CHAPTER THIRTEEN

Trustee Instructions for Death or Disability of the Trust Owner

So now we know why a trust is necessary, what kind of trust to get, how to get it prepared, and how to fund it. But what happens next? What happens to the trust when the trust owner becomes disabled or dies? Most of the information we see about trusts from seminars, news articles, and books explains why a trust is needed and how to go about funding one. There is very little information out there on what to do with the trust at the death of the trust owner.

DISABILITY

One of the reasons we recommend a trust over a will is that the trust can provide an automatic manager of the trust assets if the grantor becomes disabled. People with dementia or who have had strokes or other disabilities may not be able to take care of their financial or legal affairs. Someone has to be able to pay the bills, do the taxes, and manage the money. Without a trust, the family would be forced to petition the probate court for the power to take over. As discussed earlier, this is a time-consuming and expensive process. Part of this can be done with power of attorney, but the rules of the trust itself give the second-in-line trustee—the successor trustee—the power to take over, should this situation occur.

Typically, the successor trustee would meet with the grantor's doctor and, if appropriate, the social worker at the hospital or nursing home to be sure there is a confirmed diagnosis of disability. A written opinion of the diagnosis is best. This satisfies the trust language, which requires proof of actual disability. Armed with this and the power of attorney, the successor trustee can then contact bankers and investment advisors to assume the financial management role. As successor trustee you can do everything that the trust maker could do insofar as managing assets and taking care of his or her needs. You generally cannot change the terms of the trust, however. You, as successor trustee may be entitled to a fee for doing these things if it is authorized by the terms of the trust. These fees are taxable income to you, while monies you inherit at death are not.

So during the time of incapacity you sign the checks, prepare and file income taxes, manage repairs on property, run businesses, if any, and basically take care of all of the grantor's business and legal affairs. Unless you are also his guardian or medical power of attorney, you do not make decisions as to where he might live or whether a nursing home is appropriate, though you pay the bills for these things from his assets.

AT THE GRANTOR'S DEATH

Trust settlement is the term used to describe the process of wrapping up the affairs of the grantor after death and carrying out the instructions in the trust as to disposition of the trust assets. Attorneys are very good at trust settlement, and if you do not care about the cost of settling the trust or the amount of time it might take, the easiest way to settle a trust is to hire a lawyer.

The thing is that the work that needs to be done at death is not legal work. It is a mostly clerical job that almost anyone can do with some direction. Why pay lawyer rates at hundreds of dollars an hour for things you can easily do yourself? I am going to give you a step-by-step guide on how to settle a trust without a lawyer.

It's true that I do not recommend setting up your trust without a lawyer, but the trust settlement part is entirely different. A lawyer is usually not needed.

As discussed earlier, a trustee is a fiduciary, a person with a special responsibility both to the trust creditors and the trust heirs. If the trustee makes a mistake, he can be personally responsible for making good on it. That's why some trustees go ahead and hire the lawyer—to help cover their liability. If you as a trustee decide to hire a lawyer to help you, make sure she understands that you know the process and plan on doing as much of the work as possible yourself, leaving the lawyer with only lawyerly things to do. Do not let the lawyer talk you into letting her handle all the money and keep the checkbook. You or your accountant can pay the bills and write the checks.

THE SETTLEMENT PROCESS

Settling a trust consists of three steps:

1. Identify and collect the assets.
2. Identify and pay the debts and obligations.
3. Distribute the trust assets as directed in the trust document.

Seems pretty simple, and it is. Of course, there are many potential components to each step, but I am going to try to lay out the most common areas you are likely to encounter. If something comes up that is not covered here, you can always pay a trust attorney for a half-hour conference to ask a question or two. (You do not have to turn the trust over to him, though.) If you want a lot of detailed advice and basically to have the attorney settle the trust for you, then the attorney will need to read the trust carefully and likely will give you a written opinion letter. This is to ensure that he is giving you the right advice based upon the trust. He is legally liable if he gives you the wrong information or advice, so the services will likely be expensive.

Settlement of a trust after the death of one grantor in a joint trust is usually simple. The assets may stay in the trust under the continuing control and management of the survivor, who just has to take care of cashing in or rolling over beneficiary-type assets, and then nothing happens until the survivor dies. But this is not always the case, so I recommend being careful and looking for the following possible issues.

