



## BUYNAK & FAUVER

### TRUST FUNDING

*(Estate Planning Advisory No. 4)*

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#### WHAT IS TRUST FUNDING?

Funding a revocable trust (sometimes called a living trust or an *intervivos* trust) involves the act of transferring legal title from an individual or a husband and wife into the name of their trust. For example, if Svend and Gerda Johansen are funding their revocable trust, they will change title to their assets from "Svend and Gerda Johansen, husband and wife" to "Svend and Gerda Johansen, as Trustees of the Johansen Family Trust, dated January 1, 2010."

This Advisory discusses various types of assets, how title is transferred to a trust and when some assets need not or should not be transferred to a trust. This memorandum is neither exhaustive nor tailored to your specific situation, but only intended to give you enough information to discern the options available as you evaluate the status of how you hold title to your various assets and whether you have property transferred title to your trust. Our firm representation is only undertaken through a written engagement letter and not by the distribution of this Advisory.

#### WHY IS TRUST FUNDING NECESSARY?

If you have signed trust documents but haven't changed titles and beneficiary designations on your assets, you will not avoid probate. You may have a great trust, but until you fund the trust, it doesn't control anything; your living trust can only control the assets you put into it. If your goal in having a trust is to avoid probate at death and court intervention at incapacity, then you must fund it now, while you are able to do so.

In California, property held in an individual's name alone that collectively exceeds \$100,000 in value will be subject to probate. An amazing number of people go to the trouble and expense of forming a revocable trust and then fail to complete the work necessary to fund it. Moreover, transferring assets to a trust during a person's lifetime will make it easier for the successor trustees to manage and protect trust property without court intervention. The result in failing to fund a trust is that the surviving spouse or successor trustee must petition the court for an order transferring intended assets to the trust, which defeats one of the trust's objectives to keep personal finances private and not part of the public probate records.

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#### **Buynak & Fauver, LLP**

820 State Street, 4th Floor | Santa Barbara, California 93101 | (805) 966-7000 tel | [www.BuynakLaw.com](http://www.BuynakLaw.com)  
433 Alisal Road, Suite C | Solvang, California 93463 | (805) 688-8090

## WHO CAN FUND A TRUST?

A settlor (the creator of the trust) is typically the person who makes arrangements to transfer title to the trust; however, there are other people that can assist, or can do it for the settlor. An attorney can prepare all the transfer documents and instructions and after obtaining signatures on the documents by the settlors, can deliver the documents to the person or entity that can transfer the title. If a settlor has signed a power of attorney that specifically grants the power to handle trust matters, an agent acting under a power of attorney can do the trust funding by signing the transfer deeds and documents. If a person creates a testamentary trust in their will, then after the person's death, their named executor can fund the trust at the conclusion of the probate when assets are distributed. In the event that a person has become incapacitated, a conservator can handle trust funding at the order and direction of the court. By far, the best choice is for the settlor of the trust to see that the transfers are done as soon as possible after creating a trust to avoid future complications and expenses.

## WHAT HAPPENS IF YOU DON'T FUND A TRUST?

If a trust is created and never funded, it is termed a Stale Trust. A trustee has no purpose to manage assets in the manner directed in a trust if there are no assets owned by the trust, making the entire purpose for a trust moot. Without funding, assets held in an individual's name must go through probate before they can be transferred to the proper beneficiary, unless the assets held are valued at less than \$100,000 when a declaration under Probate Code §13100 can achieve the result without probate.

If a person creates a trust, and intends to fund the trust, but fails to do so prior to his or her death, all the effort to avoid a probate is not lost. As a result of a 1993 California case entitled the *Estate of Heggstad*, (legal citation of 16 Cal.App.4<sup>th</sup> 943), a court will allow probate to be avoided in certain circumstances if certain criteria is met. If the trust includes a list of assets and language that constitutes a conveyance, if the settlor signs an agreement stating that they are assigning all of their assets to their trust, or if property was once held in a trust but is transferred back to the individual settlor's name due to a refinancing and never transferred back to the trust, the intent to fund the trust can be established in a petition filed with the court asking that all of the assets be declared to be trust assets. This procedure, known as a Heggstad petition, avoids a full probate of the assets that were not transferred to the trust by changing their titles.

Another method of transferring assets to a trust is the pour over will which acts like a safety net. When you die, the will catches assets not properly funded to the trust and states that the asset is to be distributed to the successor trustee of your trust. This process still requires filing a court petition and obtaining a court order before the asset can be transferred, and the time and increased cost for this procedure makes for yet another reason to fund a trust while you are living and have no incapacity issues to prevent you from managing your assets.

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## HOW DO YOU FUND A TRUST?

Because trusts are now so widely used, transfers to fund a trust are commonplace. Some institutions will want to see proof that your trust exists before they will change title. To satisfy them, a bank or brokerage company may have their own Trust Certification form, or the form can be prepared by your attorney. A Trust Certification is a shortened version of your trust that verifies your trust's existence, explains the powers given to the trustee and identifies the trustees, but does not reveal any information about your assets, your beneficiaries, and their inheritances. By using a Trust Certification, you can provide the information needed to transfer title to your trust without revealing confidential information to persons who have no need for this information.

The general idea is that *all* of your assets should be transferred to your trust; however, there are a few assets that you may not want in, or that cannot be put into your trust for tax and other legal reasons. Generally, assets you want in your trust include your home and other real estate, bank and saving accounts, investments, business interests and notes payable to you. You may also want to change your beneficiary designations to your trust if you want those assets to be controlled by your trustee rather than paid out directly to a beneficiary.

