Title

Whether nonfiduciary trusts and quiet trusts are true trusts

Text

A trust is a fiduciary relationship with respect to property, one that imposes enforceable duties on the titleholder, in this case the trustee. A so-called trust that is unenforceable is a trust in name only. Thus, a so-called trust under which its "beneficiaries," or their surrogates, are to be kept in the dark as to the rights, duties, and obligations that are incident to that relationship is a trust in name only, secrecy being incompatible with accountability. What, then, are we to make of so-called trusts whose terms expressly purport to impose no fiduciary duties on title-holding "trustees," hereinafter "nonfiduciary trusts," or whose terms expressly purport to relieve "trustees" of the duty to keep the "beneficiaries" informed of the existence, nature, and scope of their ostensible equitable property rights, hereinafter "quiet trusts"? Is a nonfiduciary or quiet trust just an outright completed gift to the title-holder masquerading as an entrustment? Or perhaps some kind of a third-party-beneficiary contract that not only can survive the death of the two parties to it, the settlor and the inception trustee, but also the current non-existence of its beneficiaries, think unborn and unascertained remaindermen? Or maybe all we have here is a simple agency in which the settlor is the principal and the trustee is his or her agent. On the other hand, in the years to come we may find the equity courts inclined to deem these curious relationships nonetheless to be true trusts, ignoring those express nonfiduciary features that are incompatible with classic trust doctrine. Recall that equity traditionally looks to the substance of a relationship rather than to its packaging when it comes to sorting out the rights, duties, and obligations of the parties to that relationship. It will endeavor to ascertain a settlor's true intent from a reading of the governing instrument in its entirety. In any case, one wonders why a prospective trust settlor who is fully informed of and has a full subjective understanding of the applicable law and facts would ever elect to forego the fiduciary protections afforded both a trust's purposes and the equitable property rights of its beneficiaries, the fiduciary principle being one of the crowning achievements of the Anglo-American legal tradition. It falls to the drafting attorney, who himself or herself is a fiduciary, an agent-fiduciary to be precise, to see to it that the prospective settlor fully appreciates the nature, and even more importantly the ready availability, of those protections, not to mention the all-but-inevitable adverse economic consequences of venturing into uncharted doctrinal waters.

For an exhaustive discussion of the current state of nonfiduciary-trust jurisprudence, see Jeffrey Schoenblum, *The Nonfiduciary "Trust"*, 46 ACTEC L. J. 357 (2021). The quiet trust is the subject of §9.9.25 of *Loring and Rounds: A Trustee's Handbook* (2021), which sub-section is reproduced in its entirety in Appendix A immediately below. Information surrogates in the quiet-trust context are taken up in §6.1.5.1 of *Loring and Rounds: A Trustee's Handbook* (2021), the relevant parts of which sub-section are reproduced in the Appendix B below.

Appendix A

§9.9.25 *The Quiet or Silent Trust May Not Be a True Trust* [from *Loring and Rounds: A Trustee's Handbook* (2021)]

Is a quiet or silent trust illusory? The question is intentionally ambiguous. Is the question whether the trust itself is illusory, or just its quietness? A quiet or silent trust has been defined as "an irrevocable trust that, by its terms, directs the trustee not to inform the beneficiaries of the existence of the trust, its terms

and the details of the administration of the trust."[414] South Dakota, for example, would seem to authorize such trusts by statute. See S.D. Codified Laws §55-2-13, which provides that "[t]he settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or in writing delivered to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to the trust." It seems there are two possibilities:

The first is that §55-2-13 means what it says, in which case a quiet or silent trust is something other than the legal/equitable relationship that is the subject of this handbook. Perhaps it is just a constructive principal/agency relationship, the "settlor" being the principal and the "trustee" being the agent. Or perhaps it is just a fancy completed common law gift to the "trustee."

The second is that a quiet or silent trust is a true trust. If that is the case, then how, as a practical matter, is the trustee to hide the existence of the trust from the beneficiary and comply with applicable tax laws?[415] Assuming that that is possible, then how is the trustee to handle a request for information from the curious beneficiary about the terms of the trust should the beneficiary somehow otherwise get wind of its existence? If the trustee lies to the beneficiary, or intentionally obfuscates, is he not committing an act of actual, or constructive, fraud against the beneficiary, such that any applicable statute of ultimate repose is tolled?[416] Finally, the trustee's duty to account is a two-edged sword. Yes, it is burdensome for the trustee. But rendering accounts to the beneficiary is also the tried-and-true vehicle for limiting the trustee's liability.

