of the Trust's assets will be subject to estate taxes when the client dies.

In order to guard against the client being treated as having made a gift to the 678 Trust when he or she loans money to the Trust, the interest rate on the loan should be at least equal to the applicable federal rate in effect at the time the loan is made. When assets are sold to the Trust, the sales price must be equal to the fair market value of the asset.

Sale documents can also include adjustment clauses, where the 678 Trust and the client agree that, if the fair market value of the asset sold to the Trust is ever determined to be different than that agreed upon by the Trust and the client, the sales price will be adjusted to reflect the differently determined fair market value. This adjustment clause could help avoid the argument that the client made a gift to the 678 Trust if the sales price were determined to be lower than the asset's fair market value.

In addition, it is advisable to have the asset sold to the 678 Trust professionally appraised. The appraiser should be advised that the value sought should be on the mid-range of the scale of reasonableness. If the appraisal is too aggressive, and results in a value lower than that reasonably determined by the IRS, it is possible that the client will be treated as having made a gift to the Trust equal to the difference between the appraised value and the IRS-determined value. As a result, the appraisal should not be overly aggressive.

The 678 Trust can also allow the client to exercise a special power of appointment ("SPOA") over the Trust assets during life or at death. An inter-vivos SPOA can give the client/beneficiary the power to provide for Trust property to pass to individuals or charitable organizations during the client's life.

A testamentary SPOA can give the client/beneficiary the power to control how the property will be distributed at his or her death and also can give the client/beneficiary flexibility to modify the terms of the Trust on his or her death to account for changed circumstances. The SPOA can be so broad as to allow the client to exercise it in favor of anyone (including other individuals, trusts, and charitable organizations) other than the client, the client's estate, the client's creditors, or the creditors of the client's estate.

D. RESULTS OF 678 TRUST PLANNING

The 678 Trust should be structured as a GST exempt dynasty trust. When the initial gift is made to the 678 Trust, the client's parents (or other third party who makes the gift) should allocate GST exemption to the Trust, which will allow it to pass to future generations free of transfer taxes. As a result, the assets owned by the Trust should not be subject to estate tax at the death of the client or the client's children. In addition, the 678 Trust should contain a spendthrift provision, in which case the Trust assets should be protected from the client's creditors. Furthermore, assets in the 678 Trust do not constitute marital property, protecting the assets if a beneficiary of the Trust gets a divorce.

With regard to assets sold to the 678 Trust, the value of the assets owned by the client is frozen at the value of the note the client received in the sale. The client can spend down his or her remaining assets and pay the income tax liability generated by the Trust's assets. This process will allow the assets owned by the 678 Trust to grow without being depleted by income taxes.

The Trustee of the 678 Trust has the ability to distribute Trust assets to the client and his or her issue for health, education, maintenance, and support needs, and the client may be given inter-vivos and testamentary powers of appointment over the assets of the 678 Trust to account for changes in family circumstances or the law. Upon the client's death, the 678 Trust can be drafted to divide into separate trusts for his or her children, and those trusts will be considered "complex" trusts (rather than "grantor" trusts) for income tax purposes.

E. REPORTING REQUIREMENTS

The creator of the 678 Trust should file a gift tax return reporting the \$5,000 gift to the Trust and allocating GST exemption to the gift. The gift tax return will be due on April 15 of the year following the year in which the \$5,000 gift is made.

When the client transacts with the 678 Trust, he or she should file a gift tax return disclosing the sale or loan in order to start the running of the statute of limitations. Assuming that the disclosure is adequate, if the IRS does not audit the gift tax return within the statutory period, it will be prohibited from asserting a gift tax related to the transaction later. The gift tax return will be due on April 15 of the year following the year in which the transaction takes place.

F. EXAMPLES

Example #1: The example below illustrates how the 678 Trust would be structured when the Trust will be investing in a new business, expanding an existing business, or purchasing a new asset from a third party.

- Step 1: Client decides to buy a new business, and the purchase price is \$100,000.
- Step 2: Parents of client (“Mom and Dad”) create a trust (the “Trust”) for the benefit of the client (“Son”) and his descendants. Mom and Dad initially fund the Trust with \$5,000, and the Trust provides that Son has a Crummey withdrawal right over contributions to the Trust.
- Step 3: Son receives notice of withdrawal right and allows the withdrawal right to lapse.
- Step 4: Trust creates a limited liability company (“LLC”) to purchase the new business. Trust is the sole member of the LLC. (Note that if expanding an existing business (such as acquiring more product lines or franchises, additional oil and gas drilling, etc.), the new activity will be owned by the new LLC rather than the existing business.)
- Step 5: Trust borrows \$100,000 from a bank or a third party. Son, Son’s existing business, or another trust guarantees the Trust’s debt to the bank/third party for a small fee. Alternatively, the Trust can borrow \$100,000 from Son directly, with interest on the loan charged at the applicable federal rate.
- Step 6: Trust contributes \$100,000 to LLC. LLC purchases new business opportunity for \$100,000.
- Step 7: Mom and Dad file Form 709 Gift Tax Return, reporting a \$5,000 gift to the 678 Trust and allocating \$5,000 of GST exemption to the 678 Trust, making the Trust fully exempt from GST tax.

