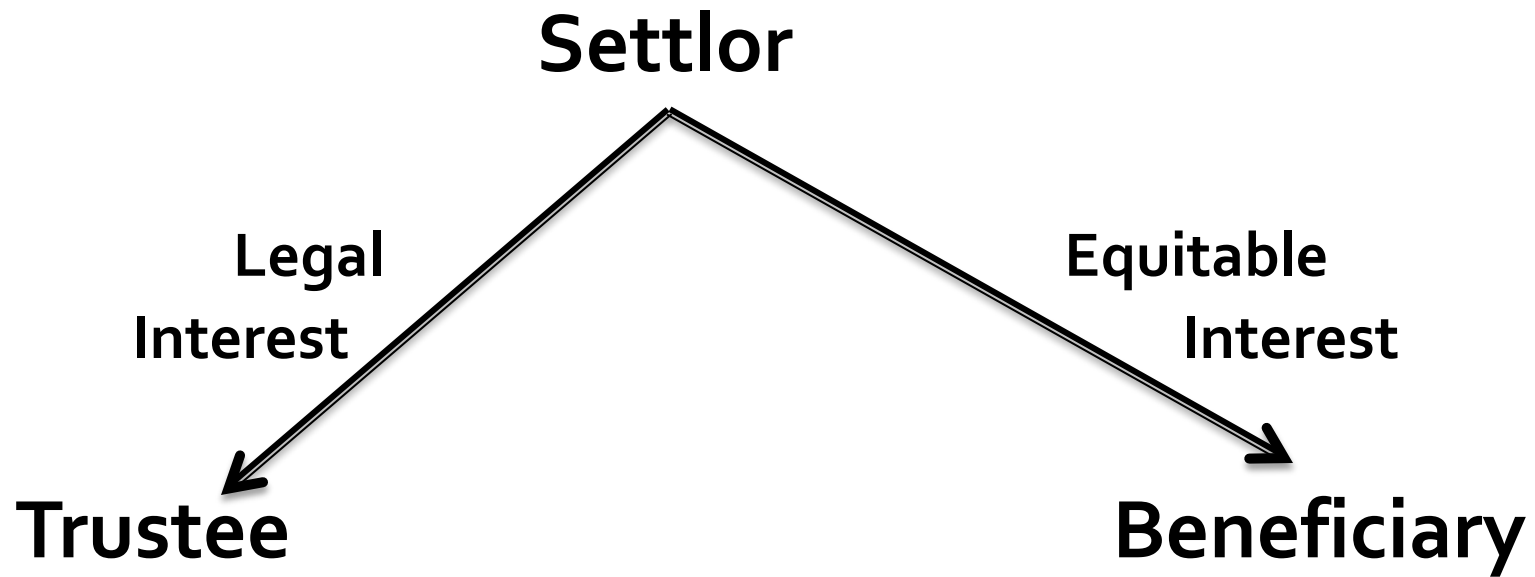


TRUSTS

Introduction

Basic Idea



Basic Functioning

- Settlor transfers legal title to trustee (honest and reliable) and equitable title to beneficiary (deserving of a windfall).
- Trustee manages property according to:
 - legal duties and
 - the settlor's instructions.
- Trustee distributes to beneficiaries according to settlor's instructions.
- Trust ends when duties complete.

Purposes and Uses of Trusts

Purposes and Uses of Trusts

- **1. Provide for and protect beneficiary**
 - **Minors**
 - **Incompetents**
 - **People without management skills**
 - **Spendthrifts**

Purposes and Uses of Trusts

- **2. Flexibility of asset distribution**
 - Spread benefits over time.
 - Give trustee discretion whom to pay and how much to pay.
 - Set standards.
 - Impose conditions.

Purposes and Uses of Trusts

- 3. Protection against settlor's incompetence and help avoid guardianship
 - The "stand by" trust

Purposes and Uses of Trusts

- **4. Professional management of property**

Purposes and Uses of Trusts

- **5. Probate avoidance if trust inter vivos**
 - Privacy of asset distribution

Purposes and Uses of Trusts

- **6. Tax benefits**

Warning!

