

# Do You Trust Your Trust Review Process?

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# Do You Trust Your Trust Review Process

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Presented by:

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# Trusts in Real Estate

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# What is a Trust?

- “A trust is where there are rights, titles, and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another.”
- Seymour v. Freer, 8 Wall. 202, 19 L. Ed. 300 (1868 - Illinois)
- (not what you initially think)
- A gives money to B to purchase land on behalf of A and sell the land within 5 years. B’s payment was to be ½ of the profit. Title is held longer than 5 years. Court rules that A hold title in trust to protect B’s rights of profit.



# What is a Trustee?

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- The person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another.
- - <https://thelawdictionary.org/trust/>



# What is a Fiduciary?

*“for the benefit of another”*

[The term fiduciary] embraces trust, confidence and refers to the *integrity*, the *fidelity*, of the party trusted, rather than his credit or ability. It contemplates *good faith*, rather than legal obligation, as the basis of the transaction.” Stoll v. King, 8 How. Pro. 298 (1853).  
Smith v. Ogilvie, 127 N. Y. 143, 27 N. E. 807 (N.Y. 1891)

A contract for royalties on book sales does not create a fiduciary relationship. It is a contract only.

The position of one in whom *special confidence* is reposed, and who is bound in *equity and good conscience* to act in *good faith with due regard* to the interest of the person reposing the confidence.  
Illinois v Riggins, 8 Ill 2d 78

Embezzlement is conversion of funds held in a fiduciary capacity.



# What is the scope of the Trustee's authority?



## Act as a Fiduciary!

Most states have a Probate Code which specifies the duties of a trustee/fiduciary:

South Carolina: Title 62,  
Chapter 7

- 801 – Loyalty (conflicts of interest)
- 803 - Impartiality as to beneficiaries
- 809 - Preserve/Protect trust property
- 813 – Duty to inform
- 933 - “Prudent Investor” Rule – and see -1005B (Trust investment advisor)

NOTE: And if you are also an attorney, ethical duties ascribed to attorneys apply to you as a trustee: (Briefly)

Rule 1.1 – Competence

Rule 1.4 – Communication

Rule 1.6 – Confidentiality

Rule 1.15 – Safekeeping Property

Rule 1.7 – Conflicts of interest – Personal Interest Conflicts (*like say, being a trustee!*)

# Some (not all) of the “basic” responsibilities of a Trustee (in no particular order):

(The following information was taken from a 2021 CLE titled, “Trust administration in the 21<sup>st</sup> Century” by Midland Trust Company)

## **As for Asset & Investment Management:**

- A. Select and Monitor appropriate investments
  - Possibly get investment advice from a Trust Investment Advisor
  - Consider needs of other current or future beneficiaries
- B. Gather, inventory, appraise and re-title trust assets
  - Bank accounts, real estate, personal property, insurance policies, etc.
- C. Render periodic accounting to beneficiaries
- D. Manage trust-owned real estate (maintenance, bills, insurance, taxes, valuations)
- E. Collect and maintain copies of corporate documents

# Some (not all) of the “basic” responsibilities of a Trustee (in no particular order):

(The following information was taken from a 2021 CLE titled, “Trust administration in the 21<sup>st</sup> Century” by Midland Trust Company)

## **As for taxes owed by the trust or trust-controlled assets:**

- A. Obtain Tax ID number for trust
- B. Make elections if trust holds certain closely-held businesses
  - Make elections as a Qualifying Subchapter S trust
  - Make elections as an Electing Small Business trust
- C. File tax returns for businesses owned by the trust
  - Possibly file in multiple states depending on trust assets
- D. File annual state and federal 1041 fiduciary tax returns
- E. Time distributions to pass income tax liability to beneficiary

# Some (not all) of the “basic” responsibilities of a Trustee (in no particular order):

(The following information was taken from a 2021 CLE titled, “Trust administration in the 21<sup>st</sup> Century” by Midland Trust Company)

## **As for Distributions to Beneficiaries:**

- A. Read and interpret trust agreement to determine if distribution is appropriate.
- B. Document distribution requirements/requests
- C. Research if expenses are appropriate.
- D. Monitor age-based distributions
- E. Consider distributions to disabled or minor beneficiaries.
  - Coordinate Bill paying
  - Working with case managers, guardians, care providers

# What is the scope of the Trustee's authority?



Abide by (act within the scope of ) the terms of the Trust Agreement!

