

## Ohio Legacy Trusts – Purpose, Structure and Implementation

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The Ohio Legacy Trust Act became law in Ohio on March 27, 2013. The Act created the legal framework for Ohio's version of the DAPT, or Domestic Asset Protection Trust. In Ohio, it is known as the Legacy Trust. This paper will briefly discuss the purpose of a Legacy Trust, the structure of the trust, and the process for implementation.

### Purpose

A primary purpose of a Legacy Trust is to provide a legitimate means of protecting a client's assets from unknown or future creditors. Under Ohio law, Legacy Trust assets will not be subject to a claim of a creditor unless the client's transfer of assets to the trust was made with the intent to defraud the creditor. Other trust purposes may include the protection of trust assets from creditors of the client's descendants and the implementation of a multi-generational estate plan.

The best way to think of the Legacy Trust is as a rainy day fund. As a beneficiary of the trust, the client is eligible to receive distributions from the trust, but the trust should not be viewed as a source of normal living expenses. In fact, it is prudent to reserve plenty of assets in the client's own name to fund lifestyle.

A Legacy Trust does not provide protection against creditors on certain family claims, such as child support, spousal support or property division at divorce. In the case of spousal support or property division, however, the trust does protect assets against the claims of a person whom the client marries after establishing and funding the trust.

### Trust Structure

Like all trusts, a Legacy Trust has a trustee and one or more beneficiaries and, like some trusts, the traditional duties of a trustee are divided among persons serving under various fiduciary offices.

The trustee must be an individual Ohio resident or a bank or trust company that is qualified to provide trust services in Ohio. The other possible fiduciary offices under the trust include a distribution advisor (who directs the trustee to make a distribution to a beneficiary), an investment advisor (who directs the investment of trust assets), and a trust protector (who may have various powers, such as the power to add or remove a beneficiary, terminate the trust, or move the trust to another jurisdiction, including offshore). The client may serve as an investment advisor only.

As a beneficiary of the trust, the client may enjoy one or more of the following interests:

1. The right to receive trust income. For example, the trust could provide that all income (interest, dividends, rents) is distributed to the client on a regular basis or that the client receives a fixed percentage of trust assets, valued as of the beginning of each year. A typical percentage would be four percent.
2. An interest in receiving trust income or principal pursuant to the discretion of the trustee or a distribution advisor.
3. The right to occupy real estate and use tangible personal property held as part of the trust assets, including use of real estate under the terms of a “qualified personal residence trust”.
4. The right to trust income or principal pursuant to the terms of a “charitable remainder annuity trust” or a “charitable remainder unitrust,” as defined in the Internal Revenue Code.
5. An annuity, unitrust or remainder interest under instruments known as grantor retained annuity trusts (GRATs), grantor retained unitrusts (GRUTs) and charitable lead trusts.
6. The right to distributions to pay taxes on income generated by the trust, or an interest in receiving such tax distributions in the discretion of the trustee.

The client may also reserve certain powers in the trust instrument:

- A. The power to veto a proposed distribution to any beneficiary.
- B. The power to appoint trust assets (*i.e.* direct that trust assets be distributed) to any person other than the client or the client’s creditors. Such a power may be exercised during life or in the client’s Will.
- C. The power to invade trust principal once per calendar year up to an amount equaling five percent of the value of the principal as of the time of exercise.
- D. The right to remove and replace a trustee or advisor, such as a distribution advisor, investment advisor or trust protector.
- E. The right to serve as investment advisor to the trustee.

The client may not retain the power to revoke the trust.

### Implementation

The steps to establishing a Legacy Trust are generally the following:

1. The client is vetted by the attorney as to pending claims, sources of wealth, current assets, current liabilities, possible contingent liabilities, the intentions of the client in establishing the trust, the risk exposure of the client, and other items.
2. The assets to be transferred are identified and valued.

3. The attorney prepares a solvency analysis of the client.
4. The trustee is identified.
5. Persons to serve in other fiduciary offices are identified (distribution advisor, *etc.*)
6. The client and attorney discuss the terms of the trust, and the attorney prepares the trust document.
7. The attorney prepares a confidential summary of the trust terms and a review of relevant risks going forward.
8. The client executes the trust instrument.
9. The client executes an Affidavit upon Disposition, known as a “qualified affidavit”. In this instrument, the client must aver that (i) the transferred property is not derived from unlawful activities; (ii) the client has full right and title to the property and the authority to transfer it; (iii) the transfer will not render the client insolvent; (iv) the client has no intention to defraud any creditor; (v) there are no pending or threatened court actions (unless disclosed); (vi) the client is not involved in any administrative proceedings (unless disclosed); and (vii) the client does not currently contemplate a bankruptcy filing.
10. The client executes an Affidavit of Intended Transfers to the Legacy Trust as a means of verifying the client’s continuing solvency.
11. Assets to be transferred are typically packaged into one or more limited liability companies formed under Ohio law.
12. The transfer of assets to the trust takes place.
13. A notice of the transfer is recorded in the county of the client’s Ohio residence or, if none, in the county of the trustee’s home office or principal place of business.