

FUNDING AND ADMINISTERING YOUR LIVING TRUST AGREEMENT

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Now that you have decided to create a living trust in the State of Florida, it is important for you to obtain some guidance in the funding and the administering of the trust. The probate avoidance, asset protection and cost reduction features of a living trust can only be accomplished if you **fund** the living trust during your lifetime, **administer** the trust property, and keep meticulous **trust records**. The purpose of this article is to give you some guidance regarding these matters.

I. Funding Your Living Trust

Funding your living trust means transferring the ownership of assets, such as real estate and intangible personal property, and the beneficiary of assets, such as life insurance and retirement plans, to your trustee. After the title to these assets is transferred, the assets should be listed on Schedule "A" of your trust agreement. Likewise, as assets are sold, they should be eliminated from Schedule "A" of your trust agreement.

Since funding your living trust is a very time-consuming process, the fees which we have quoted to you do not include these services. Generally, our clients take on the responsibility of funding their trusts. If you need assistance, we will be happy to assist you and will charge for our services on an hourly basis.

1. Real Estate

The transfer of real estate to your trust is a legal function which a lawyer should perform for you. Generally, the transfer requires the preparation and recording of a deed to the trustee. The grantor of the deed is you, the current owner of the property. The grantee or new owner is " **as trustee under Agreement dated** " where the first blank is the name of the trustee and the second blank is the date that the trust was executed.

The deed will contain a "full powers" clause so that the trustee may sell, lease, and otherwise deal with the property without having to record the trust document. A successor trustee can be named in the trust document to avoid having to record the Trust upon the death, disability, or resignation of the current trustee.

If the homestead real estate is being transferred to the name of the trustee and you are planning to continue to reside in the property, you are eligible for homestead exemption. You must re-apply for this exemption between January 1st and February 28th of the year after the transfer is made to the trust. The property appraiser's office will require a copy of that page of Trust which shows that you have reserved the right to reside in the homestead real estate for the remainder of your life.

2. **Stocks, Bonds, Bank Accounts and Other Intangible Personal Property**

If your intangible personal property is held in brokerage accounts, you must provide your broker with a letter of instruction requesting that the assets in the brokerage account be transferred to the name of "_____ **as trustee under Agreement dated** _____" where the first blank is the name of the trustee and the second blank is the date the trust was executed. The broker may require a photocopy of the Trust Agreement or may required you to complete a Certification of Trust and new account application. During your lifetime, you will use your social security number as the tax identification number for the trust. After your death, your successor trustee must apply for a federal identification number. The procedure for applying for this number is explained later in this article.

As for your bank accounts, the banks will generally require the same information as the broker. Be careful to inquire whether your certificates of deposit can be transferred without an early withdrawal penalty. Most banks and other financial institutions require an early withdrawal penalty to be paid except on the death of the account holder. Therefore, you may want to wait until your C.D.s mature to transfer them to the trust.

The most difficult assets to re-register are the stocks and bonds for which you hold the original certificates. These certificates must be forwarded to the transfer agent for re-registration. Normally, the transfer agent will require a copy of the Trust, a letter of instruction, an Affidavit of Domicile, and an assignment separate from certificate. You may obtain the name of the transfer agent from your local banker or broker. In the alternative, you may pay a brokerage house a small fee for transferring the name on these assets for you. In most cases, the fee will be money well spent, especially when you consider the out-of-pocket costs, such as registered mail and photocopying expenses, and the time involved in re-registering the assets yourself.

3. Life Insurance Beneficiary Designation

Under some circumstances, I will recommend that the beneficiary of a life insurance policy be changed to the trustee of your living trust agreement. In such cases, you must do the following:

First of all, you must request a change of beneficiary designation form from the insurance company. Once you have received this form, you should name the primary beneficiary of your insurance policy as "**The Trustee of the _____ Revocable Living Trust Agreement dated _____**" where the first blank is your name and the second blank is the date which you signed the trust agreement. We would also recommend that you request a confirmation of this change of beneficiary from the insurance company so that a clerical error by the insurance company will not prevent the benefits from passing to the intended beneficiary.

4. Retirement Plan Benefits

Under normal circumstances, we recommend that an individual survived by a spouse name the surviving spouse as the beneficiary of retirement plan benefits. The spouse has greater flexibility and options regarding the taxation of these benefits than would a trustee. Trusts which do not have a "designated beneficiary" are required to recognize income tax on the distribution of the plan benefits within five years after the death of a former employee. Trust which have a designated beneficiary may take distributions over the life expectancy of the designated beneficiary. On the other hand, the surviving spouse can roll over the plan benefits to their own IRA and delay taxation on these plan benefits until the year after age 70-1/2 years just as the former employee.

