## 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. Trusts originated in the 15th century as a means of avoiding the brutal death taxes and the one who held property in trust for another (trustee) swore an oath of fealty (undivided loyalty) to the Lord of the manor, that entrusted the estate for the benefit of his heirs while avoiding the ecclesiastical courts and the double taxes to both church and state.

This was the feudal system. For a man to become a squire he would swear an oath to serve a Knight. To become a Knight a squire would have to swear an oath of fealty to the Lord of the Manor, which meant undivided loyalty even unto death. 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.