CHAPTER SEVEN

Making Your Trust Work: Funding

Having a trust is a great thing for many reasons as explained, but one of the main advantages is avoidance of probate. In order to avoid probate, all assets above the probate exemption threshold must either be in the name of the trust at the time of death or pass to the trust at that time by way of beneficiary designation.

In my law practice, it is not unusual to see clients die who had a trust that was not fully "funded" at the time of their death. Funding is just a word to describe the process of transferring assets to the trust. Any assets left out of the trust will have to go through probate to get into the trust. Our goal is to have no assets left out of the trust.

In some cases, there is a trust but no assets at all in the name of the trust—a trust may be fully funded, partially funded, or unfunded. However, we strive for a fully funded trust in order to get the probate-avoidance advantage.

Everything does not have to go to the trust. As stated earlier, the trust only controls the assets it owns or that pass to it at the death of the grantor. Sometimes a grantor will leave a particular asset such as a bank account or insurance policy to a person outside of the trust by way of beneficiary designation or joint ownership. This is often the case in a blended family where one spouse will leave an asset to his separate children, with the balance of all the trust assets going to all of the children of both spouses. The general rule, though, is that all assets should either be in the name of the trust, pass to the trust at death, or pass to someone else at death. Nothing should have to be

probated.

FUNDING METHODS

Funding is not particularly difficult for most assets. Here is a list of common assets and how they are typically funded into a trust.

Real Estate

Real estate is transferred to a trust by way of a deed in most cases. The deed is made from the owner of the real estate to the trustee as trustee of the trust. The deed may be deeded from the grantor to the trust as follows: “John Smith as trustee of the John Smith Revocable Trust dated January 2, 2017.”

There are two kinds of deeds commonly used. The “warranty deed” is the kind normally provided to the buyer of real estate by the seller. As its name implies, a warranty deed is used to guarantee that the title to the property being sold is genuine and without any encumbrances.

The “quitclaim deed” is most often used by attorneys working with trusts. This deed does not guarantee title to the property but merely says that what is being transferred is all the rights to the property owned by the owner of the property. For transfers into trusts, we do not have to worry about guaranteeing title; we know they own it, so a quitclaim deed works fine and in some jurisdictions is less expensive to file with the county recorder.

In either case, the grantor can either record the deed immediately or deliver it to the trustee to be recorded after the death of the grantor. Attorneys are not in agreement as to whether the deed to the trust should be recorded immediately or later, upon the death of the grantor. The advantage of recording is that the deed cannot be lost and you will know it is in proper recordable form. There are states that say that an unrecorded deed is not valid, cannot be recorded after the death of the grantor, and has not effectively been completed until recording. This is another thing to ask your lawyer.

Recording a deed right away may result in additional paperwork if the grantor decides to sell or refinance the property. There may also be reasons not to record it in scenarios involving bankruptcy or qualification for Medicaid for nursing home or other medical care.

Should you buy other real estate in the future, be sure it is deeded to the trust. Timeshares in vacation property can be put into the trust name. Real estate located in other states may also be put in the name of your trust,

thereby avoiding probate in those other states. Property you are buying on a land contract or contract for deed, where you are not given a deed until the property is paid off, is transferred to the trust by way of an assignment form.

Recording a deed makes it public record, which means that anyone who looks can find out that you have a trust. Recording a deed may also affect certain property tax issues such as homestead rights and may result in removing caps on property assessments. Recording fees may also be high in some states. There are often exemptions available for transfers into a person's revocable trust, so be sure to ask the local tax assessor or your attorney.

Also ask your attorney about potential problems with real estate insurance and title insurance if real estate is in the name of the trust.

Bank and Credit Union Accounts

Bank accounts can be put into the name of the trust directly, or, in most institutions, the trust can be named as either a co-owner of an existing account or a beneficiary of the account. The bank may not use the word beneficiary—it may call it a "pay on death" (POD) or "transfer on death" (TOD) designation—but it amounts to the same thing. As trust owners, we do not care how the bank or institution does it, so long as at our deaths the money ends up in the trust without probate.

To accomplish the transfer, you need only take your trust certificate (sometimes called the trust abstract) to the bank, where it will copy the certificate and have you sign the appropriate paperwork to make the transfer. You will find that they have had experience with trusts and will guide you on how they handle these accounts at their bank. They may even use a shortened version of the trust name to fit their system. This is okay.

Other bank-type deposit accounts such as certificates of deposit and money market funds can be handled the same way.

Stocks, Brokerage Accounts

These can also be put directly in the name of the trust, though the transfer process for stocks not being handled by a broker can be trickier. For broker accounts, we send them your trust certificate and they provide the necessary paperwork to either change the account name or put into effect a TOD or POD. This should not be a transaction for which you are charged a fee because it is not a sale or purchase of securities. It is also not a taxable event for capital gains tax purposes.

Stocks that are not being managed in street name or held by your broker are easily identified, since you will have an actual paper stock certificate issued by the corporation and sent to you. Transferring these to your trust requires that you contact the stock office of the corporation and ask for the appropriate paperwork. In most cases, the forms must then be countersigned at your bank or broker with a "medallion signature guarantee," which is something like a fancy notary. After receiving the signed forms and the old certificates, the corporation issues new stock certificates to your trust.

