

## WHAT IS A TRUST?

*A trust is a mechanism used to transfer property. Bradley v. Shaffer, 535 S.W.3d 242, 247 (Tex. App.—Eastland 2017, no pet.); Hallmark v. Port/Cooper-T. Smith Stevedoring Co., 907 S.W.2d 586, 589 (Tex. App.—Corpus Christi 1995, no writ).*

A trust is a relationship, a specific type of private law contract relating to property. Trusts are governed according to the general law of contracts. The hierarchy of controlling law is the trust indenture, then the trust code and, if neither addresses the subject, the common law is controlling. The public policy parameters within which trusts must confine their operation are covered in Title 9 of the Texas Property Code.

### Separation of Legal and Equitable Title

In distinguishing trusts from other kinds of legal relationships there are two vital distinctions to be noted. The first is separation of legal and equitable title wherein a fiduciary (loyal and trustworthy) holds the bare legal title to property and the beneficiary (deserving of a windfall) holds the equitable title and right to enjoy the property. The beneficiary is considered the true property owner. For a trust relationship to exist the separation of legal and equitable title must be maintained, Texas Property Code § 112.034, because when legal and equitable titles are held by the same person merger occurs and either the trust collapses or no trust is created. When merger of legal and equitable titles occurs the property is

held by the beneficiary in their individual capacity and is not protected by the trust relationship.

### **Enforceable duties**

The second aspect of a valid trust is the Imposition of enforceable (fiduciary) duties on the holder of legal title. Precatory language is insufficient. The duties of the trustee must be legally enforceable by the beneficiary and not merely moral or ethical. The imposition of affirmative and enforceable duties is called “executing the uses”, which finds origin in King Henry’s Statute of Uses of 1535. *See Property Code § 112.032*. If the trustee has no enforceable affirmative obligations to perform for the benefit of the beneficiary, the trust becomes dry and both legal and equitable titles merge in the beneficiary as no trust relationship exists.

**SETTLOR/FOUNDER/GRANTOR A&B**

**TRUSTEE**

(Bare Legal Title)

**TRUSTEE**

“A”

“B”

**CONTRACT OF INDENTURE**

**TRUST CORPUS \$\$\$**

**Beneficiary “A”**

(Equitable Title)

**Beneficiary “B”**

**Successor Beneficiaries “C”**

Settlor’s A & B have created a trust. Settlor’s A & B are the original co-trustees and the original co-beneficiaries. Each is a trustee for the other. “A” is trustee for B’s share and “B” is trustee for A’s share. It is necessary to retain this relationship in order to maintain the separation of legal and equitable titles. Trustee “A” owes fiduciary duties to Beneficiary “B” and to B’s successor beneficiaries and Trustee “B” owes fiduciary duties to Beneficiary “A” and to A’s successor beneficiaries. The indenture defines the rights of the beneficiary and the obligations of the trustee as well as the managerial provisions.

## **THE INDENTURE**

The trust contract is referred to as an indenture because; in order to become a trustee, one must accept the obligations of a fiduciary (feoffee to offer) which in essence means to swear an oath of fealty to the grantor to faithfully serve the interests of his beneficiaries. The fiduciary, commonly referred to as the “Trustee”, holds a position of obligation whereas the beneficiary holds a position of right. The trustee holds bare legal title to the Corpus (property) of the trust for the sole purpose of performing the obligations entrusted for the sole benefit of the beneficiary.

Trusts can be formed as a revocable contract or an irrevocable contract and can begin as the former and end as the later, dependent upon some future occurrence. There is a great deal of flexibility in structuring a trust as long as the basic structure remains in place: (separation of legal and equitable title with active, affirmative obligations of the trustee, enforceable by the beneficiary.)

This is the framework in which I will explain the bait and switch rupture of the Brunsting Family Living Trust. According to the trust indenture either beneficiary (A or B) could execute a Qualified Beneficiary Designation (QBD) as to their share alone. After the passing of the 1<sup>st</sup> Settlor to die, the corpus was divided into two separate shares that we refer to for convenience, as the Survivors

Trust and the Decedents Trust. The trust indenture also provided the Surviving Settlor with a Testamentary Power of Appointment (TPA) over the assets in the Decedents Trust.<sup>1</sup>

### **The Brunsting Family Living Trust**

Pursuant to Article III changes to the original trust indenture could only be made with the (1), the signature of both settlors or, (2) the approval of a court of competent jurisdiction but would become irrevocable at the passing of the 1st settlor to die.

According to the Defendants, after the incapacity and death of Settlor “A” the remaining settlor continued to serve alone. They also argue that Trustee “B” exercised both powers together in one instrument called “*Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement*”. This instrument faces insurmountable obstacles beyond forgery, the combining of incompatible powers without distinction or the fact that it fails to contain the signatures of two disinterested witnesses as required of a testamentary instrument. Most importantly it fails to recognize the vacancy in the office of trustee for beneficiary “B” and, that the plenary exercise of either power by the

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<sup>1</sup> I dispute the existence of this power both in substance and in its very appearance in the trust. The Testamentary Power of Appointment provision was inserted into the indenture using the sleight of hand the trust was designed to facilitate. Page 9-2 was removed and replaced with pages 9-2 and 9-3. The preceding page remained 9-1 and the following page remained 10-1.

remaining Settlor alone would result in the merger of legal and equitable titles thus extinguishing the trust. Settlor “B” had no power to extinguish the trust.

Once Settlor “A” was incapacitated the office of Trustee for Beneficiary “B” was vacant, the exercise of any alleged power to alter the trust held by remaining Settlor/Trustee/Beneficiary “B”, would require a court of competent jurisdiction to stand in for Trustee “A” in order to validate and approve the proposed changes. None of the instruments dated after Elmer’s incapacity (June 9, 2008) were signed by Elmer; none of the instruments dated after Elmer’s incapacity were approved by a court of competent jurisdiction and thus, none of the instruments dated after Elmer’s incapacity can be considered valid as affecting any part of the trust beginning with changing successor trustees!

It’s that simple!