The trustee's duty to provide critical information to the beneficiary is covered generally in §6.1.5.1 of this handbook. The quiet or silent trust is not to be confused with the secret (or semi-secret) trust, which is the subject of §9.9.6 of this handbook.

Appendix B

§6.1.5.1 Trustee's Duty to Provide Information to Beneficiaries

[from *Loring and Rounds: A Trustee's Handbook* (2021)].

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The information surrogate. In several states, the terms of a trust may authorize the trustee to account to a "surrogate" of the beneficiary in lieu of accounting to the beneficiary.[793] The trustee is said to be a "quiet trustee." The surrogate is designated in the trust's terms and would seem to meet the definition of a trust protector.[794] If one assumes that the protector/information surrogate is a fiduciary, which is likely to be the case, then the tangle of possible intersecting fiduciary relationships and duties could get mind-boggling. The protector/information surrogate, for example, might well owe a fiduciary duty to a minor beneficiary to report to the minor's guardian about the activities of the protector's cofiduciary, namely the quiet trustee. In turn, the guardian might well owe a fiduciary duty to the minor to apprise himself of all the critical information he can get his hands on relative to the minor's equitable property rights under the quiet

[414]Joyce Crivellari, Trust & Estate Insights, May 2013 [A UBS Private Wealth Management Newsletter].

[415]*See generally* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 659, 679 (2005) (taxation and the quiet/silent trust).

[416]*See generally* §7.1.3 of this handbook (the Uniform Trust Code's statute of ultimate repose).

[793]*See, e.g.*, D.C. Code Ann. §19-1301.05(c)(3).

[794]*See generally* §3.2.6 of this handbook (discussing the office of trust protector).

trust. In other words, the guardian might well owe the minor a duty to monitor the relevant activities of both the protector/information surrogate and the quiet trustee.

Once the minor beneficiary attains the age of majority, it could get even more interesting. Presumably, both the guardian and the protector/information surrogate would then owe the beneficiary a fiduciary duty to convey in good faith to the beneficiary all the critical information that they had acquired while the beneficiary was a minor regarding the terms of the quiet trust and the activities of the quiet trustee. What information would be critical? Whatever information the beneficiary would need to protect and defend his equitable property rights under the quiet trust. Moreover, if the quiet trustee upon being confronted by the beneficiary intentionally deceives the beneficiary as to the existence and/or terms of the trust, then the quiet trustee risks incurring liability for committing acts of fraud against the beneficiary.

Prof. Alan Newman has written a law review article that, in part, flags some "additional questions" that are raised by a quiet trusteeship that has a protector/information surrogate feature to it, such as whether there is a tolling of the applicable statute of limitations for breaches of fiduciary duty until such time as the beneficiary is put on actual or constructive notice of the relevant facts and law.[795] Under the Restatement (Third) of Trusts, one has a sense that notice only to the protector/information surrogate would not start the applicable breach of trust statute of limitations running against the clueless beneficiary. It provides that "[b]y the terms of a trust, the settlor may reserve or confer upon others the power to enforce the trust. The holder of such a power has standing, on behalf of the beneficiaries, to bring suit against the trustee, although the power does not prevent a beneficiary from acting on his or her own behalf."[796]

Now, if the protector/information surrogate, by statute, case law, or trust term, is truly not a fiduciary, then it is hard to see how a quiet trust can be a true trust, a trust being a fiduciary relationship with respect to property. It cannot be said that the quiet trustee owes any fiduciary duties to the protector/information surrogate, the protector/information surrogate not being a beneficiary. Certainly the protector/information surrogate owes the quiet trustee no fiduciary duties. No fiduciary duties, no trust, at least not of the kind that is the subject of this handbook.

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[795]*See* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 649, 680–681 (2005).

[796]Restatement (Third) of Trusts §94 cmt. d(1).