

**New Jersey
N2K Hour:
Conveyances
and
Underwriting
Practices
involving
Trusts**

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History of Trusts

- The Statute of Uses was an Act of the Parliament of England, enacted in 1535, that restricted the application of uses in English property law.
- Under the act, the full title to land was automatically given to the person for whom the property was being used.
- Once the act was passed, English courts were hostile to the legislation, and landowners tried to find alternatives to hold property.
- English courts expanded the concept of the trust to fill the void.

History of Trusts (cont.)

- The courts defined a land trust to be an arrangement whereby one person holds full title to property for the benefit of another person, who may direct the management and use of the property.
- Courts focused on the difference between a trust and a use to achieve essentially the same result for landowners.
- In a trust, the title owner plays some active role in connection with the use of the property.
- The trusts that were created from the unexecuted uses of the landowners developed into the modern day trusts we encounter today.

What is a Trust?

- A trust is a relationship between assets and individuals.
- In a trust relationship, one individual or entity holds legal title to the property of another for the benefit of that person or a third person.
- Restatement of Trusts defines a trust as a fiduciary relationship with respect to the trust property subjecting the trustee to equitable duties for the benefit of another person.
- The parties to a trust include the Trustor or Settlor; the Trustee; and the Beneficiary or “cestui que trust.”
- The Settlor creates the Trust, and technically, the Trustee becomes the legal owner of the property transferred into the trust.

What is a Trust? (cont.)

- The Settlor creates a trust by transferring title to real or personal property to a trustee under an agreement that the trustee will administer it for the benefit of another.
- The beneficiary is the person for whose benefit the property is held.
- A trust can also be used as a vehicle to minimize taxes, protect assets, and be done in addition to a will to direct your assets after you die.
- By creating a trust, you can direct where remaining assets should go in the event of a beneficiary's death, and also avoid a long probate process.

Statute of Frauds

- The Statute of Frauds, provides that all trusts for real property shall be manifested and proved by a writing signed by the creator of the trust, or by their last will in writing, or else the trust shall be utterly void.
- The trust does not necessarily have to have been created in writing, but its existence, if denied, must be proved by some writing.
- In NJ, the source of the Trustee's powers are derived from the Trust Agreement, the Will, and by statutory authority, the Fiduciary Powers Act, N.J.S.A 3B:14-23.

Statute of Frauds (cont.)

- When a trust is created by will, it is necessary for the will to have been executed and proved in accordance with the applicable state law.
- The Statute of Frauds applies to public, private and charitable trusts, but it does not apply to resulting or constructive trusts.

Irrevocable v. Revocable Trust

- An irrevocable trust describes a trust that cannot be modified after it is created without the consent of the beneficiaries.
- The settlor of a revocable trust may change its terms at any time or revoke it.
- The settlor can also remove beneficiaries, designate new ones, and modify stipulations as to how assets within the trust are managed.
- Since a trust is considered a concept rather than an entity, title to real property should never be vested in a trust, but rather in the trustees thereof.

Trustee's Powers

- The trust terms may expressly or by implication define the trustee's powers.
- Normally, the power to sell any trust asset is found in the trust instrument.
- If not expressly given, the power may be inferred from the trustee's inherent duty to make trust assets productive, unless there is a specific prohibition against a sale.
- In the absence of an express or implied power to sell, a trustee has no power to sell without a court order.

Trustee's Powers (cont.)

- Authority to sell or encumber cannot be inferred from a power merely to manage trust property and distribute income.
- Underwriter approval must be obtained prior to issuance of a policy based on an implied trust power to sell.
- The same above considerations for a power of sale apply in relation to leasing power.
- Normally, a trustee does not have power to mortgage any trust asset, and it is improper for a trustee to acquire property subject to a mortgage unless specifically authorized in the trust document.
- A power to mortgage cannot be inferred.

Living and Testamentary Trusts

- There are many types of trusts.
- The two main categories that we often see frequently are living (inter vivos) and testamentary trusts.
- The rules governing the trustee's power and authority to deal with the trust property are usually set forth in a formal written agreement between the settlor and the trustee known as a trust agreement.
- If the trust is to become operative during the lifetime of the settlor, it is known as a living (inter-vivos) trust.
- If the trust agreement is created in the settlor's will, and thus does not become operative until after the settlor's death, the trust is known as a testamentary trust.

