Focus Probate, Trusts Estates/Tax Law

Trust FAQs: Ask an Estate Planner

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Trust us, there are many good questions about trusts! Keep reading for answers to the top 10 questions estate planners hear.

This discussion focuses on "trusts" formed under Texas law, including revocable, irrevocable, grantor, nongrantor, intervivos, and testamentary trusts. A trust is a ***fiduciary relationship formed by agreement between grantors who "settle" the trust and trustees who manage property on behalf of beneficiaries***. These answers do not apply to real estate trusts or business trusts.

1. Is a trust an entity? Under the Texas Business Organizations Code (TBOC), a trust is a "person," but not an "entity." Texas trusts are not domestic entities, because trusts are not formed under, nor governed by, the TBOC. Additionally, trust agreements are not filed with the Secretary of State and generally remain private.

2. Can trusts be partners of partnerships? Own real property? Yes, *in both cases, subject to the response to Question 3 below*. A trust can be a stockholder, member, or partner of an entity and can even serve as general partner, managing partner, or managing member. Trusts can own assets just as individuals do, e.g., equity investments, real and personal property, digital assets, and financial accounts.

3. Who signs on behalf of a trust? The trustee signs documents on behalf of a trust—in the fiduciary capacity "as trustee." Note that because a trust is a relationship and not an entity, trust property is technically held in the name of the trustee and not the name of the trust, e.g. *Charles R. Flint, as Trustee of the Smith Revocable Trust*.

4. How do I transfer property into a trust? Most property can be transferred into a trust by an assignment agreement. However, real property must be transferred by deed filed in the county of record. Bank or brokerage accounts can be opened on behalf of a trust. Trusts can be designated beneficiaries of assets that are transferred by contract, such as life insurance policies.

5. Do trusts pay income taxes? It depends on the trust agreement and the specific facts. A trust can *itself* be responsible for taxes on income generated by trust property. The tax brackets for trusts are very condensed so the tax rate may be higher than for individuals with the same amount of income. However, the trust agreement can be drafted so that the grantor *individually* is responsible for the payment of income taxes if certain conditions are met. Further, a *beneficiary* may be responsible for taxes on income distributed to the beneficiary from a trust.

6. Can I fire my trustee? Generally, a trust agreement will govern the powers that beneficiaries, trustees, and others have regarding trustee removal, replacement, and appointment. Many trusts permit beneficiaries to remove trustees, but may require a corporate trustee as a replacement.

7. Can a gift to a trust qualify for the annual exclusion from gift tax? Yes, if there is language in the trust agreement that specifically allows the beneficiaries to have certain withdrawal rights with respect to gifts (a/k/a, "Crummey" powers), a gift to the trust can qualify for the annual exclusion from gift tax.

8. What is UTMA? The Texas Uniform Transfers to Minors Act (UTMA) provides a set of rules under which a custodian can hold and manage property for the benefit of minors without the expense of a trust. *However, UTMA requires all assets be paid outright to the beneficiary at age 21*.

9. Can I create a trust for myself in Texas to protect my assets from creditors? No. Transferring assets to a trust created for your own benefit (a "self-settled" trust) will not provide asset protection in Texas. In order for the assets in a Texas trust to be protected from creditors, the grantor may not be a beneficiary.

10. Should I transfer all my assets to my Living Trust during my lifetime? In Texas, the probate process is relatively painless, so it is not necessary to transfer all of your assets to your Living Trust during your lifetime if you have a *valid will* that provides for *independent administration* and *"pours" your assets into trust upon your death*. Funding your Living Trust during your lifetime, however, does provide other benefits such as privacy (i.e., assets transferred into trust are not listed on an inventory publicly-filed during probate) and avoiding a court-appointed guardianship in the event of your disability. Transferring out-of-state real property to your Living Trust is key to avoiding out-of-state probate, which can be more onerous than probate in Texas. **HN**

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