

WHEN TRUSTS DON'T AVOID PROBATE

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WHEN DOES A TRUST NOT AVOID PROBATE?

Since I practice in Southwest Florida, many of my new clients already have revocable trusts that were prepared for them up north. As a part of my client intake system we ask for any new client to complete an organizer that details their assets, including information on how those assets are owned, along with a copy of the existing estate planning documents.

Anecdotally, I estimate that more than 85% of our new clients who already have revocable trusts do not have them fully funded when we first visit with them. Here's a conversation that I had with a married couple, who I will refer to as Bruce and Robin recently:

“You realize that you’ve never funded your trusts?” I asked.



Bruce and Robin quizzically looked at me, “What do you mean by funded?” Bruce asked.

“Transferred title of your bank and brokerage accounts as well as your real estate into your trusts,” I replied.

“I thought our attorney took care of that,” Robin said.

“No,” Bruce replied, “remember he gave us that sheet that told us what to do.”

Robin agreed, “Oh yes, I remember! Didn't we ask Alfred to do that for us?”

“Who's Alfred?” I asked.



“Alfred is our financial planner” Robin informed. “But I suppose he never got around to it.”

“Even if Alfred finished the job with your investment accounts, what about your real estate, business holdings, bank accounts and certificates of deposit?” I asked.

“Good point,” Bruce replied. “Can’t we just transfer our assets into our trust when we die?”

“If your assets are in your individual name at the time of your death, they’ll be subject to the probate process through your pour-over will,” I said. “You might as well not have a trust if that’s what’s going to happen. You could have accomplished all your planning in your will. But avoiding probate is a key benefit to having a trust. Also, your trust is there to assist your successor trustee if you should become disabled,” I continued, “and if the assets aren’t in the trust at that time it does you no good.”



That conversation with Bruce and Robin is not uncommon. Many attorneys draft revocable trusts only to leave it up to their clients to actually transfer title to the assets and fund the trust. Listing the assets on a trust schedule doesn’t accomplish funding. Instead, the actual title to the account must be transferred. Retitling bank and brokerage accounts usually involves completing a change of ownership form. Each financial institution has its own form. Sometimes the form requires a notary and other times it requires something known as a medallion signature guarantee, a special signature guarantee for the transfer of securities. It is a guarantee that the signature is genuine and the financial institution issuing it accepts liability for any forgery.



POUR-OVER WILL

Many clients are confused between the functions of a will and those of a revocable living trust. Whenever you have a revocable trust you typically also have a pour-over will. A pour-over will acts like a safety net, catching any assets in your name at the time of your death and, through the probate process, transferring them for ultimate distribution into your trust.

Because an attribute of your trust is to avoid probate for the assets funded into the trust, having a pour-over will catch assets is not ideal. You want all the assets that would otherwise be subject to probate to be titled into your trust prior to your death so the pour-over will does not have anything to catch and distribute.

Without a pour-over will those assets are subject to your state law's intestacy statutes for distribution, which likely differ greatly from the disposition called for under the terms of your trust.

DISABILITY BENEFITS

In addition to avoiding probate, an often-overlooked benefit to having a revocable living trust is your successor trustee's ability to conduct business for you in the event of your incapacity. It is a relatively seamless transition from you as your own trustee to your successor trustee.





DURABLE POWER OF ATTORNEY DIFFICULTIES

You may point to the Durable Power of Attorney (DPOA) document as the alternative, and it is. The problem with a DPOA is that the banks and financial institutions are more suspicious of it in the sense that if a fraudulent DPOA is presented, then the institution may be held liable to you for any losses.

Consequently, when a party presents a DPOA to the financial institution, they frequently ask its legal department to review and approve the document prior to allowing the agent under the DPOA to act. This could take days, or even weeks, if the financial institution accepts the DPOA at all.



