



7-2017

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NON-CHARITABLE PURPOSE TRUSTS: PAST, PRESENT, AND FUTURE

By Richard C. Ausness

Purpose trusts are trusts that are created to carry out a particular purpose as opposed to distributing property to specified human beneficiaries. Charitable trusts are purpose trusts, even though they may benefit certain individuals, because they are intended to promote some broader public purpose such as the relief of poverty or the promotion of education or religion. However, it is now possible to create private or non-charitable purpose trusts as well. Examples include trusts for the maintenance of tombs, monuments, and gravesites; trusts for the performance of religious services; trusts for the care of animals; and trusts for “off-balance sheet” financing and other business purposes. In recent years these trusts have found increasing acceptance in the United States, largely owing to the incorporation of the purpose trust concept in the Uniform Trust Code.

Private trusts. Express trusts may be categorized as either private trusts or charitable trusts. A private trust is created when a settlor transfers property to a trustee for the use and enjoyment of one or more beneficiaries. Private trusts must have a settlor, one or more trustees, and one or more beneficiaries. In addition, there must be property that is the subject of the trust.

Charitable trusts. Charitable trusts are established to achieve various charitable purposes. A charitable trust is administered by a trustee who owes the same fiduciary duties as the trustee of a private trust. However, unlike private trusts, charitable trusts have no specific

individual beneficiaries; instead, the equitable or beneficial interest in the trust is vested in the public at large.

In the past, purpose trusts sometimes ran afoul of various legal doctrines such as the Rule Against Perpetuities, the beneficiary principle, and the certainty principle. The Rule Against Perpetuities invalidated trusts of excessive or indeterminate length. In the past, a trust was considered invalid if there were no ascertained beneficiary available to carry out

attained. Thus, an otherwise valid trust will fail if it is not capable of execution.

Honorary trusts. In the twentieth century, courts developed an exception to the beneficiary principle known as an “honorary” trust. These trusts were called honorary because while the trustee could not be compelled to carry out the purpose of the trust, he or she was honor bound to do so. Furthermore, alternative beneficiaries or intestate takers could sue to terminate an honorary trust if the trustee refused to administer the trust or failed to carry out its provisions. Although courts have generally upheld honorary trusts for such benevolent purposes as the maintenance of gravesites and care of animals, they have not hesitated to invalidate trusts for wasteful or “capricious” purposes.

Modern non-charitable purpose trusts. Modern non-charitable purpose trusts differ from traditional honorary trusts in a number of respects; for example, an honorary trust will fail if the designated trustee refuses to serve or fails to carry out the trust. In contrast, where a modern non-charitable purpose trust is concerned, a court may save the trust by appointing another trustee if this failure occurs. In addition, the traditional honorary trust was limited to 21 years in order to comply with the Rule Against Perpetuities. A modern purpose trust for the care of an animal may last more than 21 years.

Like the Uniform Probate Code, the Uniform Trust Code recognizes purpose trusts but distinguishes between trusts for the care of animals and other non-charitable purpose trusts. Section 408 avoids problems with the Rule Against Perpetuities by expressly allowing the trust to last for the duration of the animal’s life. It solves the enforcement

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the settlor’s intent if the trustee failed to do so. This was known as the “beneficiary principle,” which invalidated a trust if the beneficiary class was too indefinite to identify or when the purpose of the trust was not to benefit human beings. In addition, the “certainty principle” required that a valid purpose trust must not only have certainty with respect to the objectives of the trust but also certainty that these objectives could actually be

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problem by allowing the settlor or the court to appoint a trust protector to ensure that the trustee carries out the settlor's intent, and it provides a procedure by which trust property that is not necessary for the care of the animal may be returned to the settlor. Section 409 is concerned with non-charitable trusts without ascertainable beneficiaries other than trusts for the care of animals. Purpose trusts authorized by section 409 are limited in duration to a period of 21 years.

Drafting a non-charitable purpose trust raises a number of potential questions. What is the settlor's specific objective? How much property should be placed in the trust in order to achieve these objectives? What should be the duration of the trust? How will the trust be enforced in the absence of human beneficiaries? How can the trust be modified or terminated? Should the arrangement be described as a trust or as a power of appointment?

The drafter's principal responsibility is to identify and articulate the settlor's intentions clearly, while at the same time leaving room for the trustee to exercise discretion and respond to changing conditions. The drafter should remember that courts may refuse to approve private trusts that they deem to be "capricious" in nature. The drafter should avoid setting forth objectives that are impracticable or impossible to carry out.

If the trust is an inter-vivos trust, the settlor may prefer to act as trustee. However, if the trust is testamentary, the settlor must choose a third-party trustee. If the trust is small and of short duration, it may be preferable to appoint a family member or friend. However, if the trust is large, complicated, or of longer duration, it would be better to choose someone with professional expertise, such as

ABA SECTION OF REAL PROPERTY, TRUST & ESTATE LAW

This article is an abridged and edited version of one that originally appeared on page 321 of *Real Property, Trust and Estate Law Journal*, Fall 2016 (51:2).

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a lawyer, accountant, or financial advisor.

The size of the trust corpus will depend on the client's wealth and the amount he or she wishes to devote to carrying out the objectives of the trust. The client should be encouraged to err on the side of generosity if the trust is intended to remain in existence for a long period.

The Uniform Trust Code distinguishes between trusts for the care of animals and trusts for other purposes. Section 409 permits trusts for the care of animals to last for the life of the animal even if it exceeds the traditional 21-year limit. However, for other purpose trusts, Section 408 establishes a durational limit of 21 years. Consequently, unless the jurisdiction has abolished or modified the Rule Against Perpetuities, the drafter will have to limit the duration of such a trust to a period of 21 years, even though a longer period would be more appropriate.

Unlike a conventional private trust, in the case of a non-charitable purpose trust

there are no beneficiaries to ensure that the trustee administers the trust properly. The Uniform Trust Code provides that a non-charitable purpose trust "may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court." It follows that the drafter should provide for the appointment of an "enforcer" or trust protector.

The drafter should also provide a mechanism in the trust instrument for modification or termination if it becomes impractical to carry out the trust purpose as originally contemplated by the settlor.

Finally, the drafter should consider the possible tax consequences for the grantor, the trust, and the recipients of trust funds. ■