Title

Would equity deem an enforceable irrevocable power of attorney (IPA) to be a trust rather than an agency?

Text

At law and in equity the classic agency is terminable at the will of either the principal or the agent, and in any event upon the death or mental incapacity of either. The durable power of attorney is one statutory partial exception. In a common law jurisdiction equity would (or should) deem an irrevocable power of attorney to be a trust in substance, notwithstanding the agency format, absent special facts, particularly if obligations are to survive post-mortem. As a consequence, legal title would have passed by operation of law to the “agent,” i.e. to the trustee, at the time the parties had entered into the “relationship.” In a common law jurisdiction the consequence of there being a trust relationship is that legal title is in the trustee by operation of law. While desirable for evidentiary and other purposes, a formal conveyance or re-registration is generally not a sine qua non, at least when it comes to tangible and intangible personal property. See appendices A & B below, which are relevant excerpts from §§2.1 & 2.1.1 of *Loring and Rounds: A Trustee’s Handbook* (2017). A trust that is masquerading as an irrevocable power of attorney is no exception. It is hard to see how a ministerial agent could justifiably be deemed in equity to be an express trustee masquerading as an agent. The critical element of discretion is absent. Conversely, an agency coupled with an interest is not a true agency; nor, absent special facts, should equity deem the relationship to be a trust in disguise. See Seavey, *Law of Agency* 21 (1964) (“Holders of powers for their own benefit… are not agents…The powers they hold may be termed proprietary, the language and forms of agency being used to create them and hence have to some extent been included in treatises on agency. ..They are frequently described as ‘powers coupled with an interest.’”) Finally, at least under classic agency doctrine, an “irrevocable” agency is either something other than a true agency or is revocable notwithstanding the “irrevocable” label. “The principal can revoke the authority of an agent at any time, irrespective of an agreement not to do so.” Id. at 87.

Appendix A

§2.1 The Property Requirement [from *Loring and Rounds: A Trustee’s Handbook* (2017).]

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Title is generally in the trustee. Legal title to the property is in the trustee. The consequence of there being a trust relationship is that legal title is in the trustee by operation of law. While desirable for evidentiary and other purposes, a formal conveyance or re-registration is generally not a sine qua non.

If the trustee sells an item of trust property, a trust is impressed upon the proceeds. “Where the relation of trustee and cestui que trust has once been established as to certain property in the hands of the

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27Bogert §1. When a trustee holds the beneficial interest in another trust, however, title to the underlying property is in the trustee of the other trust. Cf. Papale-Keefe v. Altmare, 38 Mass. App. Ct. 308 (1995) (involving an incomplete transfer of shares of beneficial interest to the trustee of an inter vivos trust).
trustee, no mere change of trust property from one form to another will destroy the relation.”

Unless the terms of the trust provide otherwise, the trustee takes the entire legal interest in personal property. In other words, he takes an interest of unlimited duration that is a fee simple. As to real property, the rule was that the trustee took “such an estate and only such an estate as was necessary to enable him to perform the trust by the exercise of such powers as were incident to ownership of the estate.” Thus, for example, it was possible that a passive trust of real estate for the life of a beneficiary caused the estate of the trustee to be cut back to a legal life estate, the measuring life being the life of the beneficiary. The Restatement (Third) of Trusts has swept away once and for all the ancient distinctions between trusts of real property and trusts of personal property insofar as the nature and quality of the trustee’s title is concerned:

Unless a different intention is manifested, or the settlor owned only a lesser interest, the trustee takes a nonbeneficial interest of unlimited duration in the trust property and not an interest limited to the duration of the trust.

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Appendix B

§2.1.1 The Inter Vivos Trust [from Loring and Rounds: A Trustee’s Handbook (2017)].

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The mechanics of funding. All a settlor need do, for example, in order to make the settlor’s fifty shares of stock the subject of a trust is to have the shares re-registered in the name of the trustee. A simple phone call to a broker should set the re-registration process in motion. Rights under an insurance contract may be transferred during the insured’s lifetime to a trust by assigning the policy itself to the trustee or by merely filling out a form designating the trustee as recipient of the insurance proceeds. A bank account should be re-registered in the name of the trustee. All that having been said, “[e]ven when an owner of property surrenders possession of it or of a document of transfer in a manner that otherwise would be sufficient to transfer the property to a trustee, if the property owner does not intend to make a presently effective transfer there is no transfer of the title.”