After the death of the first grantor to die, the survivor should do the following in relation to the trust.

Life Insurance. Contact the life insurance companies and request a claim form. This should then be filled out and returned to them with a certified copy of the death certificate. In most cases, the death benefit will be paid within thirty days.

Real Estate. If the real estate has previously been transferred to the joint trust by deed, nothing needs to be done since the trust is still in existence and still owns the real estate. As the surviving partner and surviving trustee, you are in charge of the trust and all trust assets, including the real estate. You may file a certified copy of the death certificate in the county where the property is located, but you are not required to do so at this time, and this may be done by your successor trustee at your death.

Personal Property. If the trust requires that certain personal property items of your partner's be transferred to named beneficiaries now rather than at your death, you, as the survivor, must now transfer those items to those persons. The balance of the personal property may be divided among the heirs in the proportionate shares, or if that is not workable, you may auction or sell the items and add the cash to the other accumulated assets.

Income Tax. The tax returns for the year of your spouse's death may be made as "married filing jointly" if you wish, but the last year's income tax return for your spouse must be filed.

Estate Tax. If the property and other assets of the trust, including property passing by beneficiary designation and property in the name of your spouse outside of the trust, exceed the estate tax exemption amount (currently $5,450,000, but subject to change), then you should consult your accountant or attorney about the need for filing a federal estate tax return Form 706. Even if no tax is due now, the filing of a return may still be required. It may also be necessary, if you had, for instance, an A/B trust, to obtain a separate Taxpayer Identification Number for the trust. In the case of an A/B trust, it is also very desirable to get provable valuations in place for all trust assets as of the date of death so that you can prove the values at that time. It can sometimes be difficult to establish a value at death for real estate or a business, for example, a year or two later.

State Inheritance Tax. Each state has a death tax separate from the federal tax. While only a few people will ever have to pay Federal Estate Tax based on the current rates, the state tax inheritance tax may have a much lower threshold. Ask your attorney about the law in your state, or do an Internet search for a general answer.

Benefits. Contact the Social Security office to see what survivor's benefits may be payable to the surviving spouse or children as well as to apply for the Social Security death benefit. Contact any previous employers to be certain that all employee benefits have been applied for. Form letters are included in the appendix to initiate this process.

Wrongful Death. If the death was or could have been the result of another person's negligence, such as medical malpractice or an auto accident, contact your attorney to see what benefits may be available for the family.

As was explained earlier, there are two basic types of trusts—the joint trust and the single trust. If you have a joint trust with a spouse, a parent, or a life partner, you should be sure that nothing has to be done at the death of one of you insofar as the trust is concerned. So in a joint trust, this is what might need to be done in some cases.

Read the Trust (Or Have Your Attorney Explain It to You)

The language of the trust document itself needs to be reviewed to see what happens to the trust at the death of one of the cograntors. Most often the trust will say that all the trust assets stay in trust and under the control of the surviving grantor. The survivor can still spend the money, borrow against the assets, sell them, or do anything that was possible before. The trust distribution provisions typically do not take effect until both grantors die. Often the surviving grantor has the ability to change the trust in any way desired. This is not always the case, so read the trust carefully.

There are numerous types of provisions that may take effect immediately upon the first death. Read the trust carefully to be sure you, as the surviving grantor, are doing everything correctly. It may be a good idea to go to the lawyer who prepared the trust to have her review the trust provisions with you. If you are making up your trust now, you may want to include some of these provisions in your trust, if they apply, or to remove the more onerous ones. Here are some examples:

1. Can you change the trust? Often in the case of blended families, the grantors want to be sure that if one of them dies first, the children of the first to die are not going to be disinherited by the survivor. So the trust may have a provision that the survivor may not change the trust in one or more ways. It becomes, in effect, wholly or partially irrevocable at

the death of one. Even if the survivor can't change the beneficiaries, there may still be the power to make limited amendments, such as changing the successor trustees. If the trust is silent as to limitations on the right to amend after the death of one of you, the survivor can change the trust provisions in any way or even revoke the trust altogether.

