Title

The trust being a creature of equity, the Uniform Trust Code rightly defers in spirit to the maxim "Equity looks to the intent rather than to the form"

Text

The UTC does not presume to define a trust, the trust being a creature of the judiciary (equity), not the legislature (statute). Thus, the UTC is merely an aggregation of tweaks to the corner of equity doctrine that governs the trust relationship. The maxim "Equity looks to the intent rather than to the form" is woven throughout the fabric of trust jurisprudence, which is first and foremost principles based. Settlor intent is the "lodestar" the must guide a court when sorting out the duties and rights of the parties to a trust relationship. In fact, it must guide the court in determining whether the relationship itself is one of trust, not one of, say, contract or agency. Perhaps there is no "relationship." The transferee may have taken the property free of trust, either as donee of an inter vivos gift or as a devisee. It is all about what the transferor had intended. Thus, even oral trusts of personal property are enforced. The UTC in no way tampers with the maxim. The maxim governed before the UTC's enactment. It has governed since its enactment.

Take the issue of whether an amendment to a revocable inter vivos trust is effective. Assume settlor is murdered as he was about to sign an instrument of amendment. Has the trust been amended? One first consults the maxim. Intent trumps form. The maxim supports its validity. One then consults the UTC to see if it in any way has messed with the maxim. Section 602(c) provides that the settlor may revoke or amend a revocable trust: (1) by substantial compliance with a method provided in the terms of the trust; or (2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by: (A) a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or (B) any other method manifesting clear and convincing evidence of the settlor's intent." In other words, intent shall prevail over form. The UTC may have enveloped the maxim in a statutory fog when it comes to instruments of amendment, but it has not messed with it substantively. UTC §602(c) and the maxim co-exist.

In *In re the Omega Trust*, 281 A.3d 1281 (N.H. 2022), the Sup. Ct. of N. H. wrestled with the issue of whether a rev. i.v. trust had been amended via a series of emails from the settlor to his lawyer requesting that an instrument of amendment be prepared, the settlor having died before a formal amendment could be signed. Rather than apply the maxim, the court spilled much ink parsing New Hampshire's version of UTC §602(c). Though the maxim was never mentioned, the holding was as if the maxim had been applied: "We conclude that the method at issue here—an expression of intent to amend by email—is capable of manifesting, by clear and convincing evidence, the settlor's intent…Because the settlor's intent 'is a question of fact to be determined by competent evidence and not by rules of law,'…we leave the question of the settlor's intent to the trial court to determine in the first instance."

Note 1: The statute of frauds applicable to trusts of land is a minor exception to the intent-over-form equity maxim. The statute is discussed in §8.15.5 of *Loring and Rounds: A Trustee's Handbook* (2023). The section is reproduced in the appendix below. The Handbook is available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-trustees-hanbook-2023e/01t4R00000Ojr97.
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Note 2: A will, unlike a trust, is a creature of statute. Thus, it is up to the legislature whether a testator need only have substantially complied with statutory will-execution formalities, i.e., whether the intent-over-form equity maxim shall also govern the execution of wills and codicils.

Appendix

§8.15.5 *Statute of Frauds* [from *Loring and Rounds: A Trustee's Handbook* (2023), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-trustees-hanbook-2023e/01t4R00000Ojr97].

Creation of the trust. To this day, oral trusts of personal property are generally enforceable.[131] In England before 1676, a trust of real or personal property, with some exceptions, was "averable," *i.e.*, it could be declared by word of mouth.[132] In that year, however, Parliament enacted a statute commonly known as the statute of frauds.[133] Section 7 provided that "all declarations or creations of trusts or confidences of any *lands*, tenements, or hereditaments shall be manifested and proved by some *writing* signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."[134]

The statute did not require that a trust of land be created by a written instrument, merely that it be proved by one.[135] Thus, a writing—perhaps even an oral admission in open court or a revoked will—whose purpose is to assert the unenforceability of an oral trust of land may itself constitute a writing that satisfies the statute's requirements, provided it contains a direct or indirect acknowledgment or admission of the trust's existence.[136] Moreover, if lost or destroyed, the writing itself may be proved by parol (oral) evidence.[137]