Moreover, with DPOAs, the agent often must be physically present at the financial institution itself to create and sign paperwork that enables her to act for you. Each bank also wants an original of your DPOA, of which there is only one. This requires your attorney to record the DPOA in the public records and order expensive certified copies. If your DPOA agent is not local or does not have the time to visit each institution where you conduct business, then there may be considerable delay accessing those accounts.

Sometimes the financial institution will not accept the DPOA, citing its age (if the governing statute has changed) or its lack of a power the institution deems necessary for the agent to act on your behalf. By definition you may be incompetent and unable to sign a new DPOA.

This presents your agent with a difficult decision—should she sue the bank in an effort to force it to accept her authority or go to court seeking a guardianship over your assets? Either course involves a public court action, which is expensive and time-consuming.



TRUSTS OWN TITLE TO ASSETS

The trustee of your revocable trust (usually you), on the other hand, own title to your assets, assuming that those assets have been so transferred. When the successor trustee presents a valid trust naming her as the trustee, the bank or financial institution doesn't have the same concerns that they may have with a DPOA. Therefore, your successor trustee usually has immediate authority to transact business on the trust accounts.



TRUSTS ARE NOT LEGAL ENTITIES

It is important to note that legally trusts are not entities like a partnership or a corporation. Under trust law, a trustee takes legal title to assets for the benefit of the beneficiaries of a trust. That's why the change of ownership to a trust is to ***its trustee***. An example is “***John Smith, Trustee*** for the John Smith Trust dated May 1, 2018.” Since the grantor of the revocable trust (in this example, John Smith) is usually also the trustee, it is easy to determine who the trust benefits.

Sometimes, especially in married couple situations, a trust has co-trustees. Here the co-trustees take legal title as follows: ***John Smith and Jane Smith, Trustees for the John Smith*** Revocable Living Trust dated May 1, 2018.”



When a married couple has a joint trust, however, the legal title may appear as: John Smith and Jane Smith, Trustees for the John and Jane Smith Joint Revocable Living Trust dated May 1, 2018.”

These examples point out how easy it might be for someone not well versed with funding a revocable trust to err when completing change of ownership



documents. A person who is not acting as a trustee, for example, cannot jointly own title to an account with a trustee. When you want to put someone on an account to transact business on the account, it is better to name that person as a co-trustee. With revocable trusts you can always remove a co-trustee.

This is yet another reason why your attorney is integral to the asset alignment process.