2. A surviving grantor may discover from reading the document that while he cannot change the trust, he still retains the ability to remove assets from it or to make gifts. To thwart the no-amendment provision, the survivor might try to remove all the trust assets or give them away to effectively revoke the irrevocable trust. Provisions should be in the trust that prevent this sort of end-run around the rules.
3. There are sometimes family heirlooms or one-of-a-kind items that a grantor may want to see end up in the hands of his own heirs. Often a trust will instruct that these individual items go immediately to the people indicated without waiting for the death of the surviving grantor. Things like collections, jewelry, firearms, sporting goods, the family bible, collector cars, or other such possessions can be listed on an addendum to the trust that must be followed at the death of one person. However, the trust must specifically provide in its language that if such a list is appended to the document, it must be followed.
4. Trust property for the survivor. Often the family home is owned by one of the grantors prior to the beginning of the relationship. The plan may be to pass the place on to the next generation after the death of the parent. The other partner may face undue hardship if forced to leave the house and find another place to live. Trusts often provide that the surviving grantor has the right to remain in the home for a set period of time (or for his lifetime), following which the property is given to the ultimate beneficiaries. In the meantime, either the trust pays the expenses on the property or, more commonly, the survivor is responsible for such things as taxes, insurance, maintenance, and utilities.

   Again, if the trust is silent as to the residence, it remains part of the trust principal and belongs to the surviving partner, who can sell it, mortgage it, or even give it away.

   And don't forget about the furniture and household goods. I had a case where the trust provided that the survivor had the right to live in the house but was silent as to the furniture. The children of the deceased grantor, who were the ultimate beneficiaries, removed all of it. So while the survivor had the right to live in the house, he had to buy all new furniture, silverware, pots and pans, and even bath towels. A trust provision could cover that kind of situation.

5. New trustees. To make sure the trust provisions are followed, careful grantors will sometimes provide that at the death of one of them, the surviving grantor is no longer solely in charge of the trust management. Often a bank or one of the deceased grantor's children will be added as a cotrustee along with the surviving grantor.

   This is not necessarily a bad thing, since it ensures that the survivor has no choice but to honor the terms of the trust, but it could make for complications on the part of the survivor. From that point on, the survivor has to agree on all financial decisions with the new cotrustee. I had a client whose husband died, and the trust appointed his daughter as the cotrustee with the wife. While the husband was alive, the client thought the plan would work fine, but after he died, the stepdaughter made every effort to conserve all the trust assets, refusing or complicating every request for money from the trust.

   Her thinking was that the stepmother was spending the ultimate inheritance. The courts could have intervened to appoint a new trustee, but this would have added another layer of cost and complexity to the process. Adding a trustee to serve along with your partner is a good idea in theory, but in practice it can lead to rather contentious situations. Be careful what provisions are put in the trust, since they are very difficult (if not impossible) to change, and your cograntor will have to live with them.

6. Changing trust asset management. At the death of one grantor, some trusts will have provisions that put the survivor on what amounts to an allowance. A new trustee is in charge of paying the bills for the surviving partner. The survivor gets her expenses paid for life, but at death, the trust assets pass on to the heirs named in the trust. There is no right to the use of the principal, except in limited amounts and circumstances. These provisions are typically put in for estate tax purposes but sometimes to preserve the assets in the trust for the ultimate beneficiaries. When you set up your trust, be sure that you understand the effect these provisions will have on the survivor. Most

often the surviving partner resents having limitations on access to what was once jointly owned property.

7. Tax provisions. Years ago, when estate taxes were assessed on estates of $600,000 and up, estate tax provisions were a valuable part of any good trust. Now, the threshold is $5.45 million, so this is not an issue for nearly everyone. The problem is that many trusts were created a long time ago and have not been brought up to date to reflect the new laws. Consequently, some surviving grantors find themselves subject to restrictions on their access to the joint trust assets that serve no tax-saving purpose yet severely limit their financial activities.

   The "QTIP" provision is a common one. This acronym stands for "qualified terminable interest property." It's a mouthful, and a detailed explanation is beyond the scope and intent of this book. Briefly, this trust provision has been used to avoid estate taxes and is still used for the larger estates that may exceed the $5.45 million threshold.