Either by case law or by statute, some form of §7 has found its way into the law of most U.S. jurisdictions.[138] As a general rule, then, with the exception of the resulting trust[139] and the constructive

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[131]*See, e.g.*, *In re* Est. of Fournier, 902 A.2d 852 (Me. 2006). *See also* Wolff v. Calla, 288 F. Supp. 891, 893 (E.D. Pa. 1968) ("A trust in personal property may be established by parol evidence ….[W]hile no particular form of words or conduct is necessary for the creation of a trust, language or conduct and a manifestation of an intention to create the same must be proven by evidence which is sufficiently clear, precise and unambiguous …."); Snuggs v. Snuggs, 571 S.E.2d 800 (Ga. 2002) (involving an oral trust of personal property established by a grandfather to fund the advanced educations of his four grandchildren).

[132]1 Scott & Ascher §6.1.

[133]Stat. 29 Chas. II, c.3 (1676).

[134]1 Scott on Trusts §40 at 413, 414. "The Statute of Frauds required not only that the declaration or creation of a trust of land be manifested and proven by a writing, but also that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect." 3 Scott & Ascher §14.7 (referring to Stat. 29 Car. II, c. 3).

[135]1 Scott & Ascher §6.3.2.

[136]1 Scott & Ascher §6.6.

[137]1 Scott & Ascher §6.8.

[138]1 Scott & Ascher §6.2.1; 1 Scott on Trusts §§40, 40.1; Restatement (Second) of Trusts §40. *See also* UTC §407 cmt. "The term 'statute of frauds' is used in … [the Restatement (Third) of Trusts]… to refer to all of these rules requiring that inter vivos trusts be created or proved in writing, including those rules that are based on judicial decisions finding the requirement in the common law, and those rules that apply to some or all inter vivos trusts of personal property." Restatement (Third) of Trusts §22 cmt. a.

[139]Restatement (Second) of Trusts §40 cmt. d; 1 Scott & Ascher §6.12 (a written conveyance of land "in trust" that does not specify the trust beneficiaries or its purposes will trigger a resulting trust in favor of the transferor notwithstanding the Statute of Frauds). *See generally* §§3.3 of this handbook (the

trust,[140] a trust concerning an interest in land requires a writing if it is to be enforceable.[141] The writing must show with reasonable definiteness the trust property.[142] It also must show the trust beneficiaries and the extent of their interests or the purposes of the trust.[143] While a resulting trust of land may be exempt from the writing requirements of the statute of frauds, an oral *assignment* of the nonpossessory equitable reversionary interest to the trustee most likely would not be.[144] "Just as parol evidence is ordinarily inadmissible to rebut a resulting trust, such evidence should also ordinarily be inadmissible to extinguish a resulting trust."[145]

The writing may consist of several writings[146] and, again, need not be intended as the expression of a trust.[147] Take, for example, a prospective settlor who writes and signs a letter explaining that he or she intends at some time *in the future* to impress a trust by oral declaration on a certain parcel of land. The letter sets forth what the terms of the trust will be. If at some time in the future the trust is declared, the letter will satisfy the writing requirement of the statute of frauds.[148] Also, a corroborating letter written *after* an oral trust of land has been declared will satisfy the writing requirement.[149]

In the case of nondeclarations of trust, the statute of frauds does not require that delivery of the deed or conveyance of the real property to the trustee and the creation of the trust occur simultaneously so long as ultimately there is documentation connecting the property to the trust.[150] For declarations of trust, the writing must be signed by the declarant, *i.e.*, the settlor/trustee.[151] While perhaps desirable, "there is no requirement that the settlor/trustee execute a separate writing conveying the property to the trust."[152] For inter vivos transfers in trust from *A* to *B*, either *A* (the settlor)[153] or *B* (the trustee)[154] must sign.[155]

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purchase money resulting trust) and 4.1.1.1 of this handbook (the resulting trust); 6 Scott & Ascher §§40.1 (When a Resulting Trust Arises), 40.2 (The Statute of Frauds and the Resulting *Use*), 40.3 (the Statute of Frauds and the Resulting Trust), 43.1 (The Purchase Money Resulting Trust).

