

## Practical Probate

### Taking the Mystery Out of Trusts Part 6: Common Trust Mistakes

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Over 20 years as a Probate Judge and 26 years as a trusts and estates attorney, I've seen numerous situations where mistakes – especially in trust administration – resulted in significant financial implications, delays, and expensive and prolonged court proceedings.

In this the sixth article in my Taking the Mystery Out of Trusts series, I review just a small number of the most common mistakes I've seen and how to avoid them.

#### Advice from the Unqualified

While not unique to trusts, I'm still astounded by how many people act on "advice" from the unqualified regarding estate planning and probate. In the digital age, it's easy to access myriad articles and blogs from people and organizations with no qualifications or even worse, with the intention of "selling" their estate planning products. In my courtroom I've seen disasters as a result of people doing their own estate planning, using the internet to prepare their own estate planning forms, acting or failing to act in Probate Court on the advice of bank tellers, social workers, nurses, contractors, neighbors, relatives, and unscrupulous purveyors of estate planning products.

Estate planning, and trusts in particular, are complex and have far-reaching implications. Only an experienced trusts and estates lawyer is qualified to give legal advice in this area. In my opinion, even a "general practice" attorney may not have the requisite experience and knowledge to advise clients in estate planning options and, just as importantly, the consequences of the choices inherent in creating an estate plan.

Example:

#### Bad Advice

I recently met with a new client who had a will prepared many years ago. During my initial discussion with him, he stated that the attorney who drafted his current will told him he didn't need a trust because the value of his assets was under the estate tax exclusion amount at that time. While this was true at the time the will was prepared, minimization of estate tax is only one of many advantages of a trust. This type of advice – allegedly from a general practice attorney - is consistent with the common but outdated misconception that trusts are only for the wealthy. For those dying in 2022, state estate tax exclusions are at their all-time highest: in New York, the state estate tax lifetime exclusion is \$6.1 million; in Connecticut, it's \$9.1 million. Florida has no state estate tax. Likewise, for those dying in 2022, the federal estate tax lifetime exclusion is \$12.1 million per person, and \$24.2 million for married couples. As a result of these historically high exclusions, compared to several years ago, very few decedent's estates incur estate tax liability.

## Trust Advantages for the Middle Class

Despite this, trusts still provide many advantages, including for those whose assets are well below the state or federal estate tax exclusions. As outlined in previous articles in this series, trusts are effective at helping people maintain control of their affairs while they are alive, during incapacity, and after death. All these advantages are independent of estate taxes. A sound estate plan that includes a trust greatly reduces the likelihood that someone will be subject to court proceedings. Court proceedings are stressful, expensive, time-consuming, and may ultimately result in having one's rights taken away from them. In addition, most court proceedings, including for conservatorships and guardianships are public record. This means that certain personal information of someone involved in a conservatorship, guardianship, or decedent's estate will be public record. This includes the type and value of assets, debts and expenses, and (for decedent's estates) heirs or beneficiaries.

Even for estates that are not subject to estate tax, there are many other tangible benefits to an estate plan that includes a trust.

## Failing to Fund the Trust

"Funding" a trust is another way of describing the process of transferring assets into a trust. I can't count the number of trusts I've seen where the grantor (the person who created the trust) didn't take the all-important next step after executing the trust to transfer assets into it. By far, this is the most common mistake that those who have trusts make.

It's easy for people to believe, after executing an estate plan with or without a trust, the work is completed. While executing an updated estate plan is very important, without carefully reviewing assets and how they are owned, the estate plan is likely to fail.

A trust only governs assets that are placed into it. There are a few ways to do this: while the grantor is alive, they may change ownership of an asset to the trust. For assets with title documents (real estate, motor vehicles, accounts in financial institutions, stocks, bonds), a new title must be created that shows the owner as the trustee of the trust. A second way is to name the trust as the beneficiary of an asset on the title document for life insurance policies, qualified retirement accounts (this only after careful consideration of tax implications), or account in financial institutions. A third way is by using a pour over will. The will names the trust as the beneficiary of the testator's (that's the person who created the will) estate, so that when the testator/grantor dies, the probate court transfers his or her assets to their trust. It's important to note that the last two options bypass an important trust advantage: management of the asset during the grantor's incapacity. In the majority of cases, it's far better to transfer assets to the trust while the grantor is living.

## Not Updating the Trust

At least every three years, an estate plan must be reviewed with a trusts and estates attorney. There are many reasons for this: changes in the law, changes in personal circumstances, changes with relationships with loved ones, changes in assets, and changes in each person's estate planning objectives.

Divorce, marriage, birth or adoption of a child or grandchild, death of a child or spouse, significant health changes, changes with finances, or moving to another state are all events that require an immediate review and most likely change to an existing estate plan.

#### Successor Trustees Failing to Retain Legal Counsel

For revocable inter vivos trusts, generally the grantor or grantors – the persons who established and initially funded the trust – will be able to do as they please with trust assets while they are alive if they are the initial trustees. However, once the grantor or grantors pass away, a successor trustee will administer the trust. Over my 20 years as a probate judge, I've seen disasters when a lay trustee attempts to administer a trust without having a trust attorney advise them. Trustees may have unlimited personal liability for a breach of duty, or administering the trust in a way that is inconsistent with the terms of the trust.

Trustees are subject to the highest legal standard in our system of law. It is relatively easy for an uninformed trustee to breach their duties as trustee, or engage in activities that are beyond the scope of their authority when they administer the trust.

Trusts are complex legal documents that impact the rights of trust beneficiaries and creditors of the beneficiaries. The trustee is also responsible for tax filings that must be carefully adhered to in order to avoid significant financial implications to the trust and trust beneficiaries.

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#### 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 of Certified Public Accountants, the Connecticut and Fairfield County Bar Associations, and the Connecticut Probate Assembly. Calabrese Law PLLC has offices in Palm Beach Gardens, Florida, and Watertown and Stamford, Connecticut, devoted to estate planning, asset protection, and business counsel.

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