Step 8: Son manages and grows new business. All of the income from the Trust assets is taxed to Son. If necessary, Son (or his descendants) may receive distributions of Trust income or principal.

Step 9: The 678 Trust continues to own and operate business and has sufficient capital to acquire new business opportunities or other assets. Son and his children can benefit from Trust income or principal. The assets are protected from creditors. At Son's death, if Trust assets are worth \$5 million, then Son has saved approximately \$2 million in estate tax.

Example #2: The example below illustrates how a 678 Trust transaction would be structured when the 678 Trust plans to purchase an existing business or other asset from the client. This use of the 678 Trust may be a fit for more clients' situations.

Step 1: Client owns a package of investment assets that have high appreciation potential. The package of investment assets is currently worth approximately \$30 million.

Step 2: Client contributes the investment assets to a limited partnership (the "LP"). Assuming a 35% valuation discount, the LP interests would be worth approximately \$19.5 million.

Step 3: Client creates a grantor trust for the benefit of Client's children (the "Grantor Trust") and makes a gift of up to \$13,610,000 worth of LP interests to it. If Client is married, Client's spouse can also make a gift of up to \$13,610,000 worth of LP interests to the Grantor Trust. For a transaction this size, a gift of \$4 million should suffice. (Note that this step is not necessary if Client has already created trusts for his children that have substantial value.)

Step 4: Parents of Client ("Mom and Dad") create a non-grantor trust (the "678 Trust") for the benefit of Client and his descendants. Mom and Dad initially fund the Trust with \$5,000, and the Trust provides that Client has a Crummey withdrawal right over contributions to the Trust.

Step 5: Client receives notice of withdrawal right and allows the withdrawal right to lapse.

Step 6: 678 Trust purchases Client's LP interests in exchange for a promissory note. The note is structured as a 9-year note, with interest at the mid-term applicable federal rate. New Grantor Trust (or previously existing trust, if such exists) guarantees at least 10% to 20% of the note amount in exchange for a small fee. (The size of the guaranty dictates the amount of LP interests the Client can sell, as the guaranty should be at least 10% to 20% of the note amount (the higher, the better)).

Step 7: An appraisal of the LP interests is obtained for the purpose of determining the exact percentage transferred to the Grantor Trust and determining the principal amount of the promissory note owing by the 678 Trust.

- Step 8: Mom and Dad file Form 709 Gift Tax Return, reporting a \$5,000 gift to Trust and allocating \$5,000 of GST exemption to the Trust, making the Trust fully exempt from GST tax.
- Step 9: Client files a Form 709 Gift Tax Return, reporting the \$4 million gift to the Grantor Trust and disclosing the sale to the 678 Trust. A copy of the appraisal should be attached to the Return.
- Step 10: All of the income from the Grantor Trust assets and the 678 Trust assets should be taxed to Client. If necessary, Client (or his descendants) may receive distributions of income or principal from the 678 Trust. Client's descendants may also receive distributions of income or principal from the Grantor Trust. The assets owned by the 678 Trust and the Grantor Trust are protected from creditors.
- Step 11: Trust continues to own the LP, which owns and manages the investment assets. Over time, the investment assets appreciate. At Client's death, if Trust assets are worth \$50 million and the estate tax rate is 40%, then Client has saved at least \$12.2 million in estate tax. (Calculated as follows: (i) \$50 million less \$19.5 million (the \$4 million gifted, which used up lifetime gift tax exemption, plus the \$15.5 million sold, in exchange for which Client received a promissory note that was repaid over time), multiplied by (ii) 40% tax rate.)

G. DISCUSSION OF STATUTORY AUTHORITY

Although the beneficiary may be deemed to be the grantor of the trust for income tax purposes, he is not considered the grantor for estate and gift tax purposes. Under Section 2041 and Section 2514 of the Code, a lapse of a withdrawal right is not deemed to be a gift to the Trust from the beneficiary so long as the lapse does not exceed the greater of \$5,000 or 5% of the Trust assets (the "5 and 5" power). As a result, allowing the withdrawal right to lapse will not cause the assets of the 678 Trust to be subject to estate taxes at the client's death. (Note that an affirmative release of a withdrawal right may have the opposite effect. If a holder of a withdrawal right releases the right, he or she could be treated as having made a gift to the Trust, causing the Trust assets to be subject to estate taxes at the holder's death. Therefore, in order to clearly qualify for the statutory "5 and 5" exception, the plan is for the beneficiary to allow the withdrawal right to lapse, rather than release it.)

Under Section 678(a)(1), a person who "has a power exercisable solely by himself to vest the corpus or the income" of the Trust in himself will be treated as the owner of the portion of the Trust over which the power is held. A withdrawal right gives the beneficiary the right to vest the corpus or the income of the Trust in himself and, as a result, is a power that will cause the Trust to be owned by the beneficiary for income tax purposes under Section 678(a)(1) so long as the power remains outstanding. If the withdrawal right applies to all of the assets owned by the 678 Trust (as in the case of the initial \$5,000 gift), then the entire Trust will be treated as owned by the beneficiary for income tax purposes. Once the withdrawal right lapses, however, the income tax treatment of the Trust is not as clear.

