

Title

Trustees and the privilege against self-incrimination

Text

A trust is not a juristic person. Rather it is a fiduciary relationship with respect to property, title to which is in the trustee. That having been said, the federal courts will generally deem even a “common law” trust a “collective entity” when adjudicating availability of the Fifth Amendment privilege against self-incrimination. Thus, a trustee may not, at least via assertion of the privilege, avoid having to comply with a governmental request for trust-related documentation, the privilege protecting only natural persons. *See* U.S. v. Fridman, 974 F.3d 163 (2d Cir. 2020). This is not the only situation in which a trust is deemed an entity. See generally §8.15.77 of *Loring and Rounds: A Trustee’s Handbook*, which section is reproduced in its entirety in the appendix immediately below.

Appendix

§8.15.77 *The Trust Entity Doctrine* [from *Loring and Rounds: A Trustee’s Handbook* (2021)].

*The whole bundle of property, persons, rights, and duties makes up the trust.*¹²⁸⁸

The trust is being deemed an entity for certain purposes. Under classic principles of trust law, a trust is a fiduciary relationship with respect to property, not a juristic person.¹²⁸⁹ As to the world, the trustee is the legal owner of the property.¹²⁹⁰ The beneficiaries, however, have equitable property rights incident to the relationship. In other words, trusts are not corporate-like entities.¹²⁹¹ Having said that, for some purposes legislatures and courts are treating trusts as if they were.¹ “Under the ‘trust entity’ theory ... [, for example,]... a testamentary trust is established and remains at the testator's domicile, thereby giving the domiciliary court in rem jurisdiction independent and apart from the presence of the trustee, the trust assets or the trust

¹²⁸⁸Bogert §1, n.29.

¹²⁸⁹*See* Portico Mgmt. Grp., LLC v. Harrison, 202 Cal. App. 4th 464 (2011); Jimenez v. Corr, 764 S.E.2d 115 (Va. 2014) (“In contrast, an inter vivos trust is inseparable from the parties related to it, and the trust does not have a separate legal status.”).

¹²⁹⁰*See* Portico Mgmt. Grp., LLC v. Harrison, 202 Cal. App. 4th 464 (2011).

¹²⁹¹*See* Portico Mgmt. Grp., LLC v. Harrison, 202 Cal. App. 4th 464 (2011).

¹ *See, e.g.,* National Collegiate Student Loan Trust 2007-3 v. Clayborn, 850 S.E.2d 787 (Ga. 2020).

beneficiaries.”¹²⁹² The Model Protection of Charitable Assets Act (2011) deems a trust to be a person for its purposes.¹²⁹³ For years the tax laws have deemed certain trusts to be entities for purposes of the income tax, a topic we take up in Chapter 10 of this handbook. In §7.3.1 of this handbook, we consider the trust entity doctrine in the context of contracts between the trustee and third parties. The trust entity doctrine in the context of the trustee's liability in tort to third parties is considered in §7.3.3 of this handbook. A trust created under the Uniform Statutory Trust Entity Act is intended to be a juridical entity, “separate from its trustees and beneficial owners, that has the capacity to sue and be sued, own property, and transact in its own name.”¹²⁹⁴ In some jurisdictions, a formal conveyance to, or registration in the name of, “the trust” rather than the trustee will nonetheless have the effect of lodging legal title to the subject property in the trustee. See generally §2.1.1 of this handbook. The federal courts will generally deem even a “common law” trust a “collective entity” when adjudicating availability of the Fifth Amendment privilege against self-incrimination. A trustee, for example, may not, at least via assertion of the privilege, avoid having to comply with a governmental request for trust-related documentation, the privilege protecting only natural persons.²

The business trust not deemed an entity for purposes of determining federal diversity-of-citizenship jurisdiction.¹²⁹⁵ U.S. Supreme Court has held that a Maryland real estate investment trust (REIT) may not be deemed a “citizen” for purposes of determining federal diversity-of-citizenship jurisdiction, although Maryland statutory law treats a REIT as a “separate legal entity” that itself can sue or be sued.”¹²⁹⁶ Nor is the citizenship of the trustee determinative, as would be the case with a “traditional trust.”¹²⁹⁷ The holding: For purposes of diversity jurisdiction, the citizenships of the REIT’s shareholders, not just the citizenships of the trustees, are taken into

¹²⁹²Bogert §292. See, e.g., *In re Black*, ___ P.3d ___, 2020COA64M (Colo. Ct. App. 2020). Judicial jurisdiction in the context of trusts is taken up generally in §8.40 of this handbook.