- Trusts, although very helpful, are not always worth the cost, expense, and hassle.



Texas Trust Legislation

- **1. Before 1943**
 - Case law
 - Sparse statutes

Texas Trust Legislation

- **2. April 19, 1943 to December 31, 1983**
 - **Texas Trust Act**

Texas Trust Legislation

- 3. January 1, 1984 to present
 - Texas Trust Code
 - Part of Property Code
 - Trust legislation is also found in many other places.

TRUST CREATION

Elements of a Valid Trust

- Trust intent
- Settlor with capacity
- Compliance with Statute of Frauds
- Legal purpose
- Transfer of property
- Trustee holding legal title
- Beneficiary holding equitable title
- Compliance with Rule Against Perpetuities

TRUST INTENT

Threshold Requirement

- “A trust is created only if the settlor manifests an intention to create a trust.”
- Trust Code § 112.002.

Basic Elements

1. Split of legal and equitable title.

and

2. Imposition of enforceable (fiduciary) duties on the holder of legal title.

Basic Principals

- **1. Exact use of trust language not needed.**
 - *Perfect Union* – p. 502

Basic Principals

- 2. “Weak” language showing intent may be sufficient.
 - *Tomlinson v. Tomlinson* – p. 507

Basic Principals

- 3. Settlor need not know or understand technical trust words.

Basic Principals

- 4. Use of trust language is not conclusive.

Basic Principals

- **5. Duties must be legally enforceable; not moral or ethical.**
 - **Precatory language insufficient.**

Basic Principals

- **6. Present intent needed.**
 - **Intent to create a trust in the future is insufficient.**

Problems

- Page 509
 - A. Trust created.
 - B. No trust created.
 - C. I really thought about it but unfortunately could not figure out how to decide.
 - D. I did not think about it. I'm a slacker and did not read the assignment.

Statute of Uses

- **Source of trust intent requirements.**
- **History of Uses:**
 - **Before 15th Century – honorary only; not enforceable.**
 - **During 15th Century – enforced in equity, even though not at law.**
 - **Uses used to avoid duties of property ownership under feudal land ownership system.**

Statute of Uses

- **English Statute of Uses enacted in 1535.**
 - **Converted beneficiary's equitable interest into legal interest thereby eliminating legal interest formerly held by the trustee.**
 - **Called "executing the use."**

Statute of Uses

- **Exception developed at common law**
 - The “active” use where the trustee had actual duties to perform (not just a mere title holder).

Statute of Uses

- **Texas -- § 112.032**
 - **Applies to real property (but same result with personal property likely).**
 - **Trust continues if trustee has a power or duty relating to trust administration.**
 - **If trustee does not, legal title will vest in beneficiary.**

Permissible combination of parties

- **At time of trust creation**
- **During existence of trust.**

[live demonstration]

Attempt to ascertain one rule to resolve all questions.

Permissible combination of parties

- **Basic principles**
 - Any combination of parties is permissible as long as sole trustee is not sole beneficiary.
 - If all legal and equitable title in one person, merger occurs and no trust exists.
 - Trust Code § 112.034.

Distinguishing Trusts From Other Legal Relationships

Distinguishing trusts from other legal relationships

- Litigants often want a relationship to be a trust to enhance recovery chances.
- Key to distinguishing is to remember that only a trust has *both*:
 - Split of legal and equitable title, and
 - Imposition of enforceable duties on holder of legal title.

Distinguishing trusts from other legal relationships

- *Sarah* – p. 512



Distinguishing trusts from other legal relationships

- Problems – p. 518
 - A. Trust
 - B. No trust
 - C. I tried but I can't figure it out.
 - D. I didn't even try – I am still in that "Spring Break state of mind."