Stock in a "closely held" corporation may only be transferred to your trust if the corporation's bylaws allow it. A closely held corporation is one in which the stock is not publicly traded.

Stock in "subchapter S" corporations may be held in trust but only while the grantor (maker) of the trust is alive. At his death, the trust must distribute the stock to qualified beneficiaries or divest itself of it within a certain period of time, or the corporation risks losing its special tax status.

Online brokerage accounts, such as E-Trade, TD Ameritrade, Scottrade, and others can also be in the name of your trust. In most cases, you can download the forms and instructions from their websites. They will ask that a copy of the trust certificate be sent to them along with the forms, which may have to be notarized.

As for retirement accounts, Keoghs, IRAs, and 401(k)s, be aware that a transfer of such accounts to a living trust may be considered a taxable distribution of deferred income; therefore, *these should not be put in the name of the trust* but should have the trust named as the *contingent beneficiary* of these accounts, with the spouse being the primary beneficiary if that is the case. This is so that upon the death of one spouse, the other retains easier rollover elections. A beneficiary change form and instructions are usually available from the plan administrator.

Government bonds and savings bonds can be transferred to trust ownership through your local bank. The bonds are turned in (not redeemed) to the government, and new bonds are issued in the trust name. Your local bank can provide you with a form PD 1851 to fill out and transfer savings bonds to the name of the trust.

Titled assets such as vehicles, trailers, boats, and motorhomes can be put into trust ownership by having the title changed at the local Secretary of State or state tax office (or whatever the name is for the state agency issuing titles). In some cases this is not necessary. In Michigan, for example, if a person dies

who owns a vehicle in her own name and whose will is not going through probate, the “next of kin,” typically a spouse or child, can have the title transferred into his or her name directly without any court process merely by presenting the title and death certificate. This process works provided that the total value of the vehicles does not exceed $60,000 or, for boats, $100,000. Relying on this method would not be appropriate for blended families, because whose children get the vehicles depends upon which spouse died last.

Be sure to talk to your accountant about the tax effect of putting a vehicle in the name of your trust and to your insurance agent to be sure the vehicle is still insured if the trust is the owner.

Other Assets and Unusual Situations

Personal property items, such as furniture, collections, clothing, and the contents of your house and garage have no titles so are not individually listed as having been put into the trust. We use a general assignment form to assign all nontitled assets to the trust. Then, if there are specific items you want to go to particular people or organizations, we use a personal property distribution form referenced in the trust document and append it to the trust.

Some assets are difficult or even impossible to put into your trust. Royalties are rights to percentages of profits and can be available for a variety of things. Book royalties will be paid to an author for as long as a book is in publication. Assigning these to a trust will require the permission of the publisher, and I have seen publishers refuse to agree to the assignment. This creates a situation where the estate of the author must deal with royalty checks for years after the rest of the estate has been settled and closed.

Royalties on oil or gas leases are paid for a fixed period of time according to the terms of the original written lease and are typically assignable to a trust. Other royalties on things such as patents, trademarks, copyrights, profit percentages on films, songs, software programs, and business contractual arrangements may or may not be assignable, depending upon the contract that was signed. In my office, we assign these to the trust even if we are not sure, because it costs nothing if we are wrong but is a great advantage if we are right.

Celebrity Images

We have all heard that Elvis and Michael Jackson make more money now

than when they were alive. The royalties received by their estates were not assigned to a trust so far as I know, but they could have been. Celebrity images and the use of a name are intangibles that can be assigned to a trust. Otherwise they are payable to the probate estate, sometimes for years.

Animals with pedigree papers can be placed in trust ownership. Registered horses, show dogs, and even cats can be registered in the name of your trust. Animals with no pedigree or "paper" can be made part of the trust assets by using the General Assignment of Assets form, which should be included with every trust. Animals, even your favorite pet dog, are considered personal property by the law, no different from your furniture, and so can be listed in the trust on your "Exhibit A" to specify who should receive them.

Aircraft can be placed directly in trust ownership, provided the FAA rules are followed. These are very complex. An Aircraft Registration Application form (AC 8050-1) must be filled out and submitted with a copy of the trust document and a special affidavit containing specific detailed information. I have had aircraft owners who worked for the FAA tell me that it is nearly impossible to get trust ownership of an aircraft through the bureaucracy. There are a few ways to get around this. A corporation can be created to take ownership of the aircraft and the corporate stock placed in the trust name (using a limited liability company works the same way). Another method is to use joint ownership, presumably with someone younger, to have more than just the original owner's name on the registration.

Contract rights may not be assignable to the trust because the assignment is specifically prohibited. For example, interests in a partnership, a real estate cooperative, or even a small corporation or LLC may have such restrictive provisions. The reasoning is that the co-owners do not want to be stuck with the heirs of the trust grantor as partners after the grantor dies. These types of agreements will have buy-sell agreements or provisions regarding the death of a member if they are well drafted. Often these restrictions were put in place automatically and can be easily changed by your attorney with the consent of the co-owners.