   Here's how it works. Each grantor has today what amounts to a $5.45 million exemption from estate tax. The problem in larger estates is that if one grantor dies before the other, the survivor gets all of the assets tax-free (due to the unlimited marital deduction); but then at the death of the survivor, there would be only one estate tax deduction left. So at today's tax rates, a $6.45 million estate could end up paying four hundred thousand dollars in federal estate taxes. The QTIP provision in a trust could solve that problem by allowing the taxable portion over the exemption amount to be placed in a separate account. The survivor could draw the interest, and in some cases, part of the principal each year from that account, and then at the death of the survivor, the remainder would go to the ultimate beneficiaries. That way the survivor would have one exemption, and the first to die would have his exemption preserved to shield the QTIP amount from estate taxes. In effect, this doubles the estate tax exemption to $10.9 million, so at death there would be no estate taxes whatsoever.

   Sounds good, but some poorly drafted trusts will require that a certain portion of the trust assets be put into a QTIP share, even if there is no tax problem due to the size of the total trust estate. A $2.5 million estate would have no federal tax liability, yet some trusts will put half of it into the restrictive QTIP anyway. (While it was common years ago for most states to have a separate state inheritance tax, most states now use a so-called pickup tax, which allows them a share of the federal tax collected. A half dozen states still retain some form of inheritance tax with varying exemption levels. Contact your accountant or use the Internet to look up the rules in your state.)

> Another big problem area is the older A/B trusts, sometimes called marital and family trusts. These act very much like the QTIP in that they divide the trust into separate shares, and the spouse gets the marital share without restriction and has limited access to the family share. The older ones sometimes have language requiring that all the trust assets that do not qualify for the marital deduction go to the family trust to preserve an estate tax exemption on taxable estates. However, the marital deduction is now unlimited, which means that under the terms of the trust, all the assets would go to the marital trust and there would be no tax savings by preserving the deduction of the first to die.

There are a lot of kinds of trusts, often with very complex provisions that even lawyers have a hard time deciphering. Be sure you completely understand all the provisions that are going to govern your access to your own money before you let a lawyer put them in the document. As discussed earlier, some lawyers may be using form software that already contains the provisions, and they may be in your document whether they are appropriate for your situation or not.

The lesson here is that if you find these complicated tax provisions in the trust you are about to administer, or if you are the surviving grantor, it is wise to see a trust attorney (not just any old attorney) to find out how this affects you and what you need to do. It may be that you will have to immediately begin partial administration of the trust even before the death of the cograntor because of the need to carry out instructions in the trust that take effect at the death of the first to die.

If both grantors are liable for a debt, such as a mortgage, then the survivor can continue to make any required payments just as before. Most contracts do not have an acceleration clause at the death of one debtor. However, if a grantor dies and the cograntor is not jointly liable for the debt, it must be paid off in full out of the trust assets. As an example, I have seen cases where only one person who had signed on a mortgage dies. The survivor has no legal right to continue to make the mortgage payments but must either pay it off or refinance. This is what you might call a due-on-death clause.

So credit cards, auto loans, taxes, and even mortgages in only the name of the deceased are due and payable in full out of trust assets, provided they are not joint debts. If you discover that your partner had debts in her own name, then they must be paid at death from the trust assets, even if those assets were mostly put in the trust by the survivor. This was referenced earlier in this book, and the remedy sometimes is to have separate trusts for each partner.

ADDITIONAL STEPS TO TAKE WHEN SOMEONE DIES

After the funeral and burial details have been carried out, there are other things that need to be done when a partner dies. The following apply to the death of one grantor of a joint trust, the surviving grantor's death, and the death of a sole grantor of a single-person trust.

1. Order at least a dozen death certificates. It is easier to get several at first than it is to get more later, and they will be needed for various purposes. When you give these out, see if a photocopy will suffice, since a certified death certificate can cost $25 or more. You may need them for life insurance claims, Social Security benefits, VA benefits, probate of the will if necessary, and pension or profit-sharing plans, as well as a copy to include with federal or state estate tax returns.
2. Cancel credit cards that were just in the name of the deceased or in the name of his or her business. As a practical matter, even though these should be paid off in full at death, if the card is no longer being used and there is not enough ready cash to pay them, you may be able to get an agreement to continue the payments. You should never use the cards yourself unless you are an authorized signer.
3. Similarly, cancel other services such as debit cards, telephone and cell-phone accounts, Internet services and subscriptions, automatic payments from credit cards and bank accounts, cable television, and other recurring expenses that are only in the name of the deceased. They may require a copy of a death certificate to process the cancellation.
4. Keep up payments to maintain real estate (such as utilities, taxes, and insurance) until the property can be sold or transferred. We have had incredibly expensive repairs required when the gas and electric were cut off on vacant property and the water pipes froze and broke. The trustee is responsible for managing and preserving the property of the

trust and could be held liable for failing to do so.