TRUST CREATION

A. During Settlor's Lifetime

- **1. Self-Declaration of Trust -- § 112.001(1)**
 - **Settlor = Trustee**

A. During Settlor's Lifetime

- 2. Transfer or Conveyance in Trust –
§ 112.001(2)
 - Settlor ≠ Trustee

A. During Settlor's Lifetime

- Often called:
 - “Inter vivos trust”
 - “Living trust”

B. Upon Settlor's Death

- In settlor's will -- § 112.001(3)
- Precondition to trust validity = will validity
- "Testamentary trust"

CONSIDERATION

General Rule

- Consideration is not required for creation of a valid trust. § 112.003
- A trust is a conveyance; not a contract.
- Problem 1, p. 519
 - A. Yes, settlor can invalidate.
 - B. No, settlor cannot invalidate.
 - C. I would let Judge Judy decide.

Promise to Create Trust in Future

- Consideration is needed to enforce a promise to create a trust in the future.
§ 112.003
- Problem 2, p. 520
 - A. Yes, Son may legally force Dad to create the trust.
 - B. No, Son may not legally force Dad to create the trust.
 - C. Better call Saul.

Promise as Trust Property

- If trust property is a promise, it needs to be supported by consideration to have value.
- Question: Settlor transfers my promise to give the settlor \$1,000 on April 1 to the trustee of a trust. Is this trust property?

STATUTE OF FRAUDS

Basic Idea

- Under certain circumstances, a trust must be evidenced by a writing.
- Why? Whom does the writing requirement protect?
 - A. Alleged settlor.
 - B. Alleged beneficiary.
 - C. Alleged trustee.
 - D. What really goes on in Area 51.

Basic Requirement -- § 112.004

- **1. Written evidence of the trust's terms which is**
- **2. Signed by the settlor (or settlor's agent).**

Exceptions

- **1. Oral trust if *all* below are true:**
 - Personal property
 - Trustee is not the settlor
 - Trustee is not the beneficiary
 - Settlor expresses trust intent prior to or simultaneously with transfer

Exceptions

- **2. Self-declaration if *all* below are true:**
 - **Personal property**
 - **Settlor states in writing that settlor holds property in trust, even though the writing does not comply with normal requirements.**

Exceptions

- **3. Part performance**
 - **If alleged trustee acts like a trustee, alleged trustee estopped from denying existence of trust.**

Special rule if trust in writing

- All changes and any revocation must also be in writing, even if trust could have been oral originally.

Standing to raise Statute of Frauds

- **1. Alleged trustee**
 - Thus, trustee can carry out a trust even if Statute of Frauds defense exists (e.g., oral trust of land).
- **2. Trustee in bankruptcy**

Notarization

- **Not required.**
- **But, it is prudent practice because:**
 - A.** Trust may then be recorded in deed records.
 - B.** Takes more time and thus increases attorney fees.
 - C.** Provides notaries with enhanced employment.
 - D.** It really isn't – this is a trick question.

Rule Against Perpetuities Compliance



Constitutional Prohibition

- **“Perpetuities * * * are contrary to the genius of a free government, and shall never be allowed * * *.”**
 - **Art. 1, § 26.**
- **Remote vesting of contingent interests can unduly restrain transfer of property.**

Trust Code § 112.036

“The rule against perpetuities applies to trusts other than charitable trusts.”

“An interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation.”

Interests Affected by RAP: The Test

All of the following must be true for RAP to apply:

- Future interest (not present interest),
- Contingent (not totally vested), and
- Held by a transferee (not grantor).

Interests Affected by RAP: The Interests

- Thus, if you classify an interest as one of the following, you must check for a RAP violation:
 - Contingent remainders,
 - Vested remainders subject to open, and
 - Executory interests **including trusts.**

Armageddon RAP Test

- Ascertain lives in being.
- Give each life in being a child who is born after date of trust creation
 - Thus, they are not lives in being.
- Everyone dies, except new children.
- Determine if beneficial interest in the trust must vest/not vest within 21 years.

Parts of trust needed RAP compliance

1. Time of trust creation

- Page 532, note 1

2. Beneficial interests while trust ongoing

- Page 532, note 2

3. Beneficial interests when trust ends

- Page 533, note 3

Kettler (p. 527) – **Tex. Sup. Ct. 1964**

“I want my ranch * * * to be set up in a perpetual trust. I specify that it must never be sold. The income to be divided equally between my direct blood heirs as long as there is a blood heir of mine living * * *.”