*Wendt v. Steelcom Limited*,  
232 A. 3d 148 (Delaware  
Supreme Court, 2020)

Two owners of a company could not get along. Court appointed an attorney as liquidation trustee to “assume control of the company... and to carry out all powers hereunder... to prosecute, defend, and/or settle, on behalf of [the company], any and all ongoing litigation.” Both owners helped to craft the authority language for the trustee appointment.

Attorney (as Trustee) hired his own firm to resolve litigation for trust. Trustee **also** took action to windup (shut down) the company and billed the owners for BOTH services (litigation and winding up the business). Owners find out and sue attorney/trustee.

Court reduced attorney fees by over 30% because the Trustee's authority was only to resolve litigation issues, not windup the company.

Take home lesson: Don't act where you are not authorized.

# What is the scope of the Trustee's authority?

## No Self-Dealing!

*(Unless clear/unequivocal terms in trust state otherwise)*

*Grunder v. Mahaffey* G045013  
(California Court of Appeals – 4<sup>th</sup> Appellate District, 2012)

Father puts money in an irrevocable trust in 1992 for benefit of child and appoints attorney as trustee. Trust funds were depleted by payments for child. In 1996, attorney borrows money from trust (secured only by a note). Attorney made *some repayments in 2001*. No one discovers the “loan” until 2006.

The loan was to “protect the funds from the father’s payment obligations for child”.

Note: attorney had represented Father in personal injury litigation, divorce, and as trustee of two trusts and (bad) investor of trust funds.

Court required attorney to immediately replace funds (according to note – with interest).

Also: **self-dealing** trustees are *not* entitled to be reimbursed by the trust for fees used to unsuccessfully defend against charges of **self-dealing!**

Take home lesson: Don’t steal or borrow from trust.



# What is the scope of the Trustee's authority?



## What happens when there are no Trust directives?

Example: You find a recorded Deed into Trustees of a Trust, the Trustees state they do not have the Trust Agreement. Nothing is found that describes the terms of the Trust, beneficiaries, or rights of Trustees.

Possible questions:

How long is the property to be held in trust?

Can the trust property be sold?

What duties does the trustee have under the prudent investor rule, if any?

Can the language be corrected by the Settlor/Maker? [Is Settlor Alive?]

If not, does the state (trust) code “fill in” the necessary authority? [Likely not; too many missing terms.]

If not, then court approval is *likely* required to clarify the terms of the trust.

Note Settlor's heirs' interest in the property. [See Jones v. McCollen 85 Ill. App. 2d 375 (1967) & Jones v. Royal Builders 39 Ill. App. 3d 489 (1976) – not (enough) terms = a resulting trust in favor of Settlor's heirs. If a resulting trust is determined, the Deed in Trust is not void, AND the heirs have an equitable interest in the property.

Andrew's answer: You will likely need a court order to clarify terms of the trust. But see SC Code §62-7-411: Can modify trust with Settlor and Beneficiary consent; And possible termination of the trust with consent of all beneficiaries (if Settlor is dead).

# What is the scope of the Trustee's authority?



## What happens when the Trust Agreement does not contain the specific required power?

Example: A “simple” South Carolina trust agreement of Mrs. Mary Doe appoints Mr. John Doe as Trustee of the Trust, for the benefit of Jane Doe, to hold title to 123 Happy Street for 10 years. Trust is silent as to Trustee’s powers. Jane Doe needs funds.

### Questions:

Can Trustee use the trust property as collateral for a loan for the benefit of Jane Doe?

Can the Trustee sell/exchange the property to make the trust more profitable?

### Suggested Analysis:

1. Can the language be corrected by the Settlor/Maker? [Resolution?]
2. If not, does the state (trust) code “fill in” the necessary authority? – in SC, likely, but check your state’s trust code.

In South Carolina: Unless limited by the Trust, the Trustee has the following powers:

SC Code 62-7-815(2): general powers include *all powers*

SC Code 62-7-816(2): power to sell

SC Code 62-7-816(3): power to exchange trust property

SC Code 62-7-816(5): power to borrow money and pledge trust res

3. If required authority is not granted by statute or if your title underwriter needs more evidence of authority, you will need court approval to ratify the proposed authority/action.

4. Always a good idea to provide written notice to beneficiary/name them in the court action.

Likely Answer: Discuss with your underwriter.

# What is the scope of the Trustee's authority?

What happens when the "Trust" is only mentioned in a court order and all parties have not complied with the court order?