Formal re-registration of title generally is not necessary in equity to impress a trust upon an item of intangible personal property. “Thus, a delivery may be made in escrow or may be accomplished by acts

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291 Scott & Ascher §10.12.
301 Scott & Ascher §10.12.
31See Restatement (Third) of Trusts, Reporter’s Notes on §42.
32See generally §8.27 of this handbook (the difference between a legal life estate and an equitable life estate incident to a trust).
33Restatement (Third) of Trusts §42.
34Restatement (Third) of Trusts §16 cmt. b. (“Good practice certainly calls for the use of additional formalities and the taking of appropriate further steps, such as changes of registration, or the execution and recordation of deeds to land.”); UTC §401 cmt. (“However, such registration is not necessary to create the trust.”).
35Restatement (Third) of Trusts §16 cmt. b.
361 Scott & Ascher §5.1. See, e.g., Bourgeois v. Hurley, 8 Mass. App. Ct. 213 (1979); Restatement (Third) of Trusts §16 cmt. b, illus. 4 (while one may not impress a trust upon an expectancy, one may by
of constructive or symbolic delivery performed with the requisite intention to make a present transfer.”

A Texas court has enforced two trust declarations of 400 shares of common stock although there was no indication on the books of the corporation and on any stock certificates that the deceased registered owner at the time of his death had been holding the shares “as trustee.”

A California court has enforced a declaration of trust of two parcels of real estate although the grant deeds had reflected that the deceased settlor had held each parcel in his individual capacity, not as trustee. A North Carolina court has done much the same thing.

Courts even enforce oral trusts of cash. Still, the lack of a formal paper trail invites litigation over whether there was the requisite intent to impress a trust upon the property. It should be noted that in the case of a payable-on-death (POD) checking or savings account, a type of statutory will substitute grounded in contract, formal re-registration in the name of the trustee may be the only option.

In some jurisdictions, a trust may not be impressed upon real property without the property being transferred to the trustee (or to the “trust”) by a valid deed, and preferably in a way that meets the writing requirements of the applicable statute of frauds. A deed does not necessarily satisfy the Statute of Frauds, nor is a writing that satisfies the Statute of Frauds necessarily a deed. Nowadays, the deed need not contain such words of inheritance as “to X and his heirs.” In California, on the other hand, a written declaration of trust of a certain parcel of real property has been enforced although there had never been a formal deeding of the property from the declarant to himself as trustee. That the declarant had identified the parcel on an asset schedule attached to the written declaration was held sufficient for an enforceable trust of the parcel to arise. The trust instrument and the asset schedule, taken together, also satisfied the writing requirement of the Statute of Frauds. In another California case, a general assignment provision within the written declaration of trust of “all of the Grantor’s right, title and interest in and to all of his real … property” satisfied the Statute of Frauds. “… [I]t is a simple matter of referring to publicly available records to determine … [the Grantor’s]… real estate holdings …”

In New York, by statute, a trust may acquire property in the name of the trust as such name is
designated in the trust instrument. It is not necessary that there be a conveyance to, or registration in the name of, the trustee. Legal title as a matter of law, however, would still pass to the trustee. Colorado has a similar statute (CSA §38-30-108.5(i)). The trustee records a “statement of authority” evidencing his legal authority to act with respect to the real estate.

For a more detailed discussion of funding procedures, see How to Fund a Revocable Living Trust Correctly.100 For a discussion of the complex and time-sensitive mechanics of funding a trust with distributions from a qualified defined contribution plan account or IRA after the account owner’s death, the reader is referred to Grassi and Welber.101

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100 For a more detailed discussion of funding procedures, see Schmidt, How to Fund a Revocable Living Trust Correctly, 20 Est. Plan. 67 (No. 2-1993). See also Bruce Fenton, A Trust Is Only as Good as Its Funding, 2002 LWUSA 164.

101 Sebastian V. Grassi, Jr. & Nancy H. Welber, Special Planning Is Needed for Retirement Benefits Payable to a Disabled Special-Needs Child, J. Practical Estate Planning 51 (June–July 2010) (“Many of the concepts discussed in this article are also applicable where the beneficiary child is not a special-needs child”).