Basic Example

- **Inter vivos trust which provides:**
 - **“In trust to Clark for life, then to Clark’s children equally when the youngest reaches age 25.”**
 - **Note that the RAP result is the same regardless of whether Clark already has a 25 year old child.**

What happens if RAP violated?

- **1. Common Law**
 - Entire trust void; not just the portion that violated RAP.
 - Even if violation based on “wild” hypotheticals.

What happens if RAP violated?

- **2. Wait and see**
 - Based on reality, not hypotheticals.

What happens if RAP violated?

- **3. Expand period**

What happens if RAP violated?

- 4. Reformation – Property Code
§ 5.043
 - Court *must* reform or construe interests that violate RAP.
 - Follow settlor's ascertainable general intent.
 - Court must liberally construe statute.
 - Court may use cy pres when it reforms or construes.
 - Warning: only applies to conveyances on or after Sept. 1, 1969.



What happens if RAP violated?

- **5. Uniform Statutory Rule Against Perpetuities Act**
 - 90 year time period from the of the grant (rather than lives in being),
 - with a wait and see approach
 - then, reformation if interest still has not vested.
 - Thus, has never really been used because the Act is too recent to have allowed the 90 year time period to run.

What happens if RAP violated?

- **6. RAP repeal** (in whole or in part)
 - e.g., Alaska, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wisconsin, Wyoming
 - Why do states repeal RAP?

Savings Clause

“ If a court of proper jurisdiction finds that this trust violates the Rule Against Perpetuities, the remaining trust property shall be distributed to [Beneficiary].”

Trust Purposes

General Rule – § 112.031

“A trust may be created for any purpose that is not illegal.”

Prohibited Trustee Conduct —

§ 112.031

1. **Commit a crime**
2. **Commit a tortious act**
3. **Commit an act contrary to public policy**

Standard

- **1. Intent and effect (majority & Texas)**
- **2. Use of property (minority)**

Hunt v. Carroll – p. 534

- If married = nothing
- If widow or divorce = \$250/month
- If remarry current husband = nothing
- If live 20 years = entire estate

Stewart – p. 539

- If x named as guardian, trust ends and property goes to others.

Discrimination

- **Note 1, page 542**

Defrauding Creditors

- **Uniform Fraudulent Transfer Act (Texas version)**

Remedy

- **1. If defrauding creditors, set aside conveyance to trust up to amount of claim.**
- **2. If other improper purpose:**
 - **Resulting trust (settlor regains property), or**
 - **Permit trustee to retain property free of trust.**
 - **How decide?**

The Settlor

Generally

- **Creates trust by manifesting trust intent.**
- **Also called:**
 - **Trustor (old term)**
 - **Grantor (tax, overbroad as applies to all transferors)**
 - **Donor (overbroad as applies to all gift givers)**
- **Corporations, partnerships, etc. can be settlors. § 111.004(10).**

Capacity -- § 112.007

- **Inter vivos trust = inter vivos gift**
- **Testamentary trust = testamentary capacity**