CONTROL QUESTIONS



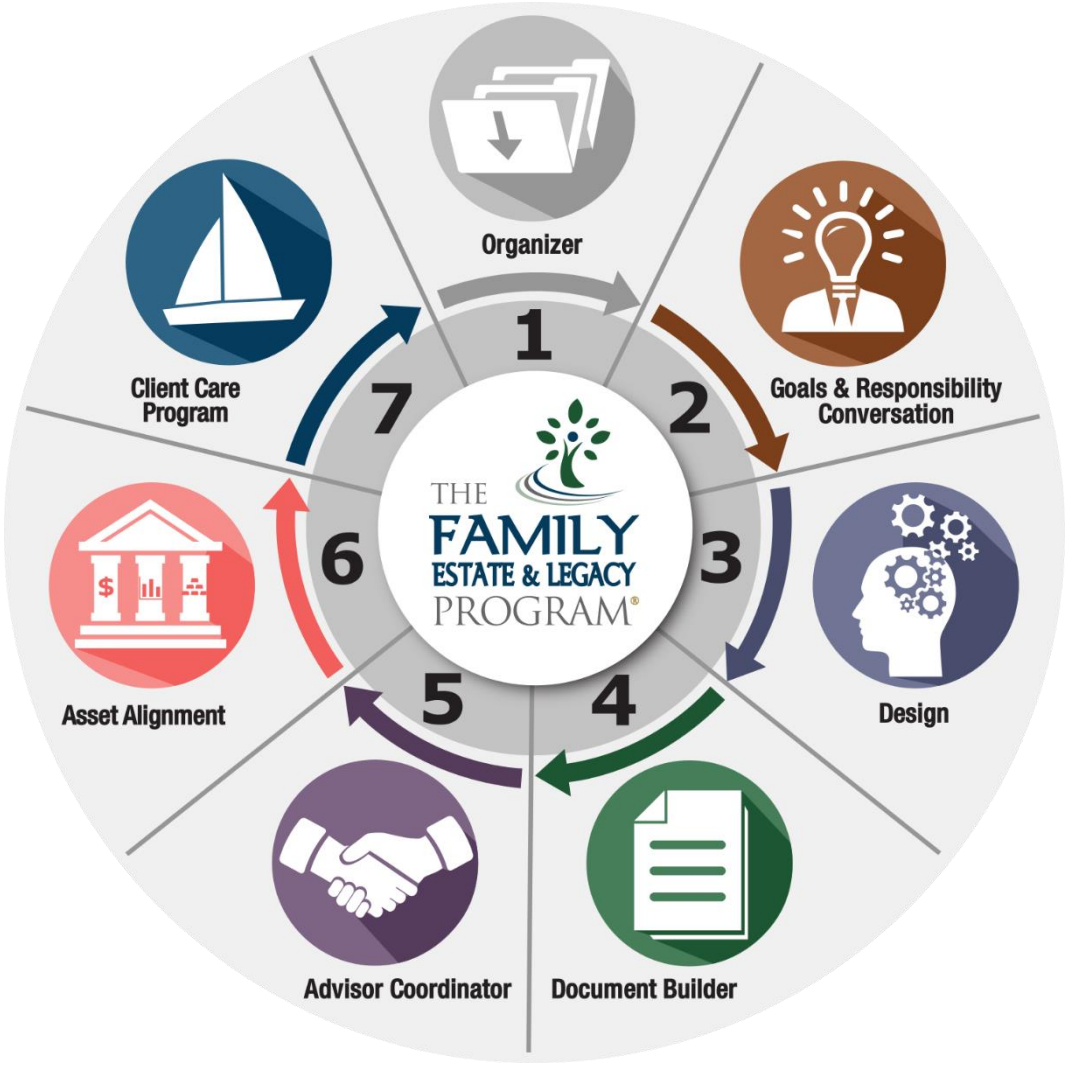
Occasionally a client will object to the transfer of his assets into his revocable living trust. He will express fear that once the assets are transferred, he will somehow lose control over the trust assets. This couldn't be further from the truth.

In a revocable living trust the client is typically his own trustee. So long as he remains mentally competent, he is the person who governs how the trust operates. He makes investment and distribution decisions. He can move money in and out of the trust easily. He can buy and sell assets inside of his trust.

The trust is nothing more than a different form of ownership. The trust even uses its grantor's social security number as its tax identification number. For all purposes, the trust is really the client himself. Once this is understood, the client usually feels much better about transferring his assets into his trust.

ACTION STEPS

As part of our Family Estate & Legacy Program[®] update, my firm works with you to ensure that your assets are properly titled into the right basket. If you're new to Florida and haven't updated your trust, or even if you're a longtime resident, it might be time to review whether your estate plan will meet the goals that originally prompted you to create it. Call us at 239.334.1141, and ask to speak to the Hersch Group Scheduler to get started!





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Craig R. Hersch is a Florida Bar Board Certified Wills, Trusts & Estates attorney and holds his Florida CPA license, with over 30 years of experience in his practice. Craig is a partner at Sheppard, Brett, Stewart, Hersch, Kinsey & Hill and has created several trademarked processes tied to his estate planning and administration practice, including The Family Estate & Legacy Program[®] and The Estate Settlement Program[®].



Craig has authored six books for clients: *The Florida Estate Planning Guide*, *Selecting Your Trustee*, *Common Cents Estate Planning*, *Legal Matters When a Loved One Dies*, *Asset Alignment and Your Estate Plan* and *Common Cents Estate Planning II*. His work has appeared in several professional journals, including *The Practical Tax Lawyer*, and *The Florida Bar Journal*, as well as being on the editorial advisory board for *Trusts & Estates Magazine*, the premier trade journal for estate planning attorneys, CPA's, and financial advisors. Craig also writes a weekly estate planning column that is published in Sanibel's *Island Sun* newspaper and on his firm's blog at www.sbshlaw.com/blog.