This would be only for property separately in the name of the deceased. Jointly owned property or property in the joint trust will continue to be under the control and management of the survivor, so the survivor would continue to maintain the trust properties.

FINDING ASSETS

1. Contact employers for information on benefit programs. There may be unpaid vacation pay, the last paycheck, life insurance, retirement accounts, or profit-sharing benefits that would accrue to either the trust or the person's family or estate.
2. File claims for life insurance and other death benefit accounts such as annuities. This is a very simple process of filling in a claim form and returning it to the insurance company with a death certificate. The insurance proceeds would be payable to the named beneficiary, which we would hope to be the trust. It may be necessary to open a bank account in the name of the trust in which to deposit the check if you have not already opened one for the joint trust. See these instructions to get a trust tax identification number, which you will need to open the account. Remember, too, that some credit card companies offer free life insurance to their cardholders. If there are loans due, find out whether the deceased had credit life insurance to cover these. The original loan paperwork will usually tell you this.
3. File claims for retirement accounts. Things like IRAs, 401(k)s, 403(b)s, tax-deferred annuities, and myriad other assets have beneficiaries. The claim would be filed on behalf of the beneficiary, and the plan administrator will provide information on what elections are available to the beneficiaries. A spouse as a beneficiary, for example, may be able to roll over the account into an IRA in his or her own name, thereby continuing to defer the tax owed. Filing the claim is just a matter of filling out a form according to its written instructions. The company representative will typically help you with this.
4. If the deceased is a veteran, contact the VA office for what benefits may be available. A form letter is included in the appendix for that purpose.
5. Contact any organizations to which the deceased belonged and see if there are any benefits available. Some of them may have insurance

programs for their members. Again, there is a form letter for you to use in the appendix.

6. Try to identify any online accounts the deceased may have had. Sometimes there are substantial assets in accounts through E-Trade, Scottrade, and other online brokerage or banking accounts. There are even online gambling accounts some people have in which they keep deposits. Similarly, there may be accounts for commodities, such as money invested in gold funds.
7. Look for refundable deposits with utility companies or landlords.
8. If auto insurance or homeowner insurance is canceled, there may be refunds of unearned premium due to you as the trustee of the estate. It is a good idea to talk to the insurance agent of the deceased, who can help with identifying other assets.
9. Contact banks and credit unions to be sure all accounts are in the name of the joint trust, and, if not, see if they have a "pay on death" designation or a beneficiary naming you or the trust as the owner at death. The bank will want a death certificate. If there are accounts that exist just in the name of the deceased with no beneficiary on them, they must be transferred via the pour-over will to the trust using, ideally, the small estate probate procedure in your state.
10. Identify business interests. If the deceased had business interests such as partnerships, sole proprietorships, LLCs, or corporations, these would typically already be in the name of the trust. If there are others involved, there may be partnership agreements or buy-out agreements, which would pay the estate of the deceased for the share of the business value. Businesses may be continued or sold depending upon the feasibility of either approach and the instructions of the deceased.
11. Search the house. Look through desk drawers and paperwork for evidence of insurance policies, savings bonds, or other assets. I once found a manila envelope on a bookshelf crammed with other paperwork in the house of a person whose estate I was settling. Inside was a paid-up insurance policy with a cash value of more than a quarter million dollars. It was a fluke that I ran across this, but it ended up being a big surprise to the family. It is not unusual for people to hide valuables in their home, though they can be difficult to find sometimes. If there is a family safe, be sure that the successor trustee knows the combination. It is a shame to have to destroy a perfectly good safe to

get it open because no one knows how to get into it. Contrary to what you see at the movies, it is not always possible to have some gizmo figure out the combination. The last time I had a safe company assist in opening a safe, they ended up doing it with two big men, a sledgehammer, and a large pry bar.