Retention of Powers by Settlor

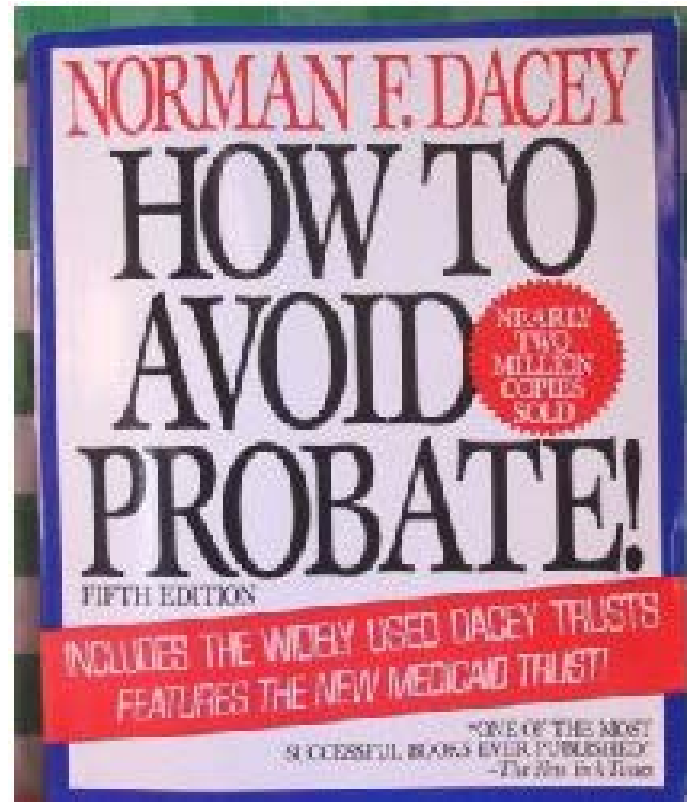
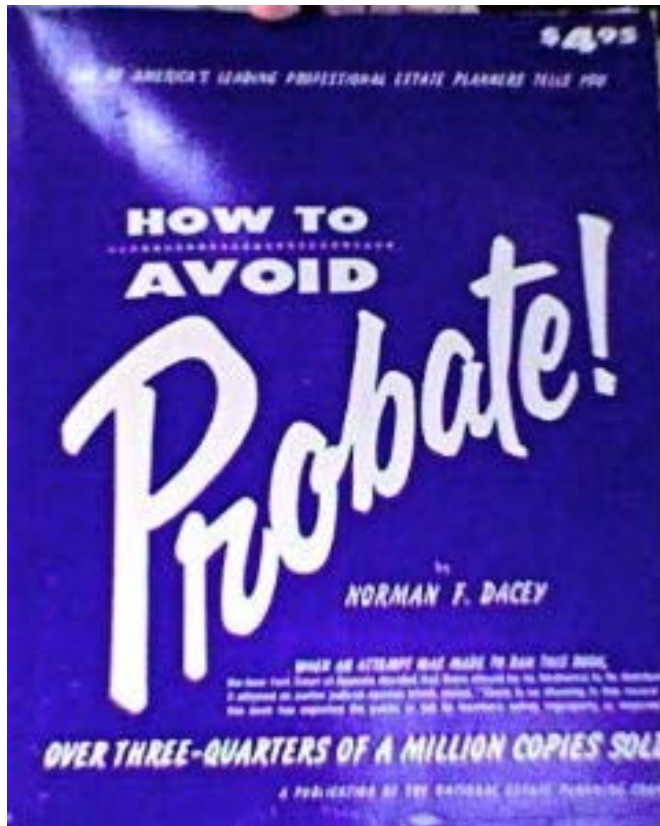
- *Westerfeld v. Huckaby* – p. 544
 - Texas Supreme Court 1971
- Did settlor reserve too many powers?
- 5-4 decision of Supreme Court of Texas.

Retention of Powers by Settlor

- **Trust Code § 112.033**
 - **Settlor may retain:**
 - Legal title (serve as trustee)
 - Life interest (considerable beneficial title)
 - Power to amend, modify, and revoke
 - Power to change beneficiary
 - Control over trust administration
 - Ability to add property to trust

Retention of Powers by Settlor

- “Dacey” Trusts



5 editions
from 1965-
1993.

Trust Property

Basic Requirement -- § 112.005

- A trust must have property.
- A trust is a method of holding title to property; a conveyancing relationship

Additional Trust Property -- § 112.006

- **New property may come from any source unless:**
 - **Trust prohibition, or**
 - **Property unacceptable to trustee.**

Types of Property -- § 111.004(12)

- **Any transferable property:**
 - **Real (present & future)**
 - **Personal (tangible, intangible, choses in action, right to be a beneficiary, etc.)**

Types of Property -- § 111.004(12)

- But not property the settlor cannot immediately transfer:
 - Non-assignable contract right
 - Spouse's share of community
 - Property to be acquired in the future
 - Expectancy to inherit from someone still alive
- *Birk* – p. 551

Delivery (trust funding)

- Real Property = deed
- Personal Property = possession, deed of gift, title registration, etc.
 - *Marshall* – p. 551

Trustee

Generally -- § 111.004(18)

- Holds legal title.
- Must act in accordance with fiduciary standards.
- Trustee's legal title:
 - cannot be reached by trustee's creditors, and
 - is not in trustee's estate upon death.