¹²⁹³See Model Protection of Charitable Assets Act §2(3) (2011).

¹²⁹⁴Unif. Statutory Trust Entity Act, Prefatory Note.

² See *U.S. v. Fridman*, 974 F.3d 163 (2d Cir. 2020).

¹²⁹⁵“Adopting the Tenth Circuit’s reasoning [which the U.S. Supreme Court has done] would treat those REITs as citizens of every one of those states for purposes of federal diversity jurisdiction. That would largely deprive REITs of access to the federal courts sitting in diversity: they would be unable to remove actions to federal court based on diversity, 28 U.S.C. §1441(b)(2) (an action brought in state court in a state where a defendant is a citizen may not be removed to federal court based on diversity), and likely would not be able to establish even the minimal diversity required for removal of large class actions.” Brief for The National Association of Real Estate Investment Trusts as Amicus Curiae Supporting Reversal, p. 1–2, available at <http://www.scotusblog.com/wp-content/uploads/2015/12/14-1382_amicus_pet_NAREIT.authcheckdam.pdf> (last accessed Sept. 4, 2020), in *Americold Realty Trust v. ConAgra Foods, Inc.*, 136 S. Ct. 1012 (2016).

¹²⁹⁶*Americold Realty Trust v. ConAgra Foods, Inc.*, 136 S. Ct. 1012 (2016).

¹²⁹⁷*Americold Realty Trust v. ConAgra Foods, Inc.*, 136 S. Ct. 1012 (2016).

account.¹²⁹⁸ The REIT is defined in §9.9.12 of this handbook.

To fundamentally transmogrify the trust into an entity, however, would be ill-advised. While it may be convenient to *deem* a trust an entity *for certain purposes*, such as when it comes to the formal titling of entrusted assets, it would be ill-advised, legislatively or otherwise, to altogether revise the default law of trusts such that the trust is no longer fundamentally a relationship; rather, it is now fundamentally a juristic entity/person. The two classic fiduciary relationships are the agency and the trust. Just as a conversion of the agency into a juristic entity/person would self-evidently destroy the agency's practical utility, so also would such a conversion of the trust into a juristic entity/person destroy the trust's practical utility, particularly in the case of the informal trust. The corporation has already been invented. There is no need to reinvent it. That the legal title to the trust property is in the trustee, that the trustee as to the world is the owner of the property, that the entrusted assets are segregated from the trustee's personal asset, and that the trustee assumes direct burdensome fiduciary duties to identifiable individuals or charitable purposes is what has made the trust such an attractive alternative to the corporation in certain settings, particularly in the informal, noncommercial setting. Even in the commercial context, the trust's protean nature can make it an attractive alternative to the standardized corporation, particularly when structural flexibility and operational nimbleness are a priority. And then there are the inevitable unanticipated/unintended consequences were the trust to be fundamentally transmogrified into a juristic entity/person. What, for example, would now be the legal/equitable status of the "trustee"? Would the "trustee" be an agent/ employee of "the trust"? Where would the legal title to the underlying property now be lodged? Still in the "trustee" or now in "the trust"? The rights, duties, and obligations of the "parties" to "the trust," once a long-seasoned legal/equitable relationship, now a fledgling juristic entity/person, would take decades, if not centuries, to sort out.

Cross-reference. See generally §3.5.1 of this handbook (nature and extent of the trustee's estate).

¹²⁹⁸Americold Realty Trust v. ConAgra Foods, Inc., 136 S. Ct. 1012 (2016).