12. Though not as commonly used today, some people still have safe deposit boxes at their banks. If the box is in the name of the trust, or if there is another authorized signer, you may be able to access the box without involving the courts simply by presenting the death certificate.
13. The decedent's mail should be forwarded to the trustee. Watch the mail carefully, since you may discover statements sent out quarterly or annually, revealing assets of which you were unaware. Bills will be coming in, too, usually by mail.
14. Internet accounts may not have mailed statements, ever. So look on computer credit card accounts for debit transactions that may identify accounts or other assets.
15. The grantor might have owned websites or domain names. These could have considerable value as well. Try to find the grantor's list of user names and passwords, and go over his search history on his computer to further investigate unknown assets.

VALUING ASSETS

Most assets are easily valued since they will be converted to cash immediately after the death of the deceased. Some assets, though, will be kept intact in a joint trust situation, and a verifiable appraisal may be a valuable tool later on. Real estate, for example, may be part of a potentially taxable estate. The value at date of death may have to be proven to show either the amount of estate tax owed or that a tax return was not needed because the value kept the estate below the threshold for taxation. Valuation, which is provable, is also used to establish a value as of date of death for capital gains tax purposes to establish a new tax basis for the assets.

When assets are to be divided on a percentage basis among several heirs and some things are to be given out individually without liquidating them, we need to be able to prove the value in order to show how much of the person's share who received the asset was represented by it. For example, it is common to have collections, antiques, or other personal property items left to a particular heir with the understanding that the item is to be considered part of her share of the estate. We do not want an argument over the value of the share, and an appraisal solves the problem.

INCOME TAXES

An income tax return must be filed for the deceased for the year of death if there was taxable income. Even if there wasn't any income tax liability, the deceased may have been eligible for certain local, state, or federal tax rebates or credits that could be claimed by filing the return. Also, pay attention to any estimated tax payments that may have been made by the deceased. Always find the deceased's last year income tax return and contact the preparer to see what issues may exist or for help in filing the last return.

If you are the surviving spouse, you may file a joint return for the year of death. Talk to your accountant about the best plan for you.

NOTIFYING EVERYONE

Part of the obligation of the trustee is to notify creditors and heirs of the death and of the existence of the trust.

In a joint trust, the heirs do not need to be notified unless they are to receive something immediately or if the trust document calls for it. The trustee would notify them after both trust grantors are gone.

Notification of heirs is typically done by sending a letter and a copy of the trust to each heir. In some states, there is only the obligation to send the portion of the trust that pertains to that particular heir. From then on, the heirs must be kept updated on what assets are in the estate and what expenses come out of the estate. This can be done at the time the assets are distributed, unless it drags on for some reason, in which case annual reports should be provided. Good communication lessens complaints to the trustee by heirs.

Notification of creditors is a bit different. In a trust, we want to be able to settle matters quickly, without the fear of an unknown creditor presenting a claim after the assets have been distributed to the heirs. In some states this is an easy matter. Michigan, for instance, allows a trustee to publish a notice in the newspaper called a "Notice to Creditors," which lets everyone know that there has been a death and allows any unknown creditors a limited amount of time (in this case, four months) to present their claim before they are forever barred from bringing it up later. This gives the trust a short statute of limitations and allows the trust to be closed up quickly and safely.

Known creditors must be contacted individually either by paying the debts or by sending notice of the death so that they can bill the trust for what is due. It is a good practice to send all doctors, clinics, and hospitals, as well as other health-care providers, a copy of the Notice to Known Creditors to put them on notice to get their billings to you or they will not be paid. Hospitals are notorious for sending medical bills months after services are provided.

PAYING THE DEBTS AND EXPENSES

Now the assets are known and the debts are all totaled. If sufficient funds are available, go ahead and pay the debts in full, keeping statements and receipts for your records. If the debts exceed the assets, we have a problem.

State laws set up rules on how claims are to be paid in probate cases if there are insufficient funds, and, in some states, the same rules apply to trusts. These laws refer to “priority of claims.” Here is a common set of rules:

> If the applicable estate property is insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order of priority:
>
> a. Costs and expenses of administration.
> b. Reasonable funeral and burial expenses.
> c. Homestead allowance.
> d. Family allowance.
> e. Exempt property.
> f. Debts and taxes with priority under federal law, including, but not limited to, medical assistance payments that are subject to adjustment or recovery from an estate under section 1917 of the Social Security Act, 42 USC 1396p.
> g. Reasonable and necessary medical and hospital expenses of the decedent’s last illness, including a compensation of persons attending the decedent.
> h. Debts and taxes with priority under other laws of this state.
> i. All other claims.