Capacity -- § 112.008

- **Trustee must be able to:**
 - **Take title,**
 - **Hold title, and**
 - **Transfer title to trust property.**

Capacity

- **Individuals:**
 - **18 (or disabilities of minority removed), and**
 - **Competent.**
- **Trustee may be the settlor and/or a beneficiary (as long as sole trustee is not sole beneficiary).**

Capacity

- **Corporations**
 - **Power to act as trustee**
 - Financial institutions (no separate charter needed)
 - Trust companies (separate charter needed)
 - Foreign corporations if comply with Estates Code Chapter 505

Acceptance -- § 112.009

- **Importance**
 - **No liability until acceptance.**
 - **Cannot force a person to accept.**
 - ***Blieden v. Greenspan* – p. 555**

Acceptance -- § 112.009

- **Methods**
 - **Signature of trustee = conclusive evidence**
 - **Exercise power or perform duty = presumption of acceptance, unless**
 - **Preservation, if notice given, or**
 - **Inspection.**

Acceptance -- § 112.009

- **Reasons to accept:**

- **Reasons to not accept:**

Acceptance -- § 112.009

- **If trustee does not accept:**
 - **Trust instrument names alternate.**
 - **Trust instrument provides method of selecting alternate.**
 - **Court appointment upon petition of interested person.**

Bond -- § 113.058

A.



B.



Bond -- § 113.058

- **Presumption = required**
- **Not required if:**
 - **Waived by settlor in trust (unless court nonetheless requires), or**
 - **Corporate trustee.**
 - **Why?**

Bond -- § 113.058

- **Why require bond?**
- **Why waive bond?**

Multiple Trustees -- § 113.085

- Possible benefits:
- Possible dangers:
- Note: Majority may act.
 - Common law and some states still require all co-trustees to join in the exercise of a power.

Resignation -- § 113.081

- Follow procedure settlor provided in the trust. Otherwise,
- Petition court for permission to resign.
- Practice tip = include procedure in trust instrument

Removal -- § 113.082

- **Details later when we cover trust enforcement.**

Successor Trustee -- § 113.083

- If no trustee remains:
 - Successor named by settlor.
 - Replacement method specified in trust.
 - Court **may** appoint on its **own** motion.
 - Court **must** appoint on petition of **interested person**.

Successor Trustee -- § 113.083

- If at least one trustee remains:
 - Successor named by settlor.
 - Replacement method specified in trust.
 - Court will not fill vacancy.

- If charitable trust, remaining trustees may fill vacancy by majority vote, even if trust silent.
 - Why does statute allow this?
 - 1. _____
 - 2. _____

Successor Trustee -- § 113.084

- **Powers:**
 - **Presumption = same as original**
 - **Exceptions:**
 - **Trust instrument provides otherwise.**
 - **Court order provides otherwise.**

Successor Trustee – Finance Code ch. 274

- **Substitute Fiduciary Act**
- **Why may what this Act allows be important to your client?**

Beneficiary

Generally -- § 111.004(2), (10)

- Holds equitable title.
- Enforces fiduciary duties against trustee.
- Capacity = ability to take and hold property.

Description of Beneficiaries

- **Must be clearly ascertainable.**
 - **Problems 1-3, page 559**

Description of Beneficiaries

- **Multiple beneficiaries allowed:**
 - **Concurrent**
 - **Successive**

Honorary (Purpose) Trusts

- Trust lacking a human beneficiary or charitable purpose.
 - Care for pet
 - Say masses
 - Erect monuments

Honorary (Purpose) Trusts

- **Traditional approach = invalid**
 - **Not private as no human beneficiary with standing to enforce.**
 - **Not charitable as lacking charitable purpose.**

Honorary (Purpose) Trusts

- **Modern trend**
 - **Pets = all states plus D.C. recognize statutory pet trusts**
 - Trust Code § 112.037
 - **Other purposes = allowed under UPC and UTC**
 - No equivalent provision in Trust Code.

