GENERAL TRUST QUESTIONS

What is a trust?

A Trust is a well recognized type of legal entity which is used to hold legal title to property for the benefit of one or more persons. The person creating the Trust is often known as the “Trust Creator” or “Grantor”. The person or institution holding legal title to the property is called the Trustee. The persons who are intended to benefit from the Trust are known as “Beneficiaries”.

What is a trust estate?

The property that is transferred to a Trust becomes the “Trust Estate”. A Trust Estate consists of all of the property, rights and obligations that are transferred to the Trust. The Trust Estate is managed in accordance with the terms and conditions of the document creating the Trust.

Who are the parties to a trust?

There are typically three main parties to a Trust:

1. The Trust Creator, sometimes called the Grantor or Settler, is the person who started out as owner of the property that is to be transferred to and held by the Trust.

2. The Trustee is the person or financial institution (such as a bank or Trust company) that holds the legal title to the Trust estate. There may be one or more Trustees. If a Trustee is unwilling or unable to serve, then a successor Trustee steps in to hold and manage the Trust estate. The Trustee is obligated to act in accordance with the terms of the Trust for the benefit of the Trust beneficiaries.

3. The Beneficiaries are the persons who the Trust Creator intended to benefit from the Trust estate. The rights of the beneficiaries depend on the terms of the Trust. Beneficiaries are said to have the "equitable title" to the property held in the Trust.

Can I create a trust, serve as the trustee and be the trust beneficiary?

Yes, in most states. Historically courts concluded that there was no need for a Trust when the Trustee was also the beneficiary. The legal and equitable titles were said to have "merged". However, now, in most states, if it is done right, a Trust Creator may establish a revocable Trust, serve as the initial Trustee and be able to obtain immediate benefits as a Beneficiary from Trust property.

What are some of the different forms of trusts?
Trusts come in a variety of forms and can be established in many different situations. Some common forms of Trusts include:

1. **Asset Protection Trust** - A type of Trust that is designed to protect a person's assets from claims of future creditors, frequently established in foreign countries.

2. **Charitable Trust** - A type of Trust established to benefit a particular charity or the public. Typically charitable Trusts are established as part of an estate plan to lower or avoid imposition of Federal (and some states') estate and gift taxes.

3. **Constructive Trust** - An implied Trust established by operation of law. While a person may take legal title to property, equitable considerations require that the equitable title of such property remain with others. Typically fraud is a requirement for the establishment of a constructive Trust, the person who took legal title to the property did so as a result of a fraud brought upon the prior legal title holder.

4. **Express Trusts** - are those specifically created by the grantor under a Trust agreement or declaration of Trust.

5. **Implied Trusts** - arise from particular facts and circumstances in which courts determine that although there was not any formal declaration of a Trust, there was an intention on the part of the property owner that the property be used for a particular purpose or go to a particular person. For example, if a neighbor asks you to take care of her car for her when she is on vacation, and never returns, there was an implied Trust, as she was not making you a gift of the car.

6. **Inter Vivos Trust** - A Trust that is created during the lifetime of the grantor. A common type is a revocable "living" Trust in which the grantor transfers title to property to a Trust, serves as the initial Trustee, and has the ability to remove the property from the Trust during his/her lifetime.

7. **Irrevocable Trust** - A Trust that cannot be altered, changed, modified or revoked after its creation (absent extreme extenuating circumstances). Once a grantor transfers property to an irrevocable Trust, the grantor can no longer take the property back from the Trust.

8. **"Living" Trust** - A Trust created during the lifetime of a grantor which can be altered, changed, modified or revoked. Typically the grantor is the initial Trustee as well as the initial beneficiary of the Trust, with his/her spouse and children as the ultimate beneficiaries of the Trust.

9. **Resulting Trust** - A Trust that arises from, or is created by operation of law, when the legal title to property is transferred, but the beneficial interest is to be enjoyed by someone other than the person who got the legal title.

10. **Special Needs Trust** - A Trust that is established for a person who receives government benefits so as not to disqualify the beneficiary from such government benefits. Ordinarily
when a person is receiving government benefits, an inheritance or receipt of a gift could reduce or eliminate the person's eligibility for such benefits. By establishing a Trust which provides for luxuries or other benefits which otherwise could not be obtained by the beneficiary, the beneficiary can obtain the benefits from the Trust without defeating his/her eligibility for government benefits. Often a Special Needs Trust includes a trigger which terminates the Trust in the event that it could be used to make the beneficiary ineligible for government benefits.

(11) **Spendthrift Trust** - A Trust that is established for a beneficiary which does not allow the beneficiary to sell or pledge away his or her interests in the Trust. A spendthrift Trust is beyond the reach of the beneficiaries creditors, until such time as the Trust property is distributed out of the Trust and placed in the hands of the beneficiary.

(12) **Tax By-Pass Trust** - A type of Trust that is created to allow one spouse to leave money to the other, while limiting the amount of Federal Estate tax bite that would be payable on the death of the second spouse.

(13) **Testamentary Trust** - A Trust that is included under the terms and conditions established in a Will. Such Trusts take effect after the death of the person making the Will.

(14) **Totten Trust** - A Trust that is created during the lifetime of the grantor by depositing money into an account at a financial institution in his or her name as the Trustee for another. This is a type of revocable Trust in which the gift is not completed until the grantor's death, or an unequivocal act reflecting the gift during the grantor's lifetime.

Many Trusts themselves establish "sub-Trusts". For example, a revocable "living" Trust might establish spendthrift Trust and a tax by-pass Trusts upon the death of the first. Trusts can be structured to handle a variety of situations but careful drafting is essential to make the plan work.