The “all other claims” would then be paid pro rata at so many cents on the dollar after dividing the total remaining assets by the remaining debts to get the ratio.

A point that might help you in a situation with more debts than assets is that the first priority is costs and expenses of administration, which includes the fees of the trustee and/or personal representative. If you are the surviving partner, you can charge a fee, usually hourly, for everything you do to settle the estate, the money for which comes off the top. Check state law, of course, to be sure this works where you live, and check the language of the trust, which may spell out what the trustee fees would be. In most cases, the debts will not exceed the assets, so everything can be paid in full.

TAX IDENTIFICATION NUMBERS

A Tax Identification Number for a living person is his Social Security Number. That number cannot be used after death, so a Tax Identification Number should be obtained for the trust itself. With that number, the trustee may open bank accounts, cash checks payable to the trust, and put in claims for trust assets. It once was a lengthy process to get a Tax ID Number using the IRS Form SS-4. Not anymore. These can be obtained online by going to the IRS website and filling out the online form. The number will be provided immediately. Alternatively, you can call a toll-free number or fill out the SS-4 and apply by fax. The IRS calls these Employer Identification Numbers, even though for a trust there is no employer. Here is the contact information, current as of the time this book went to press.

Website:
www.irs.gov/businesses/small/article/0,,id=97860,00.html

Text from website:

APPLY ONLINE

The Internet EIN application is the preferred method for customers to apply for and obtain an EIN. Once the application is completed, the information is validated during the online session, and an EIN is issued immediately. The online application process is available for all entities whose principal business, office, or agency, or legal residence (in the case of an individual), is located in the United States or US Territories. The principal officer, general partner, grantor, owner, trustor, etc. must have a valid Taxpayer Identification Number (Social Security Number, Employer Identification Number, or Individual Taxpayer Identification Number) in order to use the online application.

APPLY BY EIN TOLL-FREE TELEPHONE SERVICE

Taxpayers can obtain an EIN immediately by calling the Business & Specialty Tax Line at (800) 829-4933. The hours of operation are 7:00 a.m.–10:00 p.m. local time, Monday through Friday. An assistor takes the information, assigns the EIN, and provides the number to an authorized individual over the telephone. Note: International applicants must call

(215) 516-6999 (not a toll-free number).

APPLY BY FAX

Taxpayers can fax the completed Form SS-4 (PDF) application to their state fax number (see Where to File—Business Forms and Filing Addresses), after ensuring that the Form SS-4 contains all of the required information. If it is determined that the entity needs a new EIN, one will be assigned using the appropriate procedures for the entity type. If the taxpayer's fax number is provided, a fax will be sent back with the EIN within four (4) business days.

APPLY BY MAIL

The processing timeframe for an EIN application received by mail is four weeks. Ensure that the Form SS-4 (PDF) contains all of the required information. If it is determined that the entity needs a new EIN, one will be assigned using the appropriate procedures for the entity type and mailed to the taxpayer.

OTHER IMPORTANT INFORMATION

Thirty-Party Authorization

The Third Party Designee section must be completed at the bottom of the Form SS-4. The Form SS-4 must also be signed by the taxpayer for the third-party designee authorization to be valid. The Form SS-4 must be mailed or faxed to the appropriate service center. A third-party designee may call for an EIN; however, a faxed Form SS-4, with the taxpayer's signature, is still required. IRS assistors will take the information over the phone from the third-party designee and ask the third party to fax the completed Form SS-4 to them (to the IRS assistor's attention) at an administrative fax number. After receiving the faxed Form SS-4, the EIN will be assigned and faxed back to the third-party designee or given over the phone. The third-party designee's authority terminates at the time the EIN is assigned and released to the designee.

The EIN is also used to file tax returns for the trust itself. IRS Form 1041 is a trust tax return that must be filed for every year that the trust has income.