Some detailed information about how to transfer specific assets to your assets, see below:

Real Estate: For real estate, the change in title is accomplished by executing and recording a quitclaim deed or trust transfer deed to the property changing title to the trustees name as outlined above. You can prepare a deed yourself if you have knowledge about the required format and contents, or you can have a title company prepare a deed or hire an attorney to do it for you. The deed must then be recorded with the county recorder in the location of the property.

Bank & Brokerage Accounts: Bank accounts and brokerage accounts can be transferred by simply changing the name on the accounts to reflect the trust as the new owner. In order to make this transfer you will need to deliver a signed and notarized Trust Certification to the bank or brokerage office along with an instruction letter directing them to make the change to your accounts. This can be done by letter or in person with your banker or broker.

Stock Certificates: Shares of stock and bonds in registered form are changed by notifying the transfer agent for the issuing company and requesting that the certificates be reissued in the name of the trust. Stock in a family owned corporation can be changed by endorsing the old stock certificate to the trust and having the corporation issue a new certificate to the trust.

Partnership or Limited Liability Company Assets: A trust can be funded indirectly by transferring interests in other entities. For example, if you hold your property in a Family Limited Partnership (öFLPö) or Limited Liability Company (öLLCö), the living trust can hold your shares in those companies. This can be as simple as transferring partnership interests in the

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FLP or membership certificates in the LLC from your name individually to your name as trustee of your trust by a simple written declaration called an Assignment.

Copyrights and Trademarks: A copyright can be transferred to a trust by way of an assignment form which must be submitted to the United States Copyright Office along with the proper form available at <http://www.copyright.gov>. A patent or trademark may also be assigned to a trust and submitted on the property form obtained from the Department of Commerce Form PTO-1595.

### **WHAT ASSETS CANNOT OR MAY NOT BE ADVISABLE TO TRANSFER TO A TRUST?**

Transferring some assets to a trust will trigger a tax liability or some other undesirable result. For these assets, a beneficiary is typically designated so that at a person's death, the entity that holds the asset will transfer it to the designated beneficiary.

Many qualified pension plans and incentive stock options cannot be transferred to a trust, and some partnership agreements or limited liability memberships limit or prohibit transfer of interests to a trust. A trust may be a named beneficiary of a commercial annuity; however, the distributions provisions and tax consequences of annuities may be affected by the identity of the beneficiary. Some other examples and explanations are:

Individual Retirement Accounts: The assets of a traditional individual retirement account regulated by Internal Revenue Code §408 can be transferred to a revocable trust during a person's lifetime by withdrawing the assets, but income tax is payable on the withdrawal during the year it is withdrawn, making this transfer result in an undesirable tax. If a trust is named the beneficiary of an IRA, then at the time of the account holder's death, all of the proceeds are subject to income taxes in that year, whereas an individual beneficiary has the option of rolling the IRA into their own name and delaying withdrawal until age 70.5 when the funds are taxes in the increments as withdrawn.

Shares of a Professional Corporation: Statutory restrictions require transfers of stock in a professional corporation to be issued only to a licensed professional (i.e. doctor, lawyer, CPA, dentist, optometrist, etc.). Because licenses are issued to individuals, a trust cannot be the holder of stock.

Life Insurance: Whether it is advisable to transfer title to life insurance policies to your trust depends on the size of your estate. Estate taxes must be paid if the net value of your estate when you die (including the death benefits from life insurance policies you own) is more than the amount exempt at the time of your death. Currently, the federal exemption for 2008 is \$2 million. If your estate is less than this amount, you will not have to pay estate taxes when you die and your living trust can be both the owner and beneficiary of your insurance policies so that your trustee will have maximum control over the policies and how the proceeds are distributed.

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If your estate will be subject to estate taxes, it would be better to set up an irrevocable life insurance trust and have it own your policies for you so that the value of the insurance is removed from your estate, reduce estate taxes and let you leave more to your loved ones or beneficiaries.

### **FROM WHOM SHOULD I SEEK ADVICE ABOUT TRUST FUNDING?**

While you can handle trust funding on your own, it is wise to seek the advice of a professional who can determine which of your assets should be part of your trust. Certainly, your accountant will have knowledge about your own personal tax situation and can advise you of the impact of transferring assets into your trust, or leaving title held outside your trust. You may have an investment advisor that can provide advice on trust funding. An estate planning attorney can not only handle the preparation and filing of transfer forms, but can address other unique issues regarding property that we have not discussed here, such as out-of-state property, separate and community property issues and property that has been contaminated.

The bottom line is to educate yourself about your trust, how to find assets to your trust, and seek professional advice to make sure you are making the best decision for your situation.

As always, you should be sure that additional legislation has not been enacted, or court decisions rendered, that would change the above advisements. This memorandum is neither exhaustive nor is it tailored to your specific situation. If you have questions or concerns, you should discuss your individual situation with us or your own attorney.

Lana J. Clark,  
Business and Estate Planning Attorney

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*This Advisory is one of a series of business, estate planning, real estate and tax advisories prepared by the attorneys at Buynak & Fauver. Should you have further questions regarding the information provided in this Advisory, please contact the author at the number listed above.*

*Buynak & Fauver provides business legal services to individuals, business entities and nonprofit organizations from entity formation and start up, through day-to-day operations and exit strategies.*

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