

PRESERVING

With Purpose

How an unconventional trust can protect your collection

By Jennifer B. Goode

The curation of a collection – be it art, wine, cars or otherwise – can elevate individual pieces by allowing the connection between them to tell a story or highlight a larger theme. For this reason, a collector may wish to keep a collection intact even after death. But what if a collector cannot easily identify an individual or institution willing to accept and maintain the collection in its entirety? Could a collector leverage an increasingly popular structure – the non-charitable purpose trust – to hold the property?

Before addressing the specifics of a non-charitable purpose trust, let's consider the limitations of traditional trust structures in this context. U.S. common law has historically recognized two types of trusts: private trusts that benefit one or more human beneficiaries and charitable trusts that further a charitable purpose for the public's benefit. But these common trust structures may prove too restrictive for preserving an entire collection.

For instance, under such trust agreements, the collector must name a specific beneficiary pool or public benefit. Yet this requirement may stymie a collector without obvious beneficiaries or interested parties. If the trust's beneficiary class is limited to the collector's descendants, what if none of them wishes to maintain the collection? Alternatively, if the collector cites a specific charitable purpose with a vision for the collection's ultimate use and display, what if the trustee is unable to find an institution that will honor the intent? In each case, the trust's terms may prohibit the collection's distribution to a recipient most suitable to the collector's goal.

In addition, fiduciary liability concerns may lead a trustee to shy away from actions needed to preserve and cultivate the collection. More specifically, a trustee under

both common and statutory law faces a duty to diversify trust assets, barring special circumstances or contrary trust provisions.¹ To protect the trustee from liability under this default standard, a collector may waive the duty to diversify and direct the collection's retention under the trust agreement. However, an authorization to retain an asset will not relieve the trustee of a duty to manage the trust assets in a prudent manner.² A trustee may also have a duty to act outside the trust's terms or seek court involvement in the presence of circumstances not anticipated by the trust's settlor.³ Thus, a trustee must regularly evaluate the impact of an asset's retention on the interests of identified beneficiaries, keeping in mind the risk of such parties coming to a different conclusion.⁴ Indeed, management of a collection may entail a heightened level of risk due to the potentially subjective nature of its value.

How can a non-charitable purpose trust solve for the above concerns?⁵ Much of this trust's promise lies in the absence of a specific or general beneficiary who may detract from the settlor's purpose. For example, as defined under Uniform Trust Code (UTC) Section 409, a non-charitable purpose trust need not have an ascertainable beneficiary or charitable purpose. While common law typically held such trusts invalid for a lack of enforceability by a beneficiary or a state actor,⁶ the UTC permits the appointment under the trust agreement – or, in the absence of such appointment, by a relevant court – of a “trust enforcer” tasked with oversight of the trust's administration. Notably, the trust enforcer's role is to further the trust's purpose as defined by the settlor, rather than to protect the interests of other parties.

1. Uniform Prudent Investor Act, Sections 1(b) and 3; Restatement (Third) of Trusts, Section 90(b).

2. Restatement (Third) of Trusts, Section 91, Comment f.

3. Restatement (Third) of Trusts, Section 91, Comment e.

4. For an in-depth discussion of whether the trustee's duty to administer a trust for the beneficiaries' benefit overrides investment direction by the trust's settlor, see John Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U.L. Rev. 375, 2010.

5. For an overview of the evolution of a non-charitable purpose trust, see Richard C. Ausness, *Non-Charitable Purpose Trusts: Past, Present, and Future*, Real Property, Trust and Estate Law Journal, Fall 2016.

6. Common and statutory law typically authorizes a state's attorney general or other state actor to enforce the purpose of a charitable trust.

7. Rev. Rul. 76-486; 1976-2 C.B. 192. Note, however, that it may be possible to generate a charitable income tax deduction under IRC Section 642(c).



Fr. 121 \$10 1901 Legal Tender
PCGS Choice About New 58PPQ
Sold for: \$5,280 | May 2024
Property from The Brighton Collection

1801 BD-2 Eagle
MS62 PCGS
Sold for: \$39,600 | February 2024
Property from The Brighton Collection

A collector interested in funding a non-charitable purpose trust with a collection should consider the following:

- **How long will it take to achieve the trust's purpose?** State statutes vary with respect to a non-charitable purpose trust's allowable term. The Uniform Trust Code limits any such trust to a 21-year term while other states permit a perpetual trust.
 - **Who should serve as trustee and trust enforcer?** Since there are no individual beneficiaries to oversee the trust's administration, the selection carries greater weight.
 - **What level of funds should the settlor contribute to maintain the collection?** A court may order that property exceeding the amount necessary for the trust's purpose be returned to a trust settlor. Or, if the settlor is not living, it may mandate a distribution to the settlor's successors-in-interest. Thus, overfunding the trust for its express purpose may lead a court to require a distribution of funds to unintended beneficiaries.
 - **Will the trust generate taxable income?** If so, a settlor should consider that a nongrantor trust without ascertainable beneficiaries cannot receive an income tax distribution deduction. In other words, the trust's income will face tax at the trust's compressed tax rates.⁷
- All in all, while distinct in structure, a non-charitable purpose trust may offer just the right level of flexibility to match the unique needs of today's collectors.



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