

TRUSTS: WHAT, WHO AND WHY



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What is a “trust”?

- A “trust” is not a legal entity. It is where legal title to property is held by one party, the “Trustee(s)”, for the benefit of others, the “beneficiaries”. Typically the trusts that we deal with are evidenced by written instruments, but in some cases if the intent to create a trust relationship is expressed in an instrument, it may be sufficient to create a trust with a trustee and beneficiaries.
- The legal entity that is in title is the Trustee. That is the party that should be the grantee in deeds, the grantor in deeds, and the party to any suit involving the assets.

Defining the Terms

- **Trustee:** the party with legal title to the trust assets and the party that buys, sells and borrows on behalf of the trust.
- **Trustor or settlor:** the party that creates the trust. In some forms of trusts, the trustor/settlor may also be the initial trustee.
- **Beneficiary:** the party or party that “benefits” from the trust. The trust income may be used to benefit the beneficiaries and there may be an ability to use the “corpus” (body of assets) of the trust property for the benefit of the beneficiaries.
- **Revocable:** A trust that the trustor or settlor can revoke. Many trusts that involve two trustors become “irrevocable” on the death of the first of the trustors to die. In many cases the power to revoke the trust will also include the ability to amend the trust.
- **Irrevocable:** A trust that cannot be revoked and generally cannot be amended.

The Authority

- Prior to 1943, the trustee of a trust created in Texas had only the powers that were included in the trust instrument. But with the passage of Texas Trust Act (codified in Chapters 101 to 117 of the Texas Property Code), all trustees have the powers that are in the Texas Trust Act, unless they are limited or excluded by the instrument creating the trust.

The Authority

- Sec. 112.001. METHODS OF CREATING TRUST.
- A trust may be created by:
 - (1) a property owner's declaration that the owner holds the property as trustee for another person;
 - (2) a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person;
 - (3) a property owner's testamentary transfer to another person as trustee for a third person;
 - (4) an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person;
or
 - (5) a promise to another person whose rights under the promise are to be held in trust for a third person.

The Authority

- Sec. 112.002. INTENTION TO CREATE TRUST.
- A trust is created only if the settlor manifests an intention to create a trust.
- Sec. 112.003. CONSIDERATION.
- Consideration is not required for the creation of a trust. A promise to create a trust in the future is enforceable only if the requirements for an enforceable contract are present.
- Sec. 112.004. STATUTE OF FRAUDS.
- A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent.

The Authority

- Sec. 112.036. RULE AGAINST PERPETUITIES.
- The rule against perpetuities applies to trusts other than charitable trusts. Accordingly, an interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation. Any interest in a trust may, however, be reformed or construed to the extent and as provided by Section 5.043.

The Authority

- Sec. 112.051. REVOCATION, MODIFICATION, OR AMENDMENT BY SETTLOR.
- (a) A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.
- (b) The settlor may modify or amend a trust that is revocable, but the settlor may not enlarge the duties of the trustee without the trustee's express consent.
- (c) If the trust was created by a written instrument, a revocation, modification, or amendment of the trust must be in writing.

The Authority

- Sec. 113.001. LIMITATION OF POWERS.
- A power given to a trustee by this subchapter does not apply to a trust to the extent that the instrument creating the trust, a subsequent court order, or another provision of this subtitle conflicts with or limits the power.
- Sec. 113.002. GENERAL POWERS.
- Except as provided by Section 113.001, a trustee may exercise any powers in addition to the powers authorized by this subchapter that are necessary or appropriate to carry out the purposes of the trust.

The Authority

- Sec. 113.009. REAL PROPERTY MANAGEMENT.
- A trustee may:
 - (1) exchange, subdivide, develop, improve, or partition real property;
 - (2) make or vacate public plats;
 - (3) adjust boundaries;
 - (4) adjust differences in valuation by giving or receiving value;
 - (5) dedicate real property to public use or, if the trustee considers it in the best interest of the trust, dedicate easements to public use without consideration;

The Authority

- Sec. 113.009. REAL PROPERTY MANAGEMENT.
- (6) raze existing walls or buildings;
- (7) erect new party walls or buildings alone or jointly with an owner of adjacent property;
- (8) make repairs; and
- (9) make extraordinary alterations or additions in structures as necessary to make property more productive

The Authority

- Sec. 113.010. SALE OF PROPERTY.
- A trustee may contract to sell, sell and convey, or grant an option to sell real or personal property at public auction or private sale for cash or for credit or for part cash and part credit, with or without security.
- Sec. 113.011. LEASES.
- (a) A trustee may grant or take a lease of real or personal property for any term, with or without options to purchase and with or without covenants relating to erection of buildings or renewals, including the lease of a right or privilege above or below the surface of real property.
- (b) A trustee may execute a lease containing terms or options that extend beyond the duration of the trust.