Incidental Beneficiary

- Person who has no equitable title but benefits from the trust nonetheless.
- Typically, unable to enforce trust.
 - Perhaps fit as “interested person” under “affected by” language of § 111.004(7).

Disclaimer – Generally

- Cannot exert dominion, control, or accept benefits.
- May “cherry pick” (partial disclaimers allowed).
- Irrevocable and unconditional
- Governed by Property Code Chapter 240
 - Texas Uniform Disclaimer of Property Interests Act

Disclaimer – Formalities

§ 240.009

- **Formalities:**
 - In writing.
 - Declare the disclaimer.
 - Describe what is being disclaimed.
 - Signed by beneficiary.
 - Properly delivered.
 - [Not required but prudent practice = notarized]

Disclaimer – Delivery

Testamentary Trust § 240.103

- **Trustee**
 - If none, personal representative of decedent's estate.
 - If neither, file in public records where decedent domiciled or owned real property.

Disclaimer – Delivery

Inter Vivos Trust § 240.104

- **Trustee.**
 - If none, court with jurisdiction to enforce the trust.
 - If neither, file in public records of situs of trust administration or where settlor domiciled.
- If trust is revocable, also to the settlor.

Disclaimer – Passage of Property

§ 240.051

- Under specific terms of trust (“If A disclaims, then the property passes to X.”)
- Under terms of trust as if beneficiary predeceased trust creation.

Characterization of Distributions

- Issue arises if beneficiary is married.
- Assume trust is not created by one or both spouses.
- Are distributions separate or community property?

Characterization of Distributions

- **Principal distributions**
 - **Beneficiary's separate property (gift)**

Characterization of Distributions

- **Undistributed trust income**
 - **Not yet able to classify until beneficiary has a right to demand distribution.**

Characterization of Distributions

- **Discretionary income distributions**
 - **Separate.**

Characterization of Distributions

- **Mandatory income distributions**
 - **Commentators disagree and case law not definitive.**

Settlor's divorce from beneficiary

Estates Code Chapter 123

- **When statute applies:**
 - Divorce on or after September 1, 2005.
 - Trust is written.
 - **Trust is revocable.**
 - Settlor named his/her spouse (or other ex-relative) as beneficiary or trustee.
 - Trust is silent as to impact of divorce.

Settlor's divorce from beneficiary

- **Statutory revocation of the following provisions:**
 - **Ex-spouse as beneficiary.**
 - **Ex-spouse as trustee.**
 - **Other ex-relatives as beneficiary.**
 - **Other ex-relatives as trustee.**

Settlor's divorce from beneficiary

- **Effect – Generally**
 - Property passes as if ex-spouse or ex-relative disclaimed.
 - Fiduciary designations interpreted as if ex-spouse or ex-relative died before marriage terminated.

Settlor's divorce from beneficiary

- **Effect – Exceptions**
 - Trust executed after divorce.
 - A court order.
 - Express language in the trust.
 - Express language in a marital agreement.

Power to Transfer or Assign

- **Presumption = able to transfer:**
 - **Inter vivos (by gift or sale)**
 - **At death (via intestacy or by will)**

Power to Transfer or Assign

- **Restrictions (reality):**
 - **Life Interest – Beneficiary only received a life interest.**
 - **Spendthrift provision – Beneficiary prohibited from transferring.**

Power to Transfer or Assign

- **Priority of Assignments – Note 1, page 564**
 - **English view = notice to trustee necessary to complete the assignment as against a subsequent assignee**
 - **American view = first assignee prevails as nothing to give to second assignee**
 - **Likely to be the Texas approach.**

Spendthrift Provisions

Definition -- § 112.035

A provision which typically prohibits:

- 1. Beneficiary from transferring right to future payments of income or principal.**
- 2. Beneficiary's creditors from subjecting the beneficiary's interest to the payment of their claims.**

Purposes

- **Protect beneficiary (asset protection).**
- **Allow settlor to have trust property used as settlor intended.**
- **Note: No requirement that beneficiary actually “needs” protection.**

Time of protection

- Interest protected *only while in the trust.*
- Once trustee pays beneficiary, beneficiary may transfer and creditors may reach.

