Title

What does it take for a gratuitous declaration of trust to be enforceable?

Text

A declaration of trust arises when the owner of an interest in property declares himself or herself to be trustee of that interest for the benefit of someone. What does it take to make such an arrangement enforceable? Assume a gentleman is entertaining a woman many years his junior. Towards the end of the evening he sends her a text as she sits across from him: "I am holding the house for you and for you alone." He sketches a rough plot plan on her cocktail napkin, initials it, places an engagement ring on the napkin, and slides the napkin back over to her side of the table. The next day her lawyer phones the gentleman and says that his client intends to seek enforcement of the gratuitous declaration of trust. Let's see if there is a case to be made.

Non-relevance of absence of formal conveyance of legal title. It has long been settled law that there need not be a conveyance of legal title from the settlor to himself/herself as trustee for a declaration of trust to arise and be enforceable. *See generally* 1 Scott & Ascher §3.3.1. Pre-declaration the legal title was in the settlor. Post-declaration the legal title is still in the settlor. In each case, as to the world the settlor-trustee is the legal owner of the subject property. In the Comment to §201 of the Uniform Powers of Appointment Act there is the assertion that a declaration of trust "necessarily entails a transfer of legal title from the owner-as-owner to the owner-as-trustee…." No authority is supplied for this general proposition, because there is none. So far so good for the woman.

Non-relevance of absence of consideration. *See generally* 1 Scott & Ascher § 3.1.1.

Absence of merger. Had the gentleman, himself, been the only intended trustee and the only intended beneficiary there would be no trust in any case, there being a continuing merger of all interests in the gentleman in his individual capacity. Merger is not an issue in this situation, assuming the woman is the intended beneficiary.

Statute of Frauds. In England before 1676, a trust of real or personal property, with some exceptions could be declared by word of mouth. In that year, however, Parliament enacted a statute commonly known as the statute of frauds. 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." *See generally* §8.15.5 *Loring and Rounds: A Trustee's Handbook* (2022). The statute did not require that a trust of land be created by a written instrument, merely that it be proved by one. 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. Either by case law or by statute, some form of §7 has found its way into the law of most U.S. jurisdictions. The writing must show with reasonable definiteness the trust property. It also must show the trust beneficiaries and the extent of their interests or the purposes of the trust. For declarations of trust, the writing must be signed by the settlor/trustee. There is no requirement that the settlor/trustee execute a separate writing conveying the property to the trust. Persuading the equity court that the text and scrawls on the cocktail napkin satisfy the statute's writing and signing requirements will be a challenge, but not an impossible one.

Absence of donative intent. "This is absurd," the gentleman complains, "my sole intent was to induce her to do what she did not seem otherwise inclined to do that evening, not to give away the family home that I have just inherited from my dear mother." An admission of common-law fraudulent conduct on his part perhaps? The gentleman may have just lost his day in equity court on the intent issue, maybe even on

the writing and signing issues. "He who comes into equity must come with clean hands" goes one of equity's signature maxims.

Constructive trust doctrine. The gentleman panics and conveys the real estate to his brother. Not a good idea. If the gratuitous declaration turns out to be enforceable, the gentleman, as trustee, will have breached his fiduciary duty to his lady friend by conveying out the trust corpus to a non-beneficiary. She is entitled to have the equity court impress a constructive trust on the real estate pending a judicial sorting out of all issues. The poor non-BFP brother.

Epilogue. Acting on the advice of their lawyers, the gentleman and the woman decided to call a halt to this madness and negotiate a non-judicial settlement of all issues. He agreed to execute a signed ratification of the declaration of trust. They agreed to marry. They signed a pre-nuptial agreement that insulated her equitable interests under the trust, as well as the legal interest in the real estate itself, from any claims to them that he might make incident to any future divorce proceedings. It was not so long ago that she had been preparing to leave Russia to seek her fortune in the U.S. Everyone had been assuring her that it would be like shooting fish in a barrel. So right they had been she was thinking as she and her American husband-about-to-be recited their marital vows before the justice of the peace.

Cross-reference. For the mechanics of funding a trust that has been established other than by declaration, see §2.1.1 of *Loring and Rounds: A Trustee's Handbook* (2022), the relevant portion of which section is set forth in the appendix below. The Handbook is available for purchase at: https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP.