Craig is a multiple graduate of the University of Florida with accounting and law degrees and has provided his expertise as a continuing education lecturer for The Florida Bar and the Florida Institute of Certified Public Accountants.

Craig holds an AV Martindale Hubbell rating, the highest attainable by the independent national attorney rating service, has been selected as a Worth 100 Top Attorney and has been named to the Super Lawyers list every year since 2009, a highly-esteemed recognition given to no more than five percent of attorneys in Florida.

During his free time, Craig enjoys competing in triathlons, having finished an Ironman distance race and seven half-Ironman races over the last decade. Craig is married to his wife, Patti, and they have three daughters: Gabrielle, Courtney, and Madison.

To stay up-to-date on the latest news in estate planning, you can follow Craig on Twitter at [@FLTrustLaw](https://twitter.com/FLTrustLaw).

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Michael B. Hill is a partner at Sheppard Law Firm. Michael is a Florida Board Certified Will, Trusts & Estates attorney concentrating his practice in estate and wealth preservation and business succession planning.



Michael has extensive tax, legal and technology skills, enabling him to create unique plans for meeting client's individual and family needs.

Michael is a double graduate of the University of Florida, receiving his Bachelor of Science in Accounting in 1998, and his Juris Doctor, with honors, in 2001. He is a member of the Florida Bar Association, the American Bar Association, and the Lee County Bar Association.

Michael and his wife, Jamie, have four children, Connor, Chase, Lindsay, and Caleb. In his free time, when there is any, Michael enjoys playing golf, working out, and watching most Gator sports. As an alumnus of the Fightin' Gator Marching Band, you may be able to spot him on Florida Field as a member of the Alumni Band, which marches at one home football game each year.

HAYLEY E. DONALDSON

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Hayley E. Donaldson has been recently promoted to partner with the Sheppard Law Firm, working closely with estate planning attorneys Craig R. Hersch and Michael B. Hill.



Hayley helps guide family members in the trust administration and probate process after the passing of their loved one. Additionally, she assists clients with their tax and estate planning, drafting simple and complex wills, trusts, and related estate planning documents.

Hayley received her Juris Doctor from the University of Florida Levin College of Law, graduating first in her class. In law school she was a member of the Florida Law Review and Volunteer Income Tax Assistance (VITA) program which assists lower income individuals with their yearly tax returns.

Hayley is also a Certified Public Accountant (CPA) and worked previously as an Internal Audit Consultant for a national firm. Hayley has a Masters in Professional Accounting from the University of Texas and holds degrees in Accounting and Finance from the University of Miami. Raised in Fort Myers, she is also a proud graduate of the International Baccalaureate program at Fort Myers High School. In her free time, Hayley enjoys running, swimming, and watching the Boston Red Sox.



ANDREW H. BARNETT

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Andrew is an associate of Sheppard Law Firm, works closely with estate planning attorneys Craig R. Hersch and Michael B. Hill. Andrew assists clients with their tax and estate planning, drafting simple and complex wills, trusts, and related estate planning documents.

Andrew holds Bachelor of Science from Virginia Commonwealth University and Juris Doctor degree from the St. Thomas University School of Law. His non-legal experiences includes work in the real estate industry as a licensed Realtor and appraiser. Andrew also worked as a regulator analyst for Dominion Energy where he administered contracts that connected generating facilities to the electric system.

Andrew served as an Assistant State Attorney in southwest Florida before transitioning into a general trial practice concentrating on civil litigation and personal injury lawsuits. Andrew is a member of the Florida Bar Association, and is also admitted to practice in the U.S. District Court, Middle District of Florida.

Andrew is married to Jennifer, who practices criminal law in southwest Florida. In his spare time, Andrew enjoys exercising, fishing, home-improvement projects, and spending time with his family.