Example: Husband (H) and Wife (W) divorce in 1980. The Separation Agreement/Court Order instructs H & W to immediately convey their title interest in their house to a trust; each to have an equal share in the trust. Trustee to hold title until a) Remarriage of either; b) Death of W; c) W's option to sell house. W to be responsible for taxes and insurance for term of trust. H and W delay in transferring title to the trust and then H dies intestate. The only heirs of H are the children of W. After H's death, W transfers her title interest to an irrevocable trust. Trustee is now asked to sell the property for benefit of W.

Suggested Analysis:

1. Can the trust language be corrected by the Settlor/Maker? [No, H is deceased.]
2. If not, does the state (trust) code "fill in" the necessary authority? [No, trustee does not hold title to all the title interests (missing H's interest).]

3. If not, can a court approve the sale by the trustee and H's heirs? Example: court action (partition and sale).

4. Could the transaction occur without court action but with the consent of all of H's heirs' written consent?

Likely Answers:

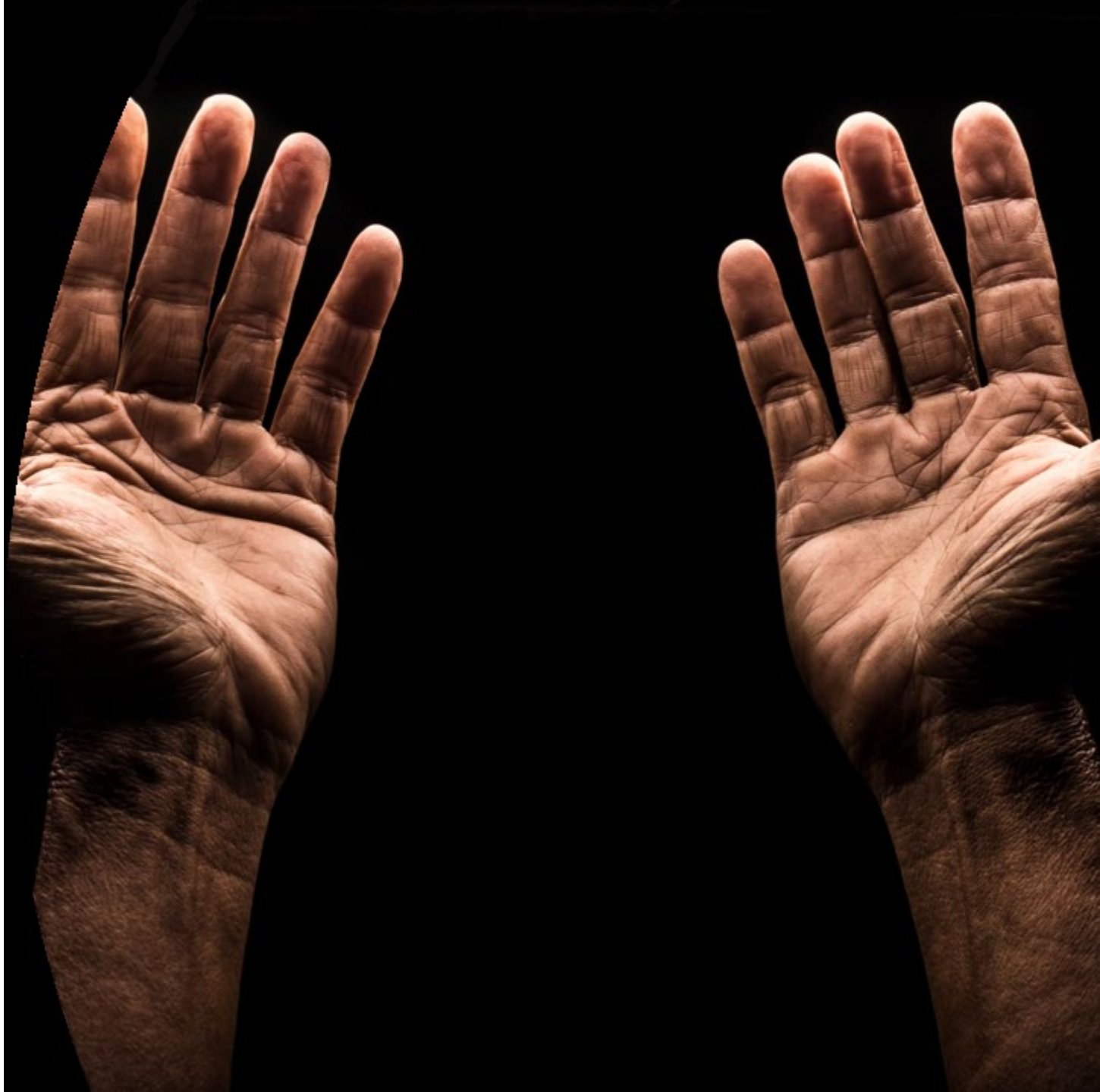
- A. Simple: Yes, ***IF*** all of H's heirs are not minors ***and*** all the heirs consent to convey their interests to the buyer.
- B. Hard: If one or more heirs do no consent or one or more heirs are minors, then a court action (partition and sale) is required.