**How is a trust helpful in estate planning?**

A Trust, if properly drawn and "funded", can be extremely helpful in many situations such as:

1. to avoid a conservatorship. If property is held in a Trust, a successor Trustee can step in and take over management, without the delay and expense of going to court to appoint a "conservator" to manage the property, if the Trust Creator becomes disabled.

2. to avoid probate. A properly drawn Trust is a separate entity that does not die when the creator dies. The successor Trustee can take over management of the Trust estate and pay bills and taxes, and promptly distribute the Trust assets to the beneficiaries, without court supervision, if the Trust agreement gives the Trustee that power.
maintaining privacy. Trusts, unlike Wills, are generally private documents. Your neighbors and the public would be able to see and how much you had and who your beneficiaries were under a Will, but usually not with a Trust.

help keep certain property separate from other property. For example, if you want your daughter to get your vacation home, and your son to get your house in the suburbs, if you create a separate Trust for each property there would be no question of commingling or who gets what.

In many estate plans, the Trust is the central tool that is used to control and manage property. A Trust continues despite the incapacity or death of the grantor. It determines how a Trustee is to act with respect to the Trust estate. It determines how property is to be distributed after the death of the grantor. A Trust is thus one of the major estate planning tools used for a grantor's property so that court interference in the event of incapacity or death can be dramatically reduced (if not completely eliminated).

Who should have a trust?
You should discuss the advantages of a Trust over a Will (even with a Will creating a "Testamentary Trust") with an attorney if:

(1) you are the parent of minor children; or

(2) privacy is important to you, your business or your family; or

(3) you own real property, particularly any property outside of your home state; or

(4) your estate has a gross value in excess of $1,000,000 (this amount increases slowly to $3.5 million in 2009; the tax is completely repealed in 2010, but reinstated in 2011); or

(5) you wish to avoid conservatorship or probate.

A Trust in NOT necessary for everyone, and some lawyers prefer to have matters go through probate, but it certainly makes sense to discuss it.

How much do trusts cost?
That varies considerably, and is sort of like asking "how much does a house cost"? The fees are typically based:

(1) on the complexity of the estate;

(2) the nature of the property involved, and to a lesser extent, its value;

(3) the amount and nature of the tax planning that is necessary;
Generally the most crucial part of a Trust (or a Will) is the planning that goes into its preparation. Words are pretty commonplace, and it is advising you what the alternatives are, how to solve foreseeable problems, and only then "drafting the documents"—essentially arranging the words to say what you would want done—and taking the risk of an error, that lawyers charge for.

While it generally costs more to prepare a Trust than a Will, a Trust often does a lot more than a Will.

**One bit of advice. DO NOT USE PRE-PRINTED FORMS.** Even the best pre-printed form is likely to have provisions in it that are harmful. Further, unlike lawyers, stationery stores and computer software manufacturers do not assume any responsibility for errors that are in the programs, language or that result from faulty execution.

**When should I create a trust?**

The only time that you can prepare and implement a Trust and an estate plan is while you are alive and have legal ("mental") capacity to enter into a contract. If you should become unable to manage your own affairs or suffer from some other disability which affects your legal capacity, your Trust may be effectively challenged by those who assert that you lacked capacity at the time the documents were created, that you were subjected to fraud, coercion or undue influence during the creation and implementation of your Trust.

The best time to discuss the need for a Trust and its role as part of a comprehensive estate plan with an attorney is now, while you have the capacity to do so.

**How do I select the trustees and successor trustees?**

A Trustee is a person or institution selected to follow the instructions provided by the declaration of Trust. A Trustee has a very high "fiduciary duty" to act with the utmost good faith in dealing with the Trust estate.

Many grantors and their respective spouses act as the initial Trustees of a revocable living Trust. In this way they remain in control until they are incapacitated or die. Then pre-selected successor Trustees are appointed in accordance with the terms of the declaration of Trust. Usually a spouse, family member or Trusted friend are selected as successor Trustees.

Trustees should be knowledgeable about financial matters, be Trustworthy, know how to manage
and invest the Trust estate, care about the beneficiaries of the Trust, and have the financial capacity to reimburse the Trust in the event that they make serious mistakes. If a bank or Trust company is selected to serve as a Trustee of a Trust, it will usually charge a fee for this service, which is then paid from the Trust estate. An attorney can give you specific advice as to who you might name as a Trustee, in light of your own personal and family situation.

**How can a trust prevent a conservatorship proceeding?**

A Trust is used to hold the property, and the Trustees manage the Trust estate. In the event of your incapacity your pre-appointed Successor Trustee(s) will manage the Trust estate in accordance with the instructions that you have provided. Thus, a properly prepared and funded Trust can enable you to avoid a conservatorship proceeding over your estate. Compared with the cost of a conservatorship proceeding, a Trust can be very attractive.

**What is the difference between a will and a trust?**

A Trust is a way of transferring your property to an artificial legal entity or "person" before your death, while still having the use and/or control of it during your lifetime. As the Trust owns legal title to the property in it at the time of your death, and the Trust does not die with you, the property does not have to go through "probate". Probate is the legal process which inherited property goes through to transfer the title to the beneficiary. If you have a large estate, or even a small estate with real property, *i.e.* real estate, it is often advantageous to set up a Trust, as it usually ultimately is far less expensive. An attorney can help you decided whether a Will or a trust is best for you and your estate. It may also be that you should have a Trust and a Will as a backup in case all your assets were not transferred into the Trust at the time of your death.

**Is a ‘living will’ different from a ‘living trust’?**

A Living Trust is VERY DIFFERENT from a Living Will. A Living Trust is a way to manage and control property during your lifetime and to distribute it at your death.

**If I have a living will, would I also need a real ‘will’ or a ‘living trust’?**

Yes. A "Living Will" has absolutely nothing to do with managing or controlling your property either during your lifetime or at your death. It deals only with health care options.