Examining an Inter-Vivos Trust

- You must review the trust agreement and confirm that the trustee or co-trustees have the power to sell, lease or mortgage the property.
- Confirm that there is no prohibition or restriction in the trust agreement against the proposed transaction.
- Is the trust still in effect or has it been terminated?
- Does the beneficiary have to join in the conveyance?
- Is the trust revocable and does the settlor have to join in the conveyance?

Testamentary Trusts

- A testator may devise property to a testamentary trust created by the terms of his own will.
- In this situation, the will itself establishes the trust and sets the boundaries of the trustee's authority.
- The creation of any testamentary trust depends on the death of the testator, who is also the settlor or trustor.
- It also depends on the validity of the will in which the trust is created.
- This condition presupposes the completion of the probate proceedings.

Testamentary Trusts (cont.)

- If the will is not admitted to probate during the time allowed by law, or if admitted, it is contested and set aside, the trust that was to be created will be of no legal effect.
- It also may be possible for an inter-vivos trust, which was previously created, to be named as a devisee under the terms of a will.
- When examining a testamentary trust, you must review a probate search to confirm that the will has been probated and obtain copy of the will creating the trust.

Classification of Trusts

- Trusts can also be classified into several different sub-categories as well.
- An active trust is a trust under which the trustee has active duties to manage or handle the corpus of the trust.
- A blind trust arises where property is conveyed or transferred to a trustee, but the conveyance or transfer does not disclose the trust or identify the beneficiaries.
- If title to property is held in a blind trust, the trustee may convey, transfer or encumber the title of the property without proof of a trust agreement and the trustee's authority from the beneficiaries to act in this manner.

Classification of Trusts (cont.)

- Some other trusts include a charitable trust, which is designed for the benefit of a class in particular or the public in general.
- Also, the individuals who may benefit in charitable trusts are indefinite in number and uncertain.
- A constructive trust arises entirely by construction of law or by operation of law, independently of any actual or presumed intention of the parties, and often contrary to their intention, for the purpose of promoting justice or for frustrating fraud.

Express Trust

- An express trust is created by the direct and positive act of the donor or settlor, by some writing, deed or will, as distinguished from a trust inferred by the law from the conduct or dealing of the parties.
- Any language which shows with reasonable certainty an intention to create a trust, and which designates the property, the beneficiary, and the purpose of the trust, is sufficient.
- Under the Statute of Frauds, an express trust must be evidenced in writing.

Express Trust (cont.)

- The most common forms used in the creation of a trust are:
 - Declaration of trust
 - Delivery in trust
 - Conveyance or deed
 - Agreement or Contract
 - Testamentary disposition
- After a trust is created and in force, it cannot be amended or altered without the consent of all parties in interest, except under a reserved power of amendment or alteration.

Express Trust (cont.)

- The trustee is generally appointed in the trust agreement.
- If the trust does not provide the method for the appointment of a successor trustee in the event of death, refusal or inability to act, a court of competent jurisdiction may appoint one.
- In the creation of a trust, the beneficiary must be clearly and definitely designated.
- Any person or legal entity capable of taking an interest in real property may be a trust beneficiary, including the settlor.
- A class, if clearly defined, may be named as a trust beneficiary.

Express Trust (cont.)

- The subject matter of the trust must be lawful and in existence at the time the trust is created.
- It can be almost any interest in property.
- Unless prohibited by statute, the trust may be created for any purpose the creator desires, providing it would not be contrary to public policy.
- Also, unless otherwise provided by statute, the term of the trust cannot be in contravention of the rule against perpetuities.
- The rule against perpetuities establishes that any created interest must vest within twenty-one years, exclusive of periods of gestation, after lives in being.

Express Trust (cont.)

- In an express trust, there is a separation of legal title and equitable ownership.
- An express trust is distinguished from a resulting or a constructive trust, as the trustee has legal title to the property, and the beneficiary has an equitable interest in the property.
- Legal title in the trust is held by a person, the trustee, for the benefit of another, the beneficiary, who has an equitable interest in the res to receive benefits under the terms of the trust.