Appendix

§2.1.1 *Funding the Inter Vivos Trust* [from *Loring and Rounds: A Trustee's Handbook* (2022), available for purchase at: https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP].

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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.[82] It goes without saying that it "would be patently absurd to require that each and every asset of a corporate entity be identified upon the entity's contribution to a trust in order to constitute a valid transfer."[83] Likewise, in the case of a mutual fund, re-registering the shares of beneficial interest alone will suffice. It is not critical that the trustee be supplied with a list of the assets that comprise the fund.[84] 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

[82]Restatement (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.").

[83]*See In re* Passarelli Family Tr., 206 A.3d 1188 (Pa. Super. Ct. 2019), *aff'd*, 242 A.3d 1257 (Pa. 2020).

[84]*See In re* Passarelli Family Tr., 206 A.3d 1188 (Pa. Super. Ct. 2019), *aff'd*, 242 A.3d 1257 (Pa. 2020).

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."[85]

Formal re-registration of title generally is not necessary in equity to impress a trust upon an item of intangible personal property.[86] "Thus, a delivery may be made in escrow or may be accomplished by acts of constructive or symbolic delivery performed with the requisite intention to make a present transfer."[87] 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."[88]

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.[89] A North Carolina court has done much the same thing.[90]

Courts even enforce oral trusts of cash.[91] Still, the lack of a formal paper trail invites litigation over whether there was the requisite intent to impress a trust upon the property.[92] 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.[93]

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,[94] and preferably in a way that meets the writing requirements of the applicable statute of frauds.[95] A deed does not necessarily satisfy the Statute of Frauds,

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[85]Restatement (Third) of Trusts §16 cmt. b.

[86]1 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 general assignment impress a trust upon whatever one is entitled to under the estate of someone who has died, even while legal title to the subject property is still lodged in the decedent's personal representative).

[87]Restatement (Third) of Trusts §16 cmt. b.

[88]*See* Dutcher v. Dutcher-Phipps Crane & Rigging, Inc., 510 S.W.3d 592 (Tex. App. 2016).

[89]*See* Ukkestad v. RBS Asset Fin., Inc., 185 Cal. Rptr. 3d 145 (Ct. App. 2015).

[90]*See* Nevitt v. Robotham, 762 S.E.2d 267 (N.C. Ct. App. 2014) (confirming that even in the case of the entrustment of real estate by declaration, the settlor and the trustee being the same person, "no transfer of legal title is required, since the trustee already holds legal title.").

[91]*See, e.g.*, *In re* Est. of Fournier, 902 A.2d 852 (Me. 2006).

[92]*See* UTC §401 cmt.; Restatement (Third) of Trusts §16 cmt. B.

[93]*See, e.g.*, *In re* Est. of Moore, 209 Ariz. 3, 97 P.3d 103 (2004).

[94]*See, e.g.*, Schindler v. Pepple, 158 S.W.3d 784 (Mo. Ct. App. 2005).

[95]*See generally* §8.15.5 of this handbook (statute of frauds).

nor is a writing that satisfies the Statute of Frauds necessarily a deed.[96] Nowadays, the deed need not contain such words of inheritance as "to X and his heirs."[97] 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.[98] 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.[99] "…[I]t is a simple matter of referring to publicly available records to determine…[the Grantor's]…real estate holdings…."[100]

In New York, by statute,[101] 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.

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[96]*See generally* §8.15.5 of this handbook (statute of frauds).

[97]3 Scott & Ascher §13.2.1.

[98]*See* Heggstad v. Heggstad (*In re* Estate of Heggstad), 16 Cal. App. 4th 943 (1993).

[99]*See* Ukkestad v. RBS Asset Fin., Inc., 185 Cal. Rptr. 3d 145 (Ct. App. 2015).

[100]*See* Ukkestad v. RBS Asset Fin., Inc., 185 Cal. Rptr. 3d 145 (Ct. App. 2015).

[101]N.Y. Est. Powers & Trusts Law §7-2.1. "To acquire the names of all the trustees and their signatures to sell or mortgage the property proved cumbersome." Margaret Valentine Turano, Practice Commentaries, 2002 Main Volume. "The legislature wanted to make these trusts parallel to partnerships, which can hold property in the partnership name…." *Id.*