Trusts
How They Work
Trust Creation and Funding

Grantor/Settlor → Appoints Trustee → Trust Agreement (Identifies beneficiaries and sets the rules) → executes Trust Agreement → Funds the Trust

Cash
Land
Stocks
Bonds
Businesses Etc.

Real Estate: Transferred to Trust by Deed
Bank, Stocks, Investment Accounts: Re-titled in Trust’s name
Life Insurance: Named as owner or as beneficiary depending on goals
Other Assets: Transferred as appropriate to indicate Trust Ownership

See Management Issues Chart

Assets are not subject to the Trust terms until they are transferred to the Trust – Proper funding is imperative

Note: This chart makes “generalized” statements. Consult legal counsel for specific advice concerning what kind of trust you need.
Types of Trusts
And Purposes

**Formal Trusts**

- Testamentary Trusts
  - (In your Will)
  - Irrevocable
  - Purposes: Privacy, Spendthrift Protection (Heirs), Tax Planning, Avoid Probate, Estate Planning, Disability Planning, Co-Ownership, Asset Protection (Self)

- Inter Vivos Trusts
  - (Created during your lifetime)
  - Revocable
  - Purposes: Privacy, Spendthrift Protection (Heirs), Tax Planning, Avoid Probate, Estate Planning, Disability Planning, Co-Ownership

**Implied Trusts**

- Resulting Trust
  - Usually imposed when formal Trust fails for any reason and it is clear Grantor intended a different result
  - Purposes: Privacy, Spendthrift Protection (Heirs), Tax Planning, Avoid Probate, Estate Planning, Disability Planning, Co-Ownership

- Constructive Trust
  - Usually imposed by law where assets were stolen or improperly taken
  - Purposes: Privacy, Spendthrift Protection (Heirs), Tax Planning, Avoid Probate, Estate Planning, Disability Planning, Co-Ownership

A Trust can be used to place conditions and/or restrictions on the use of funds given to a beneficiary. For example, a trust can provide that funds will only be used for education, or for a disabled individual’s special needs.

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Trust Relationships

Settlor creates Trust

Trustee (Operates Trust)

- Invests and manages assets
- Uses Assets for beneficiary
- Makes distribution requests (if permitted)

Trust (Holds assets pursuant to terms of written agreement)

- Distributions for beneficiary, consistent with terms of the Trust

Beneficiary (Trustee operates Trust for the named beneficiaries)

- Frequently, when asset protection is a goal, the Trustee is given discretion to make, or refrain from making, distributions.

Trust Protector often appointed to make corrections or adjustments

Frequently given authority to:
1. Remove and replace trustee
2. Adjust Trust terms for tax purposes
3. Approve or disapprove certain transactions

Remainder Beneficiaries

Remainder beneficiaries take the surplus (or separate interest) provided for them upon termination of the primary beneficiary's interest. Sometimes this complicates trust administration and investments.

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Trust Management and Operation Issues

Two things must occur before operation begins:
1. Trustee must accept the job
2. The Trust must be funded

Trustee

- Tax Compliance
  - Apply for Employer Identification Number (EIN) on IRS Form SS-4
    - An EIN for the Trust is frequently required to open bank accounts and to hold other financial assets
    - Separate Tax Return required; if Grantor Trust, then separate schedule on Form 1040

- Notice
  - Notice of Trust must be given to beneficiaries unless waived
    - O.C.G.A. §53-12-242
    - Other notices, such as annual accounting, frequently given even if not required, for Trustee’s protection
    - Failure to give appropriate notices frequently means the Statute of Limitations for claims against the Trustee does not begin running

- Accounting
  - Keep good records; cash transactions are discouraged
    - Use of Accountant advised if Trust earns income or if annual accounting is required
    - Unless waived, an accounting must be provided to each beneficiary annually, upon termination of the Trust or when there is a change in Trustee

- Investments
  - Establish investment policy
    - Diversify holdings in accordance with investment objectives (or Trust terms)
    - Monitor Investments
    - Avoid conflicts of interest (between Trustee and beneficiaries, or between income and principal beneficiaries)
    - Use of Investment advisor recommended if Trust holds significant liquid assets

- Distributions
  - Distribution standard will dictate Trustee’s discretion (or lack of discretion)
    - Must consider potential conflicts of interest between primary/income beneficiaries and remainder beneficiaries
    - Consider other factors such as creditor claims and impact on public benefits
    - Consult legal counsel if there are questions

Note: This chart makes “generalized” statements. Consult legal counsel for specific advice concerning what kind of trust you need

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Special Needs Trusts – Formation and Structure
(Frequently Used For Disability Planning)

1. Will the Trust be funded with assets of the beneficiary?
   - No
   - Yes

2. Is the beneficiary disabled?
   - No
   - Yes

3. Use Third Party Trust (Supplemental Needs Trust if disabled or discretionary trust if not disabled)
   - Limit Control; beneficiary must have no legal right to use assets for support or maintenance
   - No right to revoke or terminate trust

4. Other Trust Provisions:
   - Statement of Purpose and Goals for Trust; provides direction to Trustee
   - Distribution Standard
   - Administrative Powers
   - Spendthrift clause
   - Identification of potential residuary beneficiaries
   - Provisions for replacing Trustee
   - Decanting provisions

5. Trust must comply with (d)(4)(A) Rules
   - Must be established by one of following:
     - Parent
     - Grandparent
     - Legal Guardian
     - Court
   - Disabled individual must be sole beneficiary of the Trust
   - Beneficiary must be under 65
   - Trust must include medical assistance payback clause
   - Note: In addition, the POMS indicate the Trust will be invalid unless the person funding the Trust has legal authority to transfer assets into the Trust

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Special Needs Trusts
Distributions

Trustee Decision-Making Process

Is proposed distribution for the “sole benefit” of the beneficiary?

Yes

Is the Beneficiary on SSI, Medicaid or HUD?

No

No “means-tested” public benefits; distribution makes no impact

Yes

Distribution must be evaluated for impact on public benefits

Is the distribution for food or shelter?

No

The distribution should not impact Medicaid or SSI

Yes

Distribution is likely treated as income under Medicaid and SSI Rules

The following usually do not impact eligibility:
1. Medical, psychological and other health treatment not covered by Medicaid
2. Experimental, holistic or other treatments not covered by Medicaid
3. Education
4. Assistive/adaptive devices and equipment
5. Transportation
6. Caregivers/companion services
7. Communications/phone
8. Recreation and entertainment
9. Respite services

Following are deemed to be a shelter expense:
1. Mortgage payments
2. Real property taxes
3. Rent
4. Heating Fuel
5. Gas (for home)
6. Electricity
7. Water
8. Sewer
9. Garbage removal
Georgia Special Needs Trust Accounting

Annual Trust Review

Each expense must be documented by:
- Date
- Purpose
- Amount
- Recipient

Receipts must be provided upon request

After documentation is provided, DCH applies a 4 part test

- Was the expenditure for the primary benefit of the Trust beneficiary?
- Was the expenditure appropriate given the beneficiary’s age, physical condition, lifestyle and needs?
- Was the expenditure consistent with the terms of the Trust, and published federal and State guidelines?
- Was the expenditure consistent with the fair market value of similar goods and services?

Special review of certain expenditures

- Expenditures not clearly for sole benefit of beneficiary
- Caregiver wages
- Housing expenses
- Vehicle expenses
- Egregious expenses

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