If we have determined that it is necessary or advisable to name the trustee as the primary or secondary beneficiary, the same procedure outlined above relating to life insurance should be used to redesignate your beneficiary. If a Trust is named, we will assist you in preparing the beneficiary designation. The administrator of your retirement plan should have the necessary change of beneficiary designation forms. Once again, you should request confirmation of this change of beneficiary to assure that the plan records have been properly changed.

II. Administration of Your Living Trust

1. Identification Number

During your lifetime, you need not apply for a new tax identification number. Instead, you should use your social security number wherever required.

After your death your successor trustee must apply for a separate federal identification number. A Form SS-4, which we would be happy to provide to you, should be used to apply for this number. This number should be used on all trust records. If you have named a corporate trustee, the corporate trustee will normally apply for this number.

2. Tax Returns

During your lifetime when your social security number is being used as the tax identification number for the trust, you are not required to file a separate income tax return for the income from the trust assets. Instead, you record these assets on your Individual Income Tax Return, Form 1040, as if the trust did not exist.

After your death, the successor trustee must prepare a Fiduciary Income Tax Return, Form 1041, for each year. This income tax return is due on April 15th of each year, just as your income tax return is due. We would be happy to prepare the fiduciary income tax return for your successor trustee. If you have named a successor corporate trustee, the successor corporate trustee may prepare this return for the trust at a nominal fee.

3. Trust Records

One of the primary reasons for creating a living trust is the cost savings associated with avoiding probate. If proper trust records are not maintained, however, it may be as expensive if not more expensive, to administer a living trust after death as it is to probate your estate.

First, you must keep an accurate list of all assets which are currently in the trustee's name, which you should update each time an asset is purchased, sold, or transferred. With this information should be the acquisition date of the asset and its tax-cost basis.

Next, an accurate and complete record of all income received by and deductions paid by the trust should be maintained each year. Most individuals find it more convenient to open a separate checking account to which trust income can be deposited and checks for trust-related expenses can be paid. These records should be maintained for a minimum of four years. Tax returns should be maintained forever. Likewise, information such as relating to the tax basis of trust assets should be retained for three years after the asset is sold.

4. Fiduciary Responsibility

If you are the trustee of your own revocable trust, you may manage the trust assets without any worry of fiduciary responsibility. On the other hand, if you are acting as a trustee of an irrevocable trust you have a fiduciary responsibility to these other “Qualified Beneficiaries.” Qualified beneficiaries are current beneficiaries entitled to receive distributions from the trust and those who would be entitled to receive distributions if the interests of the current beneficiaries ceased or the trust terminated.

Although the Trust document itself determines the distribution of net income and principal, gives the Trustee a number of “powers”, and provides definitions to help interpret the Trust documents, there are a number of other duties and responsibilities imposed by Florida law and the Courts regarding the administration of trusts in Florida. The duties of a trustee are enumerated in Chapter 736 of the Florida Statutes

Although it would be impossible to provide an exhaustive description of all of the powers and duties and liabilities as trustee, the following outlines some of the more important issues:

ADMINISTER TRUST. You have the duty to administer the trust in good faith, in accordance with the terms and purposes and the interests of the beneficiaries, and in accordance with Chapter 736 of the Florida statutes. (736.0801)

LOYALTY. You have a duty of loyalty to administer the trust solely in the interest of the beneficiaries and not in your interest as trustee. The trustee may not assume a position that is antagonistic to the beneficiaries of the trust. If the duty of the trustee and the trustee’s individual interests, or its interests as a trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization. This duty of loyalty becomes especially important when an individual is both a beneficiary and a trustee. You need to be especially concerned about balancing your interests, as a beneficiary of the trust, and the interests of the remaindermen. This duty is especially important in deciding on the investments, which will be discussed later, and on making discretionary principal distributions. The trustee also has the duty not to delegate their responsibility to another for the entire administration of the trust. (736.0802)

IMPARTIALITY. For a trust having more than one beneficiary, you have a duty to act impartially in administering the trust property, giving due regard to the beneficiaries’ respective interests. (736.0803)

EXPENSE. You have the duty to only incur reasonable expenses. (736.0805)

SKILLS. If you were hired as trustee because your special skills or expertise, you must use those skills in administering the trust. (736.0806)

CONTROL AND PROTECT. You must control and protect the trust property. (736.0809)

RECORDS. You must keep clear, distinct, and accurate records separate from your own property. (736.0810)

COLLECT CLAIMS AND PROPERTY. You must collect and defend claims, collect trust property, and redress breaches of trust by prior trustees. (736.0811-0812)

