Title

In the case of a donative transfer in irrevocable inter vivos trust, it is not the trustee who is the donee of the gift

Text

In *International Rescue Committee v. Trustee of the Wylie Street Emergency Fund*, 537 P.3d 30 (2023), the Supreme Court of Idaho cited Black's Law Dictionary (11th ed. 2019) as authority for the proposition that "a person can make a '*gift* of legal title to property to someone who will act as *trustee* for the benefit of a beneficiary.'" (emphasis added by the court). This is somewhat misleading. The effectiveness of an intended donative transfer to a trustee, *qua* trustee, of an irrevocable inter vivos trust is actually determined by the laws relating to assignments, assignments that are supported neither by consideration nor donative intent. The trustee is the assignee, not the donee, of the legal title, there being no coupling of title passage with donative intent. It is the trust's beneficiaries who are the donees. The subject of the gift is the constellation of equitable property rights incident to the trust relationship. The effectiveness of the donative transfer of those equitable property rights is determined by rules that do govern the making of gifts. In the case of a declaration of trust, only the equitable interest is transferred. The legal title remains with the settlor.

In §2.1 of *Loring and Rounds: A Trustee's Handbook* (2024), we consider what constitutes an effective transfer in trust in three other situations as well: Transfer in revocable inter vivos trust, the testamentary trust, and entrustment incident to contract. The relevant portions of §2.1 are reproduced in Appendix A below.

Though a trust may arise in fulfillment of a contractual obligation, the trust itself is not a contract. See generally §8.22 of the *Handbook*, the relevant portions of which are reproduced in Appendix B below.

Appendix A

§2.1 The Property Requirement [from *Loring and Rounds: A Trustee's Handbook* (2024), as revised post-publication]

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Revocable inter vivos trusts. The effectiveness of an assignment of property by the settlor of a trust that is subject to a reserved right of revocation to the trustee of that trust is governed by the law of assignments. In this case the assignment is supported neither by consideration nor donative intent. Because of the reserved right of revocation, the settlor merely becomes, via the assignment, the property's equitable owner, he having been its legal owner before. There has been no re-ordering of economic interests. Such re-titling assignments are common in modern estate planning and generally enforced by the courts.[1]

Testamentary trusts. The funding of a testamentary trust is governed by different rules. The effectiveness of a testamentary disposition in trust is determined by the law of wills.[22]

Entrustment incident to contract. The effectiveness of a transfer in trust that is in fulfillment of a contractual obligation is determined by the laws of assignment and contract, donative intent being lacking in such a situation. Note, however, that though a trust may arise in fulfillment of a contractual obligation, the trust itself is not a contract. See generally §8.22 of this Handbook.

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[1] *See generally* Matter of Estate. of Williams, 538 P.3d 176 (OK 2023).

[22] Rest. (Third) of Trusts §16 cmt. a.

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Appendix B.

§8.22 Why Do We Need the Trust When We Have the Corporation and the Third-Party Beneficiary Contract? [from *Loring and Rounds: A Trustee's Handbook* (2024)]

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The contract.[23] The academic community is revisiting the question of whether the trust is a branch of contract law or a branch of property law.[24] This debate—essentially a continuation of what was begun by Frederick W. Maitland, who argued the former, and Austin W. Scott, who argued the latter—presupposes only two private fundamental legal relationships: contract and property.[25] Note, however, that while Maitland may have come down on the side of contract, he did so with some ambivalence:

> For my own part if a foreign friend asked me to tell him in one word whether the right of the English Destinatär (the person for whom property is held in trust) is *dinglich* [a property interest] or *obligatorisch* [a personal claim], I should be inclined to say: "No, I cannot do that. If I said *dinglich*, that would be untrue. If I said *obligatorisch*, I should suggest what is false. In ultimate analysis the right may be *obligatorisch*; but for many practical purposes of great importance it has been treated as though it were *dinglich*, and indeed people habitually speak and think of it as a kind of *Eigenthum* [property]."[26]

The issue as framed, however, can never be resolved because the premise, it is suggested, is false. Our legal system does *not* have two private fundamental legal relationships of the consensual variety.[27] It has four, notwithstanding what the scholars may say: They are the agency, the contract, the bundle of legal rights and correlative duties known as property, and the trust. There are four because four are needed. No one is sufficiently elastic to encompass another without turning into the other.[28] These relationships are

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[23]"Although the trustee by accepting the office of trustee subjects himself to the duties of administration, his duties are not contractual in nature." Restatement (Second) of Trusts §169 cmt. c.

