

HOW YOUR LIVING TRUST CAN PROTECT YOUR HEIRS IN A DIVORCE OR LAWSUIT



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By Barry Zimmer, Attorney at Law
The Zimmer Law Firm, LLC

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Your Living Trust can also be an asset protection trust by making the trust shares for your beneficiaries after you pass away as a Family Access Trust or a Family Sentry Trust.

While giving your beneficiaries unfettered access may seem appropriate for mature, wise beneficiaries, divorce is a risk for any heir who is married. A **Family Access Trust** provides divorce protection by keeping a child's inheritance separate from his or her other assets. That prevents the asset from being converted either intentionally or accidentally from separate, non-marital property to marital property. This distinction is critical if an heir gets divorced, since the divorce court can only divide and award marital assets between the spouses. Non-marital assets cannot be divided in a divorce. The Family Access Trust assets are also not considered marital assets under traditional principles of law.

In non-lawyer talk, the Family Access Trust is a Divorce Protection Trust – as long as the beneficiary keeps the assets in the Access Trust. But the beneficiary has full access to the assets of the trust share (hence the name “Access Trust”). As soon as the assets are withdrawn, they become potentially fair game in a divorce.

If you are interested in more protection for your heirs than the divorce protection possible under the Access Trust, there's the **Family Sentry Trust**. The Family Sentry Trust has divorce protection of the Family Access Trust, but adds another layer of creditor protection and management. With this trust, you can protect your loved ones and their inheritance from creditors, bankruptcy, judgements, IRS, estate taxing authority, or lawsuits. It also protects against your heirs' bad luck, poor judgement, honest mistakes, bad investments, and so on. A sentry trust would be an excellent way to leave an inheritance as well for a loved one who has spendthrift habits, is poor with money, or has issues such as substance abuse, or personality issues.

THE BIG DIFFERENCES

How do the Family Access Trust and the Family Sentry Trust differ from each other?

Successor Trustees. Any child or beneficiary can serve as a Successor Trustee of a Family Access Trust under which he or she is the beneficiary. Or anyone else can serve as Trustee of the Access Trust, although this would defeat one of the purposes of the Access Trust.

In comparison, the child or beneficiary under a Family Sentry Trust should **not** be named as a Successor Trustee, nor can they serve as trustee of their beneficiary share. A child can, however, serve as the Administrative Trustee who is in charge of everything *except*

the power to authorize distributions to himself/herself. That power should reside with one else, preferably someone independent.¹ The Administrative Trustee can have the powers, for example, to manage the investments and take care of trust income tax returns, pay trust related expenses, and so on.

The Trustee powers under a Family Sentry Trust can be shared by an Administrative Trustee and a Distribution Trustee. Thus, for example, the beneficiary of the Sentry Trust can be in charge of investment decisions, and a third party can be in charge of distributions to or for the benefit of the Sentry beneficiary.

Power to Compel Distributions. Under a Family Access Trust, the beneficiary cannot only be his or her own Trustee; the beneficiary can also withdraw assets from the Access Trust at any time, for any reason or no reason at all. In a Family Sentry Trust, in order to be completely protected from creditors, the beneficiary cannot have any rights or powers to compel distributions to himself or herself. The distributions must be wholly in the Trustee's discretion. The beneficiary cannot have any right or option to compel the distributions, even though legal action in court. This rules out a typical "ascertainable standard" for distributions, such as "Health, Education, Maintenance and Support," the so-called HEMS standard. That would mean that a creditor could also force a distribution, arguing that payment of a legal judgement falls within the HEMS criteria.

The FST does not put the beneficiary in a position to make unwise investing or spending decisions, thus adding another dimension of asset protection planning.