Often money is held in investments for a period of time before it is passed out to the beneficiaries. This may be because the trust provides for scheduled distributions to beneficiaries rather than a lump sum, or it may be a trust that is being managed for the lifetime of a beneficiary or group of beneficiaries. The trust must report the income to the IRS, and an EIN is necessary to do that.

DISTRIBUTING THE ASSETS

After all the assets are gathered together and the debts are paid, it is time to distribute the assets left in the trust according to the trust instructions. For most trusts this is merely a matter of writing checks to the heirs in the shares dictated by the trust document. Sometimes, though, all the assets have not been liquidated and money is just sitting in an account waiting, for instance, for the sale of that last piece of real estate. As the trustee, you do not have to wait for every single asset to be converted to cash before you start divvying up the shares.

Partial distributions can be made. The trustee may, for example, hand out 90 percent of the trust assets, hold back 10 percent to cover the final tax return or to pay expenses on that house that hasn’t sold yet, and then make a final distribution when everything is complete. The amount of a partial distribution would depend on the expected future expenses. You don’t want to hand the money out and then try to get everyone to chip in when an unexpected trust expense occurs.

Get receipts. In the appendix is a Receipt for Distributive Share form. This should be signed by each heir when he or she receives a distribution and kept by the trustee. The form provides protections for the trustee so that there are no complaints later on.

THE TRUST THAT CONTINUES AFTER DEATH

Trusts do not always end as soon as the assets are identified and the debts are paid. Often the trust acts as an asset manager for some or all heirs. Children, disabled heirs, and spendthrifts may find the trustee controlling their trust funds for them for a period of years, until they reach a certain age, or even for their lifetime. How does the trustee set up this sort of trust and manage the funds?

After identifying the assets, paying the bills, giving out the personal things to those who are to get them, and distributing shares to those whose trust share is not going to continue to be held in trust, the next step is to begin following the instructions of the trust grantor to manage assets for the remaining beneficiaries.

1. Get a Tax ID Number for the trust if you have not already done so. How to get one is explained earlier in this chapter.
2. Invest the assets that are to be managed for the trust beneficiary. As a trustee you are required to make safe, conservative investments. The rule generally is the “prudent investor rule,” which means you must diversify the investments and not do anything risky that could jeopardize them. My recommendation is to contact an investment advisor, such as one of the large brokerage houses or a certified financial planner, and have that advisor set up a diversified portfolio for the trust, allowing you the ability to access the assets as needed to pay the expenses of the trust beneficiary. Recurring payments such as utilities or medical insurance can be set up on an automatic pay system so the trustee is not burdened with writing monthly checks. If the financial planner is handling the payouts it may take no more effort than a telephone call to direct an extraordinary payment for the benefit of the trust beneficiary. The job of trustee, once the accounts are set up, should not be difficult.

For example, if you are the trustee for a trust for minor children with the provisions that the money may be used for their support, maintenance, education, and medical needs, you will need to be able to direct payments from the trust assets for these purposes. If there is more than one child benefiting from the trust, you would direct the broker to set up separate asset accounts for each child so that each is drawing from his own share of the total. (Some trusts may let everyone draw from the same pot of assets, so there would be only one asset account.) Typically, the balance of a child’s share not used for the permitted purposes would be turned over to that child upon her reaching the age specified in the trust, such as twenty-five. A trust for a disabled person might have to continue for the person’s lifetime but would be invested and managed the same way.

Any trust that continues beyond the death of the grantor becomes a separate legal taxpaying entity. The trustee must file an income tax return for the trust every year just as if the trust were a real person or a company.

The trust must come to an end at some point. Most states have a law called the “rule against perpetuities.” This law means that a trust may not be perpetual and that at some point all the trust assets have to be given to someone. This rule is flexible, since the typical one allows a trust to stay in place for “a life in being plus twenty-one years.” So if you had two children and two grandchildren and wanted to set up a trust that provided the income to your children for life, then their children for their lifetimes, then to your great grandchildren for twenty-one years, the trust could stay in existence for that long without violating the rule.

The rule against perpetuities does not in all states apply to all assets that may be placed in trust, nor is it a rule everywhere. It may only apply to real estate, for example, when a person wants to keep the cottage in the family. Check with your lawyer if you want to set up this type of trust provision or if you are the trustee of a trust with the provision in it.