

Practical Probate

Taking the Mystery Out of Trusts Part 3: Property That May Be Placed into a Trust

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The Mystery

There is much confusion about transferring assets into a trust (known as funding the trust). Frequently, those who have a trust prepared for them fail to take the important step of transferring assets into the trust, losing many advantages of their trust. I've seen countless situations where the deceased person had a trust but never transferred anything into the trust. As a result, otherwise avoidable probate proceedings were necessary to determine the legal owner of the deceased person's assets. By placing assets into a trust during their lifetime, this could have been easily avoided.

Until the 1960s, trusts were used in the United States almost exclusively by the wealthy. Beginning in the 1960s, the middle class began to appreciate the advantages of trusts and started to use them in their estate plans. Despite the fact that this trend began sixty years ago, the misperception that trusts are only for the wealthy persists. This is unfortunate, because many people of ordinary means may benefit from a trust.

As a Probate Judge since 2003, I've presided over hundreds of conservatorships (known as guardianships in New York and Florida) that might have been avoided if the person subject to the conservatorship or guardianship had prepared an estate plan that provided for their incapacity. A trust, along with a durable power of attorney (a power of attorney that remains effective during incapacity) can be very effective in preventing the need for a conservatorship or guardianship of the estate.

Likewise, Probate proceedings for decedents estates could be avoided or greatly reduced through the use and funding of a trust. Assets in a trust do not require probate proceedings to determine the legal owner. Instead, those assets are transferred and managed according to the terms of the trust.

Generally, a revocable inter vivos trust is not subject to probate proceedings; it's a private document not subject to public inspection. This is one of many advantages of trusts: maintaining privacy for you and your family. Unscrupulous individuals and organizations won't have access to the value of assets and to whom they are transferred at death for those assets in a trust.

Property That May Be Placed into a Trust

Real estate, accounts in financial institutions, interests in entities such as limited liability companies, boats, motor vehicles, stocks, bonds, and other tangible personal property (such as artwork and the contents of a home) may be placed into a trust. Qualified retirement accounts, such as an IRA, 401(k), or 459(b) may not be placed into a trust while the account owner is alive. Roth IRAs are an exception to this rule.

Assets in different states, including real estate, may be placed into the same trust.

IRA, 401(k), 459(b) Accounts & the SECURE Act

The SECURE Act (Setting Every Community Up for Retirement Enhancement Act, Section 401 in Title V of the Further Consolidated Appropriations Act, 2020), is a federal law that affects inheritances from qualified retirement accounts. An important provision of this relatively new law in the context of trusts is that it reduces timelines for required minimum distributions (“RMDs”) for transfers to beneficiaries beginning January 1, 2020. Great care must be exercised in considering provisions to transfer these accounts in an estate plan. Transfers to a trust from a qualified retirement account after the death of the owner could result in significant additional beneficiary income tax liability if the trust is not properly structured, or if the timing of transfers to the beneficiary are not carefully planned. If you have a trust that was prepared before 2020 and you own qualified retirement accounts, you should meet with your estate planning attorney to explore this in detail and make any necessary changes to your trust in light of the SECURE Act. This subject will be covered in more detail in another article.

How to Transfer Assets into a Trust

For assets with title documents (real estate, motor vehicles, accounts in financial institutions, stocks, bonds), a new title document must be created that shows the owner as the trustee of the trust. Examples of title documents include real estate deeds, stock certificates, bonds, and account ownership records on file in financial institutions

Example: Mark and Marion Gilroy create the Gilroy Family Trust. Mark and Marion are the initial trustees and beneficiaries of the trust. After their trust is created, they transfer their checking account into the trust. They meet with their banker, and have the owner of the checking account changed from Mark Gilroy and Marion Gilroy to Mark Gilroy and Marion Gilroy, Co-Trustees of the Gilroy Family Trust. The bank’s records must clearly indicate that the owners of the account are the trustees of the trust. In this case the persons who were the account owners before transfer to the trust are the same persons who are the owners after the transfer to the trust. The important difference is that after the transfer, Mark and Marion are owners in their capacity as co-trustees of the trust. Mark and Marion would use the same approach for other assets with title documents, such as motor vehicles, real estate, savings accounts, stocks, bonds, and brokerage accounts. Services of an attorney are necessary for transfers of real property.

Assets that have no title documents, such as certain kinds of tangible personal property (furniture, clothing, household contents, etc.) may be placed into a trust simply by reference to them in a schedule to the trust instrument.

Example: Mark and Marion Gilroy from the example above want to add the contents of their home to their trust. Their attorney prepares a schedule to their trust as an inventory of all trust assets. In this example, the contents of their home may be transferred to the trust simply by adding “all tangible personal property owned by the Grantors in their home at 4346 Palm Drive, Anytown, Florida” to the schedule to the Gilroy Family Trust. Tangible personal property with a title document, such as a motor vehicle, must also have the title document changed to reflect transfer into the trust.

About the Author

A Connecticut Probate Judge since 2003, and a trusts and estates attorney since 1995, Dom Calabrese is admitted to the practice of law in Connecticut, Florida, and New York. Judge Calabrese has given hundreds of presentations on probate and estate planning to the general public, bar associations, the University of Connecticut Income Tax School, the Connecticut Society

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