The FAT may also provide third-party creditor protection under the Ohio Spendthrift Trust Act, which is part of the Ohio Trust Code. But the beneficiary is in control of the FAT which means no outside control to assure good stewardship of the money and wise spending and investing. Also, under the FAT, the beneficiary can completely withdraw the funds or assets, terminate the FAT, and take outright ownership. This would destroy the divorce and potential of third-party creditor protection, and put the ultimate disposition of the inherited assets in the hands of the beneficiary. In comparison, the FST means divorce protection, an opportunity for more prudent investing and spending, and that the legacy left to the FST beneficiary will not leave the family and will instead be protected for the grandchildren, great-grandchildren, and so on at the time the children die.

Choosing the Right Option. You can either create a Living Trust at the outset to include a Family Access Trust share and/or a Family Sentry Trust share for heirs. Or, if you already have a Living Trust, you can modify it to include either or both types of trusts. You can create different types of trust shares for different heirs. Even IRA's can be made payable to an Access or Sentry Trust share. It is possible to divide an inheritance into smaller parts, and make one part a Sentry Trust and the other an Access Trust.

The foregoing is for educational purposes and does not constitute a complete and authoritative discussion about creditor protection for heirs though trust planning. Nor does it cover all the possible trust designs. Consult legal counsel skilled in both debtor-creditor law and trust law to determine what is best for you.

¹ There are specific requirements under Ohio law to make a trust share for an heir creditor-proof. Those complete requirements are beyond the scope of this material.

ABOUT THE ZIMMER LAW FIRM

Zimmer Law Firm, LLC is a charter member of the American Academy of Estate Planning Attorneys. It is the only member firm in Southwestern Ohio. The Firm has been providing quality estate planning services since it was founded in 1993. The fastest growing demand for its services has been asset protection from the cost of long term nursing care. Whether you need an Elder Law attorney, an attorney for general estate planning with trusts or wills, or an attorney to help settle an estate, our team of qualified staff are here to help you and your loved ones.

In these turbulent times, access to an experienced lawyer to protect your estate and accomplish your goals is more important than ever. If you or your family would like a complimentary consultation to discuss your estate plan or how to protect your estate from depletion to pay for long term nursing care, call us today at **513-721-1513** or visit our website at **www.zimmerlawfirm.com**. Check our website for upcoming seminars, or learn more about the firm at www.avvo.com where you will also find testimonials from our clients. See why *Cincinnati Magazine* recognizes us as a Five Star Wealth Manager. If you would like to receive email announcements for upcoming seminars, call to be added to our seminar mailing list.

A MESSAGE FROM THE FIRM FOUNDER



The goals of Zimmer Law Firm are to make asset protection and estate planning pleasant, easy, and understandable processes for clients. We believe that planning is much more than just creating legal documents. Rather it is about establishing relationships with clients and their family by providing a continuum of services through the passages of their lives. What we do makes an important difference and we take great professional pride and satisfaction in that.

If you or your loved ones would like a complimentary consultation to review your estate plan or to implement a plan, visit our website at www.zimmerlawfirm.com or call us today at 513-721-1513 (Toll-Free 1-866-799-4050) to schedule an appointment. See for yourself why *Cincinnati Magazine* has recognized the Firm as a Five Star Wealth Manager. For the latest news about estate planning or upcoming law firm events, subscribe to our blog and “like” us on Facebook. Check our website for upcoming educational events. We continue to expand our capabilities and services to meet the demands of a complex and changing estate planning world. Our

experience has shown us what was a solution yesterday may no longer be adequate to fully protect our clients today.

This report reflects the opinion of the Zimmer Law Firm. It is based on our understanding of state and federal laws and is intended only as a simple overview of the planning issues. We recommend you do not base your own planning on the contents of this report alone. Review your estate planning goals with a qualified estate planning attorney.

ABOUT THE ACADEMY

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services. The Academy expects members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects.. The Academy has also been recognized as a consumer legal source by *Money Magazine* and *Consumer Reports Money Adviser*, and its Education Department has been quoted by other consumer press.

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HOW TO CONTACT US



9825 Kenwood Road, Suite 201
Cincinnati, Ohio 45242
(513) 721-1513
(513) 287-8623 Fax
Toll-Free 1-866-799-4050
www.zimmerlawfirm.com
info@zimmerlawfirm.com