

Funding a Trust with a General Assignment

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Take-Away: Using a general assignment to fund a Trust, sometimes executed by an attorney-in-fact is often legally effective to fund the principal/settlor's Trust, but questions can often arise using a general assignment.

Background: If the beneficiaries of a settlor's Trust are different from the settlor's probate estate, great care needs to be sure that the Trust is funded as the settlor intends, and while the settlor is alive, if possible. If the Trust funding document is vague or incomplete, a dispute can easily arise between the estate beneficiaries and the Trust's beneficiaries. This potential problem becomes acute if the Trust funding is done by an agent under the settlor's durable power of authority (does such authority exist?) and the scope of the document used to accomplish the Trust's funding (can the asset be transferred by a general assignment?)

Example: Rex, age 86, is in the hospital facing life-endangering surgery in two days. Rex owns several bearer bonds of significant value, held in safe deposit boxes at three different Grand Rapids banks. Rex calls his attorney to the hospital. Rex explains that he wants a full estate plan, e.g., pour-over Will, Revocable Trust, durable power of attorney for financial affairs asap. Rex's Will is to benefit charities and provide some financial bequests to several friends. Rex's Trust is intended to benefit his children and grandchildren. This plan is expeditiously prepared by Rex's attorney in the following 24 hours. The attorney returns to Rex's hospital room with these documents just prior to Rex's scheduled surgery. The named successor trustee, also in the hospital room, signs an Acceptance of Trust. Rex's agent is given the authority under the durable power of attorney to execute general assignments and full authority to fund Rex's Trust. There is only time enough to token-fund Rex's Trust before Rex is rolled into the operating room. To get the bearer bonds into Rex's Trust the agent under Rex's durable power of attorney is asked to write on some available paper a general assignment of Rex's assets to the trustee of Rex's Trust. A nurse photocopies the agent's handwritten general assignment. Copies in hand, the agent and the attorney then proceed to serve any bank employee at each of the

three banks who is willing to date stamp the presented general assignment, including date and time of presentment. Rex dies from his surgery the following day. Does the Personal Representative of Rex's probate estate challenge the agent's handwritten general assignment that was executed the prior day? Is that general assignment valid and enforceable? Are Rex's bearer bonds part of his probate estate or held in his Trust?

Assignments: Some courts require that an assignment be supported by legal consideration. However, gratuitous assignments have been generally enforceable for centuries. More to the point, if an agent acting under a durable power of attorney assigns assets to the principal/settlor's Trust, the Trust's revocability means that the settlor merely became, via the general assignment, the property's equitable owner, as he/she had been its legal owner before. Restated, there is no re-ordering of economic interests and no gifting when the settlor's Trust is funded. As such, re-titling general assignments to a revocable Trust are common in modern estate plans, and they seem to be 'tolerated' by probate courts when the question arises if the settlor's Trust was fully funded prior to his/her death. See, *Estate of Willings*, 2023 WL 6994425, Oklahoma, 103.) However, when a general assignment used to transfer property to the settlor's revocable Trust, some questions can still arise. Examples follow-

- Adequate Identification: Sometimes the property-to-be-entrusted to the trustee is not adequately identified in the assignment. However, location can be used as an acceptable identifier of fungible cash for estate planning purposes. Arguably this same general 'reference to its location' rule should be an acceptable identifier for bearer bonds. A reference by Rex in his general assignment to 'all assets that I own and possess held in the safe deposit boxes located at Bank A, Bank B, and Bank C should be sufficient to transfer the contents of those three safe deposit boxes to Rex's Trust.
- Ascertainable: The property that is subject to the general assignment should be sufficiently ascertainable. Yet often the settlor's interest in bonds is fully vested and possessory. Or, as another example, in the *Willings* case

cited above, the possible right to a recovery incident to a pending wrongful death action was held to be presently assignable to the Trustee.

- Notice to Debtors: Many courts do not require advance notice to debtors, e.g., bond issuers; contract obligors. While it is desirable to provide notice to an issuing life insurance company of the transfer of an existing life insurance policy to the insured's Trust, in equity such a notice is not required for the asset's entrustment to the trustee to be enforceable. [See, *Loring and Rounds: A Trustee's Handbook, Section 2.1.1, (2024).*]
- Notice to Banks: Often a bank will not be given notice of the assignment to the settlor's Trust. The validity of the general assignment is not contingent upon notice to a mere custodian of assigned property.
- Missing Trustee: What if the trustee of Rex's Trust is unavailable to accept the assets transferred to the Trust under the agent's general assignment? In equity, a Trust must not fail for want of a Trustee. In the Rex example, had Rex's Trust instrument not provided for a successor trustee who was ready, willing, and able to accept the assignment, it would have fallen to the probate court to find someone who would be, but effective as of the date of the assignment.

Conclusion: As a practical matter, the Michigan Trust Code, based on the Uniform Trust Code, does not provide many answers about the transfer of assets to a Trust under a general assignment. It is the law of assignments, not the law of trusts, that govern the funding of a Trust and what constitutes legally enforceable actions that are taken to fund a Trust. Of course, it is much better to use actual transfer documents like deeds, bills of sale, reregistration of investment account ownership etc. to document the settlor's intent to transfer assets to his/her Trust. But for other assets, like cash, bearer bonds, etc., a general assignment can be a useful tool to document the settlor's intent, effective on the date of the signed assignment.