Under Section 678(a)(2), a person who "has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof" will be

treated as the owner of the portion of the Trust over which the power was partially released or modified. The question, therefore, is whether the client would be treated as the owner of the Trust under Sections 671 to 677 of the Code if he had been the initial grantor of the Trust.

Under Section 676, the grantor of a trust will be treated as the owner of the trust for income tax purposes if a non-adverse party has the power to revest title in the Trust property in the grantor. Because the power is over principal, both income and principal will be deemed owned by the grantor. This power is given to a special trustee who has no interest in the Trust. A person who has no interest in the Trust is a non-adverse party under Section 672(a) and (b). Therefore, the client would be deemed the owner of the Trust under Sections 671 to 677 of the Code if he had been the initial Trust grantor.

Note that Section 678(a)(2) refers to a “partial release” (as opposed to a “lapse”) of a withdrawal right as the triggering event. Although this terminology does not mirror that contained in Sections 2041 and 2514, the IRS has issued a private letter ruling interpreting a lapse under Sections 2041 and 2514 to be a partial release under Section 678.¹ In addition, the IRS has implied in prior private letter rulings that a lapse under Sections 2041 and 2514 would have the same effect of a partial release under Section 678.²

We believe the IRS position is correct under existing law. It is possible; however, that the IRS could change its policy expressed in the private letter rulings and argue that a lapse is not treated as a release under Section 678. If this policy change were to occur, we believe that it would ultimately fail because a lapse and a release are economically equivalent. Still, the mere change in the IRS position would be inconvenient and would provide additional tax risk. To help mitigate this inconvenience and risk, we typically include additional provisions in the 678 Trust.

First, the withdrawal right granted over the initial \$5,000 gift to the Trust extends until at least December 31 of the year in which the gift is made (i.e., the withdrawal right does not lapse until after December 31). Any sales to the 678 Trust occurring before the withdrawal right lapses, would be unaffected by a change in the IRS position. During the time that the withdrawal right remains outstanding, the client should clearly be treated as the owner of the Trust for income tax purposes and should be able to transact tax-free with the Trust.

Second, in December of each year, the client is typically given a withdrawal right over all of the Trust income earned during that year, to the extent that the income does not exceed the greater of \$5,000 or 5% of the Trust assets. (Note that if the client dies while the withdrawal right is outstanding, the amount of assets over which the withdrawal right exists will be included in the client’s taxable estate.) To the extent that the income is less than or equal to this amount, the client should be treated as the owner of the Trust income for income tax purposes. It is not clear whether this withdrawal right would cause the client to be treated as the owner of the Trust’s principal for income tax purposes, but that position is arguable.

If the client is not treated as the owner of the Trust’s principal, then the Trust may be required to pay any capital gains taxes out of its own assets. As a result, the tax amount would deplete the assets that will be protected from estate taxes, as opposed to the client’s assets, which will be subject to estate taxes. In addition, if the client is not treated as the owner of the Trust’s principal, capital

¹ PLR 200949012.

² See, e.g., PLRs 200747002, 200104005, 200147044, 200022035, 9809005, 8342088.

gains taxes could be triggered when the Trust makes principal payments on the note owing to the client.

In any case, the client should, at a minimum, be able to sell assets to the 678 Trust while the withdrawal right is outstanding without being required to recognize gain on the sale. In addition, if the client sells assets to the 678 Trust in exchange for a promissory note or loans money to the 678 Trust, the client should not be required to recognize the interest payments as income. This characteristic would also cause the 678 Trust to be a permissible owner of S corporation stock, without requiring the Trust to elect to become a qualified subchapter S trust (“QSST”) or an electing small business trust (“ESBT”). The IRS has issued a private letter ruling stating that a 678 Trust is a permitted S corporation shareholder under Code Section 1361(c)(2)(A)(i).³

H. TOO GOOD TO BE TRUE?

Some have expressed concern that the 678 Trust technique is “too good to be true.” However, it is important to note that, while it can be a particularly effective technique in the right situation, the technique has real economic substance, as it may not always achieve the goal of reducing a client’s taxable estate. When assets are sold to a new 678 Trust in exchange for a promissory note, another person or entity must guarantee a portion of the note. In many cases, the guarantor of the note will be an irrevocable trust created by the client and funded with a gift that uses some or all of the client’s lifetime gift tax exemption.

If the asset sold to the 678 Trust decreases in value and the Trust is unable to repay the note to the client, the guarantee must be called. In that event, the irrevocable trust must satisfy the guarantee using the assets it received as a gift from the client. As a result, it is possible to do “negative estate planning” if the irrevocable trust is required to use assets it received as a gift to repay the note owing by the 678 Trust to the client. Note that the negative planning would be particularly painful if, as is typical, GST exemption had previously been allocated to the irrevocable trust. As a result, there is a risk of loss associated with this technique, which must be carefully considered when structuring a 678 Trust.

³ PLR 201039010.