[24]*See generally* George L. Gretton, *Trusts Without Equity*, 49 Int'l & Comp. L.Q. 599, 603–608 (2000).

[25]For the recent articulation of the contract argument, *see* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995); for the recent articulation of the property argument, *see* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998). *See also* 7 Scott & Ascher §46.4.2 ("In any event, the creation of a trust is not a contract but a disposition of the beneficial interest in the trust property"). *Cf.* 3 Scott & Ascher §13.1 (coming down on the side of those who argue that a trust beneficiary has a proprietary interest in the underlying trust property, not just a chose in action or claim against the trustee, but acknowledging that "the scholarly debate continues").

[26]Frederic William Maitland, Maitland Selected Essays 146 (H.D. Hazeltine ed., Cambridge Press 1936).

[27]There are also nonconsensual legal duties which, when breached, can constitute torts.

[28]Attempting to squeeze a trust into the third-party beneficiary contract slot inevitably leaves too much hanging out, *e.g.*, the charitable trust or the private discretionary trust that calls for the shifting of property interests between and among generations of persons who at the time the contract is struck are unborn and unascertained. To doctor a third-party beneficiary contract into something that would be a satisfactory substitute for such high maintenance arrangements would merely transmogrify it into a trust.

facets, however, of the single gem we loosely call the common law.[29]

The four private fundamental consensual legal relationships are profoundly different and profoundly interrelated.[30] The trust, in part the conveyance of an equitable interest in property, exhibits agency, property, contractual, and even corporate attributes, but is *sui generis*.[31] Contractual rights are themselves property rights. Contractual rights may be the subject of a trust. The equitable interest in one trust may constitute the property of another. An agency may be gratuitous or associated with contractual obligations. The corporation, internally a statutory tangle of agencies, externally is merely property (a legal interest). And in the case of an incorporated mutual fund, it may actually be a trust.[32]

One commentator has focused not on the profound dearth of nuance of academia's efforts to demote the trust to a sub-set of the law of contracts but on the unsavory subversiveness of it all:

> Under the influence of law and economics theory, prominent scholars and reformers are rapidly dismantling the traditional legal and moral constraints on trustees. Trusts are becoming mere "contracts," and trust law nothing more than "default rules." "Efficiency" is triumphing over morality. In the law and economics universe of foresighted settlors, loyal trustees, informed beneficiaries, and sophisticated family and commercial creditors, trusting trustees may make sense. In the real world, however, it does not. A trust system that exalts trustee autonomy over accountability can and increasingly does impose significant human costs on all affected by trusts.[33]

At least one prominent jurist, Dame Sonia Proudman, of the High Court of Justice of England and Wales (Chancery Division), also not in accord that the trust relationship is contract-based, was tasked with sorting out whether a certain deed of trust imposes certain unenforceable contract-based obligations on the

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While a trust has the attributes of a contract, of property, of agency, and even of a corporation, it is now sui generis, regardless of its evolutionary origins. *See* Gibbons v. Anderson, 2019 Ark. App 193, n.3 (2019). As one commentator versed in the taxonomies of both the common law and the civil law has noted: "Trusts do, indeed, impinge deeply upon the law of obligations and the law of property, but they do not belong essentially to either." George L. Gretton, *Trusts Without Equity*, 49 Int'l & Comp. L.Q. 599, 614 (July 2000).

[29]For purposes of this section, the term *common law* encompasses the law of equity.