The Authority

- Sec. 113.053. PURCHASE OR SALE OF TRUST PROPERTY BY TRUSTEE.
- (a) Except as provided by Subsections (b), (c), (d), (e), (f), and (g), a trustee shall not directly or indirectly buy or sell trust property from or to:
 - (1) the trustee or an affiliate;
 - (2) a director, officer, or employee of the trustee or an affiliate;
 - (3) a relative of the trustee; or
 - (4) the trustee's employer, partner, or other business associate.
- The cited exceptions are rarely relevant in examining title, but the trust may include clauses that specifically allow for transactions prohibited under this statute, including self dealing by the trustee and dealing with beneficiaries related to the trustee.

The Authority

- Sec. 113.083. APPOINTMENT OF SUCCESSOR TRUSTEE.
- (a) On the death, resignation, incapacity, or removal of a sole or surviving trustee, a successor trustee shall be selected according to the method, if any, prescribed in the trust instrument. If for any reason a successor is not selected under the terms of the trust instrument, a court may and on petition of any interested person shall appoint a successor in whom the trust shall vest.
- (b) If a vacancy occurs in the number of trustees originally appointed under a valid charitable trust agreement and the trust agreement does not provide for filling the vacancy, the remaining trustees may fill the vacancy by majority vote.

The Authority

- Sec. 113.085. EXERCISE OF POWERS BY MULTIPLE TRUSTEES.
- (a) Cotrustees may act by majority decision.
- (b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.
- (c) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee:
 - (1) is unavailable to perform the function because of absence, illness, suspension under this code or other law, disqualification, if any, under this code, disqualification under other law, or other temporary incapacity; or

The Authority

- Sec. 113.085. EXERCISE OF POWERS BY MULTIPLE TRUSTEES.
- (2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has
- communicated the delegation to all other cotrustees, and has filed the delegation in the records of the trust.
- (d) If a cotrustee is unavailable to participate in the performance of a trustee's function for a reason described by Subsection (c)(1) and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

The Authority

- Sec. 113.085. EXERCISE OF POWERS BY MULTIPLE TRUSTEES.
- (e) A trustee may delegate to a cotrustee the performance of a trustee's function unless the settlor specifically directs that the function be performed jointly. Unless a cotrustee's delegation under this subsection is irrevocable, the cotrustee making the delegation may revoke the delegation.

The Authority

- Sec. 114.081. PROTECTION OF PERSON DEALING WITH TRUSTEE.
- (a) A person who deals with a trustee in good faith and for fair value actually received by the trust is not liable to the trustee or the beneficiaries of the trust if the trustee has exceeded the trustee's authority in dealing with the person.
- (b) A person other than a beneficiary is not required to inquire into the extent of the trustee's powers or the propriety of the exercise of those powers if the person:
 - (1) deals with the trustee in good faith; and
 - (2) obtains:
 - (A) a certification of trust described by Section 114.086; or
 - (B) a copy of the trust instrument....

The Authority

- Sec. 114.086. CERTIFICATION OF TRUST.
- (a) As an alternative to providing a copy of the trust instrument to a person other than a beneficiary, the trustee may provide to the person a certification of trust containing the following information:
 - (1) a statement that the trust exists and the date the trust instrument was executed;
 - (2) the identity of the settlor;
 - (3) the identity and mailing address of the currently acting trustee;
 - (4) one or more powers of the trustee or a statement that the trust powers include at least all the powers granted a trustee by Subchapter A, Chapter 113;
 - (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

The Authority

- Sec. 114.086. CERTIFICATION OF TRUST.
- (6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all of the cotrustees are required in order to exercise powers of the trustee; and
- (7) the manner in which title to trust property should be taken.
- (b) A certification of trust may be signed or otherwise authenticated by any trustee.
- (c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification to be incorrect.
- (d) A certification of trust:
 - (1) is not required to contain the dispositive terms of a trust; and
 - (2) may contain information in addition to the information required by Subsection (a).

The Authority

- Sec. 114.086. CERTIFICATION OF TRUST.
- (e) A recipient of a certification of trust may require the trustee to furnish copies of the excerpts from the original trust instrument and later amendments to the trust instrument that designate the trustee and confer on the trustee the power to act in the pending transaction.
- (f) A person who acts in reliance on a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for the action and may assume without inquiry the existence of the facts contained in the certification....

Common Forms of Trust: Blind Trusts

The “blind” trust is a form of trust where property is conveyed to a individual as trustee, but the name of the trust and who the beneficiaries are doesn't appear, as in “Jane Doe, Trustee.”

Sec. 101.001. CONVEYANCE BY PERSON DESIGNATED AS TRUSTEE.