# What are some of the Beneficiary's rights?

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- Right to receive ALL the benefits of the trust.
- Right to receive an accounting of all the activities of the trust.
- Right to rely on the trustee to act in the beneficiary's best interest.
- Right to petition court for enforcement of trust terms.



# Types of Trusts and Implications for Real Estate

## Revocable

Who holds the right to revoke?

Answer: The Settlor/Maker/Trustor/Grantor (herein “Settlor”) until death of Settlor (But remember SC Code §62-7-411 as to Durable POA’s ability to terminate trust).

If the trust is revoked and the trust is holding title to real estate, what happens to the title?

Answer: Title either reverts to the Settlor *or is as the Settlor directs* (See SC Code §62-7-601). Must memorialize/record the transfer! If not to Settlor, the revocation may incur transfer taxes!

What are the tax consequences for a revocable trust when the trust sells real property?

Answer: Capital Gains (think 1099-S) is the responsibility of the Settlor; but Settlor also may have IRC Section 121 exemption rights. Sales are reported on the Settlor’s 1040 return.

## Irrevocable

Trust is considered a separate legal entity with its own EIN.

If the trust retains the *gain* from the sale, the trust pays the taxes (normally at higher tax bracket levels).

If the trust distributes proceeds, including *gains*, to beneficiaries, the tax liability shifts to the beneficiaries, to the extent of receipt of proceeds.

Sales are reported on the Trust’s 1041 return. To the extent proceeds are distributed to beneficiaries, the Trust issues a Schedule K-1 for each beneficiary receiving proceeds (which is then reported on the beneficiaries’ own tax returns).

**Real Estate Tip:** Don’t forget to issue the 1099-S to the Trustee! Let the Settlor/Trustee deal with tax implications.

# Some Nuts and Bolts of a Testamentary Trust

- Owner/Settlor holds legal and equitable title until death (and all the liability as well).
- Where is the Trust created: in the Last Will and Testament (“LWT”)
- Some ideas to consider besides identifying the trustee / beneficiary
  - Purpose of the Trust
  - Directions for Trustee to follow (if any) (Example: hiring a Trust Investment Advisor)
  - Event when the Trust will terminate (Example: Certain Age of Beneficiary)
  - Beware violating your state’s Rule against Perpetuities
  - Be aware of generation skipping transfer tax situations
- When are assets transferred to the Trust: upon death of the Settlor (but note the Estate Representative’s ability to use estate assets to address creditor claims).
- How are assets transferred to the Trust: The declaration within LWT of the of trust transfers the assets; (for real estate) evidence of transfer should be confirmed by Deed from the Estate Representative to the Trustee
- Tax Considerations: “Stepped Up” Basis to the value of the property placed in trust at the time of Settlor’s death!

# Some Nuts and Bolts of an Inter Vivos Trust

- Owner/Settlor transfers legal title (and establishes equitable title) *now!*

Pizel v. Pizel, 7 Kan. App. 2d 388 (1982): The three requirements the trust had to meet to be a valid inter vivos trust: "(1) an **explicit declaration and intention** to create a trust; (2) **definite property** or subject matter of the trust; and (3) the **acceptance** and handling of the subject matter by the trustee as a trust."