Self-Dealing

- A trustee cannot, in its fiduciary capacity, deal with itself in its individual capacity.
- The trustee also cannot take part in any transaction concerning the trust in which the trustee has an interest adverse to that of the trustee's beneficiary, without permission of the beneficiary and only after full disclosure.
- The trustee also cannot convey or mortgage trust property to itself or to its spouse.
- Please contact your underwriter if you have any questions or concerns involving self-dealing.

Termination of Trusts

- Where the instrument creating a trust does not prohibit the termination thereof, a trust may be terminated.
- It may be terminated in the following ways:
 - By agreement of all parties in interest;
 - By the consent of the beneficiaries without judicial action except in testamentary trusts;
 - By the trustor through the exercise of a previously reserved power of revocation;
 - By judicial determination that the trust was improperly created, or that its purpose is unlawful or impossible to be carried out;

Termination of Trusts (cont.)

- By the terms of the trust;
- Expiration of the term or duration;
- Occurrence of some event.
- The termination of a trust ends the separation of legal title and equitable ownership.
- The title to the corpus and principal, including accumulations of income, passes to the beneficiaries.
- The trustee also has a duty to pay or turn over the estate to the beneficiaries and make a conveyance to them where conveyance is necessary to clear the legal title.

Underwriting Practices

- Typically, a copy of the trust agreement is required together with copies of any amendments, modifications, or revocations prior to closing.
- In the event there have been no amendments, modifications, or revocations, satisfactory evidence is required to that effect.
- At the time these items are provided, additional requirements or exceptions may be added to the title commitment.
- If no instrument creating the trust exists, then a Certification of Trust can be provided in lieu of the trust agreement.

Underwriting Practices (cont.)

- Generally, you must review a copy of the trust agreement in order to verify authority of the trustee to sell.
- Satisfactory evidence must also be furnished that the trustee holds no beneficial interest in the trust.
- If a judgment or tax lien applies to the trustee solely in his or her individual capacity, you may waive that lien if you confirm that the trustee never had and does not have any present or contingent beneficial interest.
- However, the liens must be shown until you confirm those facts.

Certification of Trust

- A Certification of Trust is a legal document that can be used to certify both the existence of a trust, as well as to prove a Trustee's legal authority to act.
- This document is typically shorter than the actual trust agreement, but it contains the most pertinent information without making every aspect of the trust public.
- Some states require the Certification of Trust to be recorded along with the Deed from the Trustee or Co-Trustees of the Trust.
- However, NJ does not have this recording requirement for this document.

Successor Trustees

- If the Trust Agreement appoints Co-Trustees of the Trust, both Trustees hold title as joint tenants.
- Upon the death of one or more trustees, the surviving trustee(s) may execute the Deed, unless the trust agreement expressly states otherwise.
- If there is no provision in the Trust for a successor Trustee, and no Trustee has been appointed or is capable to convey title, then a court order is required to have a Trustee appointed on behalf of the Trust.

Successors and Transferees Endorsement

- The NJRB 5-66 Successors and Transferees endorsement modifies the definition of insured to include, in specific limited circumstances, transferees under inter-vivos or testamentary trusts, and transferees for no or nominal stated consideration.
- This endorsement supersedes and replaces the Inter-Vivos Trust endorsement, effective September 17, 2001.
- If you have any questions regarding this endorsement, please contact your underwriter for further guidance.

Inter-Vivos Transfers by Named Insured

- In the ALTA 2006 policy forms, the definition of Insured has been expanded to include certain related-entity transferees, including:
- (D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title ... (4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.
- Based on this definition, an inter-vivos transfer by the named insured to the trustee of a trust will not cause policy coverage to lapse, even without the Successors and Transferees Coverage Endorsement.

Wrap Up and Review

- In NJ, the source of the Trustee's powers are derived from the Trust Agreement, the Will, and by statutory authority, the Fiduciary Powers Act, N.J.S.A 3B:14-23.
- A living (inter-vivos) trust becomes operative during the lifetime of the settlor, whereas a testamentary trust is a trust created in the settlor's will and becomes operative after the settlor's death.
- An irrevocable trust cannot be modified after it is created without the consent of the beneficiaries, whereas a revocable trust may be changed or revoked at any time by the settlor.

Wrap Up and Review (cont.)

- When title is held by a Trustee of a Trust, you must review a copy of the trust agreement in order to verify authority of the trustee to sell.

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