If property is conveyed or transferred to a person designated as a trustee but the conveyance or transfer does not identify a trust or disclose the name of any beneficiary, the person designated as trustee may convey, transfer, or encumber the title of the property without subsequent question by a person who claims to be a beneficiary under a trust or who claims by, through, or under any undisclosed beneficiary or by, through, or under the person designated as trustee in that person's individual capacity.

Common Forms of Trust: Blind Trusts

If the trustee of the blind trust dies while in title, with no evidence of who the beneficiaries are or that the trust actually exists, the successors of the trustee are presumed to be in title. *Jordan v. Exxon Corp*, 802 S.W.2d 880 (Tex. App.-Texarkana 1991, no writ).

Common Forms of Trust: Mom and Pop

The “mom and pop” trust is generally an intervivos revocable trust done by a married couple. It is frequently part of a binder of materials delivered to the trustors by the party that produced the trust. Other typical components of the binder are a trust certificate, an explanation of the trust, wills (which typically leave everything to the trust) and sometimes powers of attorney.

Most common Mom and Pop trust issues:

- Can't find a copy of the trust-find it or go to court
- The deed is to the trust and not the trustees-fix if possible
- The deed is a quitclaim-fix if possible
- There is no conveyance to the trust-heirship or probate

Common Forms of Trust: Mom and Pop

A mom and pop trust can have a homestead designation.

- Sec. 41.0021. HOMESTEAD IN QUALIFYING TRUST.
- (a) In this section, "qualifying trust" means an express trust:
 - (1) in which the instrument or court order creating the express trust provides that a settlor or beneficiary of the trust has the right to:
 - (A) revoke the trust without the consent of another person;
 - (B) exercise an inter vivos general power of appointment over the property that qualifies for the homestead exemption; or
 - (C) use and occupy the residential property as the settlor's or beneficiary's principal residence at no cost to the settlor or beneficiary, other than payment of taxes and other costs and expenses specified in the instrument or court order:

Common Forms of Trust: Mom and Pop

Sec. 41.0021. HOMESTEAD IN QUALIFYING TRUST.

- (i) for the life of the settlor or beneficiary;
- (ii) for the shorter of the life of the settlor or beneficiary or a term of years specified in the instrument or court order; or
- (iii) until the date the trust is revoked or terminated by an instrument or court order recorded in the real property records of the county in which the property is located and that describes the property with sufficient certainty to identify the property; and
- (2) the trustee of which acquires the property in an instrument of title or under a court order that:
 - (A) describes the property with sufficient certainty to identify the property and the interest acquired; and
 - (B) is recorded in the real property records of the county in which the property is located....

Common Forms of Trust: Mom and Pop

Sec. 41.0021. HOMESTEAD IN QUALIFYING TRUST.

- (b) Property that a settlor or beneficiary occupies and uses in a manner described by this subchapter and in which the settlor or beneficiary owns a beneficial interest through a qualifying trust is considered the homestead of the settlor or beneficiary under Section 50, Article XVI, Texas Constitution, and Section 41.001.
- (c) A married person who transfers property to the trustee of a qualifying trust must comply with the requirements relating to the joinder of the person's spouse as provided by Chapter 5, Family Code.
- (d) A trustee may sell, convey, or encumber property transferred as described by Subsection (c) without the joinder of either spouse unless expressly prohibited by the instrument or court order creating the trust....

Common Forms of Trust: Testamentary

A testamentary trust is created in the will of a decedent. It can be done because of minor devisees or in order to minimize estate tax liability.

There is no need for a Certification of Trust or copy of the trust because it is typically contained in the will. If the will is not probated in your county, then you may need to obtain a copy to know the terms of the trust. But the will must have been admitted to probate for the trust to exist.

Common Forms of Trust: Charitable

A charitable trust is created for the benefit of the general public or the benefit of a specific group.

Such trust are not subject to the Rule against Perpetuities in found in Section 112.036 of the Texas Property Code.

Charitable trusts rarely deal in real estate, so encountering them while examining title is unusual.

Common Forms of Trust: Management

Management trusts are created under Chapter 1301 of the Texas Estates Code. They are court created trusts for the benefit of incapacitated persons or persons that are physically disabled. They serve as an alternative to a court administered guardianship.

For incapacitated persons the trustee must be a financial institution. For physically disabled persons the trustee can be a private professional guardian, a nonprofit corporation or a guardianship program. Expect to see more of these since they remove the administrative complexities of a formal guardianship.

Trusts: Food for Thought

A deed of trust is a conveyance to a trustee for the benefit of a lender. In this form of trust, the trustee's responsibilities are extremely limited, invoked after a default in the terms of the trust document.

This is why in many states instead of the release that is used in Texas there is a "reconveyance" from the trustee to the grantors of the deed of trust.

The End!

Please call and/or email us if you ever have any questions. We would love to help!