[30]*See generally* Charles E. Rounds, Jr., *The Case For a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School, Together with a Model Fiduciary Relations Course Syllabus*, 18 Regent U. L. Rev. 251 (2005-2006); Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

[31]*See* Gibbons v. Anderson, 2019 Ark. App 193 (2019) ("First, we point out that a trust agreement is not a contract."); Schoneberger v. Oelze, 208 Ariz. 591, 595, 96 P.3d 1078, 1082 (2004) (confirming that a trust is not a contract). *See generally* Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517 (2010). Instead, a trust is a "conveyance of an equitable interest in property." *See* Tunick v. Tunick, 201 Conn. App. 512, 242 A.3d 1011 (2020)

[32]*See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

[33]Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 Minn. L. Rev. 602, 651 (2010). *See also* Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517, 526 (2010) ("The law governing fiduciary duty, however, came by its 'pulpit-thumping' roots honestly and those roots serve the 'institutional integrity' of the trust and its progeny.").

University of London vis-à-vis the assets of the Warburg Library/Institute or whether those obligations are trust-based and therefore "enforceable" by the Attorney General.[34] She decided the latter. There is an implicit assumption in the decision that the trust relationship is *sui generis*. The Warburg case's backstory was the subject of an article in The New Yorker.[35]

The trust's non-contractarian nature is self-evident in the estate-planning space. An irrevocable trust, for example, typically arises incident to a donative transfer of property, whether tangible or intangible.[36] There is no exchange of consideration as would be the case with a third-party beneficiary contract.[37] "A mere contractual obligation, including a contractual promise to convey property, does not create a trust."[38] That is not to say that the trust could not be *funded* with legal rights incident to a third-party beneficiary contract, think a life insurance policy, but the trust itself is not a contract.[39] Moreover, the trustee's right to compensation is merely an equitable right, the trust being a creature of equity.[40] The trustee's liability to the beneficiary is equitable, not contractual.[41] Even an uncompensated trustee assumes enforceable duties.[42] And then there is the maxim that a trust shall not fail for want of a trustee,[43] and the fact that unborn and unascertained persons can be trust beneficiaries.[44] In the case of a contract, those who supply the consideration must be in existence at the time of exchange. Also, one may not contract with oneself. An enforceable trust, on the other hand, may arise via declaration.[45] "One of the major distinctions between a trust and contract is that in a trust, there is always a divided ownership of property, the trustee having usually a legal title and the beneficiary an equitable one, whereas in contract, this element of division of property interest is entirely lacking."[46] A revocable inter vivos trust can serve as a will substitute.[47] A will, by definition, is non-contractual in that it is ambulatory. In other words, it does not "speak" until death. Moreover, the right of revocation under a trust is an ownership-equivalent power that can and may eliminate altogether the legal and equitable property rights of all the other parties to the relationship.[48] What can be more non-contractarian than that?

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[34]*See* Univ. of London v. Prag [2014] EWHC 3564 (Eng.).

[35]*See* Adam Gopnik, *In the Memory Ward: The Warburg is Britain's most eccentric and original library. Can it survive?*, The New Yorker, Mar. 16, 2015.

[36]*See* §2.1 of this handbook.

[37]*See* §9.9.1 of this handbook.

[38]*See* Tunick v. Tunick, 242 A.3d 1011, 1022 (Conn. App. Ct. 2020).

[39]*See* §2.2.2 of this handbook.

[40]*See* §8.4 of this handbook.

[41]*See* Tunick v. Tunick, 242 A.3d 1011, 1021-1022 (Conn. App. Ct. 2020)

[42]*See* §8.33 of this handbook.

[43]*See* §3.4.2 of this handbook.

[44]*See* §5.1 of this handbook.

[45]*See* §3.4.1 of this handbook.

[46]*See* Tunick v. Tunick, 242 A.3d 1011, 1022-1023 (Conn. App. Ct. 2020)

[47]*See* §8.11 of this handbook.

[48]*See* §5.3.3.1 of this handbook.