INFORM AND ACCOUNT. You have duty to keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration. In particular, to inform the beneficiaries in writing of your acceptance of trusteeship and your full name and address and the creation of an irrevocable within 60 days after acceptance or acquiring knowledge. Upon reasonable request, you must provide a beneficiary with a complete copy of the trust instrument including amendments. In addition, you must provide a beneficiary with relevant information about the assets of the trust in particulars relating to administration upon reasonable request. The trustee is required to send a trust accountings to the beneficiaries of the trust each year. The trust accounting must be a reasonably understandable report from the date of the last accounting or the date upon which the trust became accountable. It must begin with a statement identifying the trust, the trustee furnishing the accounting, and the time period covered by the accounting. The accounting must show all cash and property transactions and all significant transactions affecting the administration during the accounting period, including compensation paid to the trustee and the trustee's agents. Gains and losses realized during the accounting period, and all receipts and disbursements must be shown. The accounting must, to the extent feasible, identify and value trust assets on hand at the close of the accounting period. For each asset or class of assets reasonably capable of valuation, the accounting shall contain two values: the asset acquisition value or carrying value, and the estimated current value. The accounting must identify each known non-contingent liability with an estimated current amount of the liability shown. To the extent feasible, the accounting must show significant transactions that do the affect the amount for which the trustee is accountable, including name changes and investment holdings, adjustments to accounting values, a change of custodial instructions, and stock splits. The accounting must reflect the allocation of receipts, disbursements, accruals or allowances between income and principal

when the allocation affects the interest of any beneficiary of the trust. (736.0813-08135)

In addition, beneficiaries who receive “trust limitation notice” or a “trust disclosure document” are limited to six months after receipt of the document to bring an action against the trustee for breach of trust based on any matter adequately disclosed in a trust accounting. The limitation notice may, but is not required to be in the following form:

“An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a six-month statute of limitations from receipt of the trust accounting or other written report. If you have any questions, please consult your attorney.”

The limitation notice can be enclosed in the trust disclosure document or delivered separately within ten days after delivery of the trust disclosure document.

In addition to statutory duties, the case law in Florida imposes duties on a trustee. A trustee is a “fiduciary.” A fiduciary is a person who is entrusted with another’s property. Your duty as a fiduciary is to act for the benefit of another person as to matters within the scope of the relationship between them. A trust creates a fiduciary relationship with respect to the trust assets, subjecting the trustee to equitable duties to deal with the property for the benefit of another person.

Generally, the law requires a trustee to act in good faith, to perform selflessly, and to not abuse or take advantage of their position and the trust that has been placed in them. You are not required to accept your position as trustee. For that reason, you are required to “officially” accept the position of trustee in writing and to send notice to the beneficiaries that you have accepted your duties and responsibility.

In the administration of a trust, you have the duty to exercise care, diligence, and prudence in administering the assets of the trust and in dealing with the trust beneficiaries. This is called the “Prudent Person Rule” and it governs all your duties as trustee.

One of your most important duties as a trustee involves investment of the trust assets. Florida has a “Prudent Investor Act”, namely Florida Statutes, secs. 518.10 through 518.14. In the Prudent Investor Act, Florida has adopted the “portfolio” theory of investments. In the portfolio theory of investments, the performance of a trustee is not determined by the individual investments made by the trustee, but by the performance of the entire portfolio. Under the portfolio

theory, no investment is viewed in isolation so that an investor who fails in one or more single investments will likely not be held liable.

In making investment decisions, many professional corporate trustees use the “investment committee” approach. This approach requires the establishment of written policies and procedures to ensure that the trustee complies with applicable law.

The Prudent Investor Act provides that you have a duty to diversify the investments in the portfolio unless, under the circumstances, you believe it is in the best interests of the beneficiaries and furthers the purpose of the trust not to diversify. You also have a duty within a reasonable time after acceptance of trusteeship to review the investment portfolio and to make and implement decisions concerning the retention and disposition of original pre-existing investments in order to conform to the Prudent Investor Rule. These decisions may be influenced by the assets’ special relationship or value to the purpose of the trust or to some or all the beneficiaries consistent with your duty of impartiality. You have a duty to pursue an investment strategy that considers both the reasonable production of income and safety of capital consistent with your duty of impartiality and the purposes of the trust. The circumstances that you may consider in making investment decisions include the general economic conditions, the possibility of inflation, the expected tax consequences of investment decisions or strategies, the role each investment or course of action plays within the overall portfolio, the expected total return, including both income yield and appreciation of capital, and the duty to incur only reasonable and appropriate expenses.

Florida Statutes, sec. 518.112, allows you to delegate any part or all of the investment function to an investment agent if you exercise reasonable care and judgment and caution in selecting the agent. If you decide to delegate investment responsibility, you have to give written notice of your intention to begin delegating investment function to all beneficiaries eligible to receive distributions from the trust within 30 days of the delegation.

III. Conclusion

By creating a living trust, you have utilized a powerful vehicle through which your assets can be protected and distributed with a minimum of cost and inconvenience during your lifetime and after your death. The above information regarding your living trust outlines some of the requirements of funding and administering your trusts. The information provided in this article is intended to be general. Consequently, some of the information may not apply to you. If you have any particular questions or concerns, please do not hesitate to contact me.

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