

Trusts - Contract or Property, or More?

February 20, 2024

Take-Away: The academic community continues to debate the question of whether a trust is either a branch of contract law, or a branch of property law. According to others, there are four fundamental legal relationships from which to pick, or perhaps each of which may ultimately be involved in the creation of a trust relationship. This debate can often lead to confusion.

Background: In *Loring and Rounds: A Trustee's Handbook* (2024) the authors claim that our common law legal system does not have just two private legal fundamental legal relationships of a consensual variety- contract or property. Rather, the authors claim that there are four legal relationships: (i) agency; (ii) contract; (iii) the bundle of legal rights and duties in connection with property; and (iv) trust. [Section 8.22.] The authors observe:

“The four private fundamental consensual legal relationships are profoundly different and profoundly interrelated. The trust, in part the conveyance of an equitable interest in property, exhibits agency, property, contractual, and even corporate attributes, but is sui generis. 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.”

Trust v Contract: A trust is not a contract at common law, but others disagree.

Restatement- Not a Contract: The *Restatement (Second) of Trusts* (1959) declares *“The creation of a trust is conceived as a conveyance of the beneficial interest in the trust property, rather than as a contract.”*

Professor Langbein- A Contract: Yet in John Langbein published a seminal article in the Yale Law Journal, Volume 105, "*The Contractarian Basis of the Law of Trusts*, in which the author concludes "*In truth, the trust is a deal, a bargain about how the trust assets are to be managed and distributed. ... The distinguishing feature of the trust is not the background event, not the transfer of property to the trustee, but the trust deal that defines the powers and responsibilities of the trustee in managing the property.*"

Distinctions Between Contract and Trust: Other distinctions between the two legal theories of trust include-

An irrevocable trust typically arises in connection with a donative transfer of property to the trust. There is no exchange of consideration as would be the case with a third-party beneficiary contract, e.g., a life insurance contract.

A revocable *living* trust is often referred to as a 'will substitute.' A will, by definition, is non-contractual in that it is ambulatory- it does not 'speak' until the testator's death.

The right of revocation under a trust is an ownership-equivalent power that can and may eliminate the legal and equitable property rights of all the other parties to the relationship. [MCL 700.7602.]

A mere contractual obligation, including a contractual promise to convey property, does not in itself create a trust. *Tunick v Tunick*, 242 A.3d 1011 (Connecticut Appeals Court, 2020.)

A trustee's right to compensation is merely an equitable right, the trust being a creature of equity.

Similarly, the trustee's liability to the beneficiary is equitable, not contractual, e.g., even an uncompensated trustee assumes enforceable duties.

An unborn and unascertained person can be a trust beneficiary. Yet in the case of a contract, those who supply consideration must be in existence at the time of the exchange.

Moreover, while a person cannot contract with oneself, an enforceable trust may arise via a declaration of trust.

“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.”
Loring and Rounds, Section 8.11

On technical grounds, the effectiveness of a donative transfer to the trustee of an irrevocable trust is determined by the laws that relate to *assignments*, not to the law of donative transfers, or gifts. More to the point, an *assignment* is supported by neither consideration nor donative intent. The trustee is the assignee, not the *donee* of the legal title. Thus, there is no requirement, or ‘coupling,’ of title passage to the trustee with the need for any donative intent.

It is the trust beneficiaries who are the *donees*. The subject of the gift are all the equitable property rights that are incident to the trust relationship. The effectiveness of the donative transfer of those equitable property rights is determined by the rules that govern the making of a gift.

In the case of a declaration of trust, only the equitable interest is transferred; legal title remains with the settlor.

Conclusion: There is plenty of academic disagreement if a trust is based in property law, contract law, agency, or some other legal construct at common law. Even the courts can get confused. Just last year the Supreme Court of Idaho, in *International Rescue Committee v Trustee of the Wylie Street Emergency Fund*, 537 P.3d 30 (2023) held 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*” when it is an *assignment*, not a gift of title, to the trustee that occurred.