- How is the Trust created: in a Trust Agreement/Declaration *or* Deed to a Trustee signed by the Settlor
- Same ideas to consider besides identifying the trustee / beneficiary
  - Purpose of the Trust
  - Directions for Trustee to follow (if any) (Example: hiring a Trust Investment Advisor)
  - Event when the Trust will terminate (Example: Certain Age of Beneficiary)
  - Beware violating your state's Rule against Perpetuities
  - Be aware of generation skipping transfer tax situations
- When should assets be transferred to the Trust: At least \$1.00 during the life of the Settlor and if all identified assets are not fully transferred during Settlor's life, then upon the death of the Settlor (after the Estate Representative has addressed all creditor claims) assets are transferred by a "pour-over" provision in the Settlor's LWT.
- Tax Considerations: Settlor's Basis for the value of the property placed in trust

# Some Nuts and Bolts of an Inter Vivos Trust

## Continued...

**Strongly recommend that there be evidence of a transfer of assets to the trust (but it is not required).**

*Taliaferro v. Taliaferro*, 260 Kan. 573, 921 P.2d 803 (Kan. 1996)

The opinion begins, “The trust documents had been prepared by [Settlor’s] nephew, an attorney, *who had little estate planning experience.*”

Settlor signed a Declaration of Trust placing assets into the trust. No other supporting transfer documents were signed. Settlor then treated (trust) property *as his own*. Widow challenged whether a trust was established. Trial Court used the 3-factor test in *Pizel v. Pizel* to determine there was no “acceptance by the trustee” since there was no acceptance document besides the Declaration. Appellate Court reversed, holding that Settlor’s intent at time of creation of the trust is set forth in the Declaration of trust, and such intent is determinative.

“A trust can exist where the settlor is both trustee and life beneficiary. See *In re Estate of Ingram*, 212 Kan. 218, 510 P.2d 597 (1973). Where, as here, the settlor and the trustee are the same person, no transfer of legal title is required, since the trustee already holds legal title.”

The Comment on Clause (a) of Restatement (Second) of Trusts § 17 states directly: “If the owner of property declares himself trustee of the property, **a trust may be created without a transfer of title to the property.**” If the settlor chooses to execute a conveyance of the property to himself or herself as trustee, it has no additional legal effect beyond the declaration.”

**Real Estate Tip:** Don’t solely review a deed into a trustee: Review the Declaration, Trust Agreement, or CURRENT Certification of Trust to get the full picture

# Some benefits of using Trusts to hold title to real estate

## **Continuity of ownership beyond death (keeping it “in the family”)**

- Consider Rule against Perpetuities
- Consider Dynasty Trusts

## **Protecting use/possession by surviving Spouse/Partner/minor/blended family**

- Can qualify “life estate” use and direct final ownership/disposition

## **Asset Protection** (shield to personal liability)

- Not my house, not my lawsuit

## **Possible Probate and Estate Tax avoidance** (not in your estate)

- Not my house, not in my estate



# Non-Traditional Trusts you may see...

A. Springing Trust – The Declaration of Trust can contain terms whereby title is stripped from the owner of record upon a certain event.

- **Real Estate Tip:** Record Notice of the Event + Certification of Trust
- **Real Estate Tip:** May trigger a transfer tax and possible re-valuation of property

B. Dynasty Trust – Holds title to avoid Probate/Generation Skipping Taxes

- **Real Estate Tip:** It is **Irrevocable** – obtain the separate tax ID
- **Real Estate Tip:** Identify the location of the Trust and the Trustee – it *may* establish the duration/term of Trust
- Term General Rule = Federal Rule Against Perpetuities (“RAP”) (Life + 21 Years [TN] or 90 years, whichever is less [SC]; or just 90 years [IL])
- Term Minor Rule = longer than RAP (Alaska, South Dakota, Delaware, Wyoming)



# Non-Traditional Trusts you may see... continued

C. **Special Needs Trust** (“Medicaid”)– Used to divest owner of real estate title to “impoverish” the owner and permit qualification for Medicaid benefits. Used to cover “extra expenses” not covered by Medicaid. For First –Party SNT’s, any remaining assets after death go to Medicaid.

- For real estate transfers to a SNT, there is a 5-year elimination “look back” period. Early planning is key.
- **Real Estate Tips:** *May trigger* transfer tax – Grantee receives Grantor’s basis (for tax purposes).
- **Estate Planning Concern:** Discuss First-Party SNT’s vs. Third-Party SNT’s with a tax professional/estate planning attorney. Medicaid must be reimbursed under First-Party SNT’s.

D. **ABLE Trusts** (Achieving a Better Life Experience Trusts) – signed into law in 2014 – functions like a 529 college savings plan – for a beneficiary who is diagnosed as disabled before age 26 - assets experience tax free growth and qualified disbursements are also tax free – can be controlled by the beneficiary

- **Real Estate Tip:** Contribution limits = annual federal gift tax exclusion amount (for 2025 = \$19K), so be mindful of requests for disbursement to an ABLE Trust.
- **Real Estate Tip:** *May trigger transfer tax* - If ABLE Trust receives title, its receives the Grantor’s basis



# How trusts hold real estate: declaration and/or deed considerations

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## The Documents

A: By (written) Declaration of Settlor – See (*Taliaferro v. Taliaferro*)

or

B: By Deed into Trustee. Deeds into a trust should name the Trustee as the Grantee. Failure to name the Trustee likely results in a failed deed (other bad example: “to the marriage of A&B”). When drafting a Deed to the Trustee, consult the Trust Agreement /Declaration for the exact clause to use when naming the trustee and trust (and any amendments).



