Ask the Probate Judge—A-B Trusts

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Q: Several years ago we established a revocable living trust. Last year my wife passed on and the trust was split into an "A" Survivor's Trust and a "B" Family Trust. The "A" covers me and the "B" relates to my wife. It is my understanding that the "B" assets are frozen except for emergency use and the trustees and beneficiaries cannot be changed. Is this correct? Since my "A" trust remains revocable, may I add a beneficiary and alter the distribution of the assets? Being a senior living on a fixed income, can I accomplish this via a notarized cross-referenced amendment memo? This would save me the large attorney fee. J.P.N., Edgewood

Married couples with large estates or couples who are in second marriages may benefit from the A-B trust that you describe. In an A-B trust, the couple's assets are held in one trust until one spouse dies. After the first spouse dies, the trustee creates two trust shares, an A trust (survivor's trust) and a B trust (decedent's trust). Some of the couple's assets are held in the A trust; other assets are held in the B trust. As you state, the B trust usually becomes irrevocable upon the death of the first spouse, and the surviving spouse cannot change the beneficiaries, trustee, or terms of the B trust.

You must read your original trust document to determine its provisions about amendments and the use of B trust assets. Often the trust document states that the B trust is irrevocable. But the trust document should also contain instructions about when the B trust can be used. The most common language says that the surviving spouse can use income and sometimes principal from the B trust for the surviving spouse's "health, education, maintenance, and support." Sometimes the trust document requires that all of the A trust's assets be used (or substantially depleted) before B trust assets can be used. Your trust document is the key to the answers to your questions.

A-B trusts are useful to protect wealthy couples' assets from estate tax. The assets in the irrevocable B trust can be available to the surviving spouse. Typically, when the second spouse dies, the B trust's assets pass to the children or other named beneficiaries. If drafted properly, the IRS does not consider the B trust's assets to be part of the estate of the surviving spouse. These assets are not included in the surviving spouse's estate for determining estate tax liability, yet the surviving spouse may be able to use the B trust's assets. Remember that in 2009 your estate can be worth up to $3.5 million before estate taxes become an issue. The $3.5 million number is "per person;" thus a married couple, with a properly drafted estate plan, can shelter up to $ 7.0 million.

A-B trusts also help couples who want to leave their own assets to children from another marriage. The surviving spouse could use the income (and principal if the trust so states) from the B trust, but upon the surviving spouse's death, the children from the first marriage would receive the B trust's assets.

You are correct that your A trust should remain revocable and amendable (assuming its terms allow this). A typical living trust can be amended or revoked at any time. Trust documents require written amendments and revocations signed by the settlor. The settlor and trustee must sign the original trust document, amendments, and/or revocation in the presence of a notary public.

People are allowed to draft their own legal documents, but hiring a trustworthy attorney should ensure that their documents are drafted according to New Mexico law. I do not know what year your trust was created, but the fact that you have an A-B trust suggests that your estate is worth several million dollars or you are not in your first marriage and have children from a prior marriage. If so, you should hire a reputable tax attorney to amend your A trust.

Write to Judge Rudd at P.O. Box 36011, Albuquerque, N.M., 87176-6011, or email jueznm@aol.com. The judge cannot answer questions about specific cases.

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