[140]Restatement (Second) of Trusts §40 cmt. d. *See generally* §3.3 of this handbook (covering constructive trust doctrine generally). *See, e.g.*, Turley v. Ethington, 146 P.3d 1282 (Ariz. Ct. App. 2006) ("The statute of frauds would not bar imposition of a constructive trust.").

[141]*See generally* 6 Scott & Ascher §43.1 (The Purchase Money Resulting Trust).

[142]1 Scott & Ascher §6.5.

[143]1 Scott & Ascher §6.5.

[144]*See generally* 6 Scott & Ascher §§41.2 (Rebutting the Resulting Trust), 41.20 (Failure of Express Trust), 42.10 (Trust Fully Performed without Exhausting the Trust Estate).

[145]6 Scott & Ascher §41.20 (Parol Extinguishment). "A different result has been reached, however, when the resulting trust arose wholly by parol, as in the case in which one person paid the purchase price for a conveyance of land to another." 6 Scott & Ascher §41.20 (Parol Extinguishment). *See generally* §3.3 of this handbook (the purchase money resulting trust).

[146]1 Scott & Ascher §6.7.

[147]Restatement (Third) of Trusts §22(2).

[148]1 Scott & Ascher §6.3.1. *See, e.g.*, Orud v. Groth, 708 N.W.2d 72 (Iowa 2006).

[149]1 Scott & Ascher §6.3.2.

[150]*See, e.g.*, Tretola v. Tretola, 61 Mass. App. Ct. 518 (2004) (holding that statute of frauds not violated though trust may not have come into existence until after the real estate had been transferred to the trustee).

[151]Restatement (Third) of Trusts §23(1).

[152]Heggstad v. Heggstad (*In re* Est. of Heggstad), 16 Cal. App. 4th 943, 948 (1993).

[153]1 Scott & Ascher §6.4.1 (noting, however, that a writing signed by the settlor after the transfer would not satisfy the statute of frauds as the settlor would not then have been in a position to declare a trust).

[154]1 Scott & Ascher §§6.4.2 (Trustee Signs Prior to or at the Time of Transfer), 6.4.3 (Trustee Signs after Transfer).

[155]Restatement (Third) of Trusts §23(2).

For purposes of the statute, "interests in land" would include leaseholds and condominiums but would not include mortgage notes and stock in cooperative apartments.[156] On the other hand, if the inception assets of an oral trust are personal property, the trustee may subsequently convert them to real property without running afoul of the statute of frauds.[157] The trust would still be enforceable.

If a trustee in reliance upon the statute of frauds refuses to perform an oral trust of land, a constructive trust may arise in favor *of the settlor*, a topic we take up in §3.3 of this handbook.[158] The Restatement (Third) of Restitution and Unjust Enrichment suggests that alternatively a constructive trust could arise in favor not of the settlor but *of the designated beneficiaries of the oral trust*. Unjust enrichment principles ought to extend to intended third-party beneficiaries of unenforceable promises is the thinking.[159] Also, courts have enforced oral trusts of land when there has been part performance.[160] A trustee who elects to perform an oral trust of land may do so over the objections of his personal creditors, but not his trustee in bankruptcy.[161]

Also in §3.3 of this handbook we discuss the purchase money resulting trust, an express trust/resulting trust hybrid which, like the constructive trust, is exempt from the statute of frauds writing requirement, even when land is involved.[162] "Six years after enactment of the Statute of Frauds, it was decided that 'When a man buys Land in another name, and pays Mony, it will be a Trust for him that pays the Mony, tho' no Deed declaring the Trust; for the Statute of 29 Car. 2, called Statute of Frauds, doth not extend to Trusts, raised by Operation of the Law.'"[163] So too a purchase money resulting trust of land may be *rebutted* by parol evidence that a gift to the grantee was actually intended.[164] Or if a gift to the grantee was not intended *at the time of purchase*, the weight of authority is that the payor subsequently may orally surrender his or her equitable interest in the land in favor of the grantee, *i.e.*, in favor of the trustee of the purchase money resulting trust.[165] An oral assignment of the beneficial interest *to a third person*, however, would be invalid under the statute of frauds.[166]