# Certification/Certificate of Trust

## Abstract of Trust

- Most states have specific language in the Trust Code as to the content of the Certificate of Trust (“COT”)
  - South Carolina Code §62-7-1013
  - Washington RCW §11.98.075
  - Illinois Chapter 760 §3/1013
- **Real Estate Tip:** Always request a new COT that is issued *concurrently* with any trust transaction. Why: Things change without notice. It transfers liability to the Trustee
- “A certification of trust need not contain the dispositive terms of a trust.”
- “A person who in *good faith* enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property *as if the representations contained in the certification were correct.*”
- “A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that *designate the trustee* and confer upon the trustee the *power to act* in the pending transaction.”
- In SC: “A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages *if* the court determines that the person *did not act in good faith* in demanding the trust instrument.”
- But See: *McLean v. Echo Marie Sales (In re Gordon & Frances Sales Family Tr.)*, No. 52630-1-II (Wash. App. Nov 10, 2020) – COT can be used to determine terms of a missing/lost Trust Agreement

# The Trust Agreement and its impact on transactional decisions



Questions to ask while reviewing the Trust Agreement:

Is the Trust still active? If not, is there documentation on who now holds title? If not, is the prior Trustee still able to sign a transfer document? Successor Trustee? Beneficiaries? Appointed Administrator?

If the Trust is a party, do the title documents identify the Trust correctly? Are corrections required?

Does the Trust/Trustee have the power/authority to perform the transaction? Where is it stated? Have you reviewed the Certification of Trust? D

Does the transaction fit within the Trustee's fiduciary duties (preservation/self-dealing)?

Do you need all Trustees to sign transaction documents or just one?

Does the contract call for warranties that the Trustee should not give? (Example: The Trustee received title by quit claim deed and contract asks for warranty deed.)

If the Trust is the seller, is the Trust (via the Trustee) receiving the disbursement? If not, why not?

Are you required to listen to or follow a beneficiary's request for information or directive on the transaction?

Communication Directive to Staff

If the Certification of Title recites a different Trustee than who is listed on the Trust Agreement, are there documents to support/verify the change?

# Closing Agent Reminders For Transactions Involving Trusts

- Ask for a copy of the Trust Agreement and review the Trust Agreement as soon as possible to ensure the contract and closing documents properly name the Trustee/Trust. If you are not permitted to review the entire agreement, remember that you have a right to review those sections which identify the Trustee and the Trustee's power to act.
- Notify the Trustee that you will need a **new** Certification of Trust by the closing date. If the Trustee does not know how to create one, direct the Trustee to the attorney who assisted in creating the Trust Agreement. If they "did it themselves" then determine if you are competent to create a Certification of Trust based on the Trust Agreement and willing to accept the liability.
- If necessary, clarify to beneficiaries who are looking for funds that you will be disbursing to the Trustee, and it is the Trustee's responsibility to address Trust disbursements.
- Determine if it is common practice in your state to record the Certification of Trust!



# One Last “Run Around The Block” with Ethics For Attorneys

- **Rule 1.1 Duty of Competency:** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
  - Must review the trust instruments as part of preparation for the transaction.
  - (Andrew believes) Must obtain a Certification of Trust as part of every transaction.
- **Rule 4.1 Truthfulness in Statements to Others:** “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”
  - If you prepare the Certification of Trust, you are required to ensure it is correct.

- **Rule 1.6 Duty of Confidentiality:** “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation ...”

Who is your client? The Trustee or the Beneficiary/Beneficiaries? If the Trustee hired you, the Trustee is the client. Make sure the staff and all working on the file know to restrict communication to the Trustee unless the Trustee gives informed consent to share the information. Obtain informed consent in writing!

Can a beneficiary know the terms of the transaction: Trick question!

- Yes, from the Trustee.
- No, from the attorney hired by the Trustee unless Trustee provides informed consent

# Thank you for attending!

Please complete our online evaluation available at the end of this program.

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