The ERISA statute of frauds is all-inclusive: Section 402(a)(1) of ERISA requires that "every employee benefit plan shall be maintained pursuant to a written instrument."[167] On the other hand, under the UTC, the creation of an oral trust even of land can be established by clear and convincing evidence.[168]

Still, unless an interest in land is involved, an inter vivos trust can arise orally: "Except as required by a statute of frauds, a writing is not necessary to create an enforceable inter vivos trust, whether by declaration, by transfer to another as trustee, or by contract."[169] Some jurisdictions, however, most notably

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[156]Restatement (Third) of Trusts §22 cmt. b; 1 Scott & Ascher §6.2.2.

[157]1 Scott & Ascher §6.15.1.

[158]1 Scott & Ascher §6.9.

[159]Restatement (Third) of Restitution and Unjust Enrichment §31 cmt. g.

[160]1 Scott & Ascher §6.13.

[161]1 Scott & Ascher §6.14. *See generally* §7.4 of this handbook (trustee's discharge in bankruptcy).

[162]*Cf.* 6 Scott & Ascher §43.2.2 (Unenforceable Express Agreement by Grantee to Hold in Trust).

[163]6 Scott & Ascher §43.1.1 (quoting Anonymous, 2 Vent. 361 (1683)).

[164]6 Scott & Ascher §43.2. "In contrast, a resulting trust that arises because of the failure of an express trust declared in a will or other written instrument ordinarily cannot be rebutted by the settlor's oral statements." 6 Scott & Ascher §43.2. *See generally* §3.3 of this handbook (the purchase money resulting trust).

[165]*See generally* 6 Scott & Ascher §43.14 (Parol Extinguishment).

[166]*See generally* 6 Scott & Ascher §43.14 (Parol Extinguishment).

[167]*See* Frahm v. Equitable Life Assurance Soc'y, 137 F.3d 955, 958 (7th Cir. 1998) (suggesting that §402(a)(1) of ERISA is "a long way toward a statute of frauds").

[168]UTC §407.

[169]Restatement (Third) of Trusts §20.

Florida,[170] now have statutes requiring that certain inter vivos trust instruments be executed with testamentary formalities, even when the subject matter is personal property.[171] It remains to be seen what effect such statutes will have on the enforceability of informal trusts, particularly in cases where the manifestation of intention to impose equitable duties is merely the conduct of the parties.[172] If such trusts have been rendered unenforceable by this legislation, then we await to see how the courts will deal with the inevitable unjust enrichment issues.

Transfer of equitable interest. As noted above, the original Statute of Frauds enacted by Parliament in 1676 required that the creation of an express trust of land by declaration or otherwise must be manifested and proven by a writing to be effective. The statute, in addition, however, provided that the transfer of an equitable or beneficial interest in a trust of land also would no longer be effective without a writing.[173] In a number of, but not all, states (U.S.), the statute of frauds likewise also covers *transfers of equitable interests* under trusts,[174] including most likely equitable reversionary interests.[175] "In some states a writing is required for a transfer of the beneficiary's interest in a trust of land only; in some a writing is required for the transfer of a beneficial interest in any trust."[176] In either case, there is no dispute that it is the assigning beneficiary who must sign the writing: "We have seen that difficult questions may arise as to who is the proper party to sign the writing that evidences the creation of a trust. No similar difficulty arises in the case of the assignment of a beneficial interest. It is the beneficiary who makes the assignment, and that beneficiary alone, who may sign the memorandum, whether at the time of the assignment or thereafter. Whether the beneficiary's agent may sign depends on both the language of the statute and the scope of the agent's authority."[177]

[170]Fla. Stat. Ann. §737.111.
[171]1 Scott & Ascher §6.15.
[172]*See generally* 1 Scott & Ascher §4.1.
[173]3 Scott & Ascher §14.7.
[174]3 Scott & Ascher §14.7, n.6 & n.7.
[175]*See generally* 6 Scott & Ascher §41.20.
[176]Restatement (Third) of Trusts §53 cmt. a.
[177]3 Scott & Ascher §14.7.