Methods of Creation

- No particular language needed as long as settlor's intent is clear.
 - Paraphrase § 112.035(a).
 - “The beneficiary's interest shall be held subject to a spendthrift trust.” § 112.035(b).

Exceptions to Enforceability

- **1. Settlor = Beneficiary**
 - Settlor cannot protect his/her own property from his/her creditors. § 112.035(d).
 - *Booth* – p. 565
 - However, may be able to restrict voluntary transfer.
 - Many offshore countries and some states allows self-settled spendthrift trusts (DAPT – Domestic Asset Protection Trusts)
 - Alaska, Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wyoming, West Virginia

Exceptions to Enforceability

- **2. Necessaries**
 - Not codified but some pre-Code cases may support this exception.

Exceptions to Enforceability

- **3. Child Support**
 - **Family Code § 154.004**
 - Court has discretion to “break” spendthrift protection for child support.
 - If distribution mandatory, up to mandatory amount.
 - If distribution discretionary, up to entire income.
 - **Impact of exception.**
 - Methods of drafting to avoid impact.

Exceptions to Enforceability

- **4. Federal Tax Claims**

Exceptions to Enforceability

- **5. Compliance with agreement settling trust issues.**

Exceptions to Enforceability

- **6. Other jurisdictions**
 - Tort Claimants.
 - Always ineffective.

Merger prevented -- § 112.034(c)

- If settlor is not the beneficiary, merger will not occur with spendthrift trust.
- Court will appoint new trustee to keep title split.

Discretionary Trusts

Basic Idea

- **Trustee has discretion regarding:**
 - which beneficiaries to pay, and/or
 - how much to pay.
- **May (or may not) be subject to a stated standard.**
- **Also called “spray” or “sprinkle” trusts.**

Interest of Beneficiary

- **No interest in income or principal until the trustee exercises discretion.**
- **In effect, beneficiary hopes to receive property under a power of appointment the settlor placed into the trust.**

Availability of interest to creditors

- **General rule = not reachable until paid**
- **Exceptions:**
 - **Settlor and beneficiary same person**
 - **Child support under Family Code § 154.005**
 - **Court may order from income, but not principal.**

What does “discretion” mean?

- Trust Code § 113.029(a).



- *Dillard* – p. 569

Support Trusts

Definition

- **Use of trust funds limited to beneficiary's support, e.g.,**
 - Health
 - Education
 - Maintenance
 - Support
- **Distributions for support may be mandatory or discretionary.**

Drafting Considerations

- **1. Define support**
 - **Default = level of support to which beneficiary accustomed before becoming a beneficiary.**
 - **Is this what the settlor intends?**
 - **Does support of beneficiary include support of beneficiary's dependents?**

Drafting Considerations

- 2. Are beneficiary's other resources to be considered?
 - If yes, how?
 - *Keisling* – p. 573

Pour Over Provisions

Two plus two

- <https://www.youtube.com/watch?v=Zh3Yz3PiXZw>



Life Insurance Trusts

Definition

- **Beneficiary of a life insurance policy is a trust, rather than the individual the insured ultimately wants to benefit upon his/her death.**

Why used?

- Obtain all benefits of a trust for life insurance proceeds, often the deceased's most valuable asset.
- Virtually essential if client has a minor or disabled child.

Recognition in Texas

- **Contract right to receive proceeds is sufficient to be trust property. § 111.004(12).**
- **Life insurance may be made payable to trustee of inter vivos trust. Ins. Code § 1104.021.**
- **Life insurance may be made payable to trustee of testamentary trust. Ins. Code § 1104.022.**

Inter vivos or testamentary?

- **Reasons to use inter vivos trust:**

- **Reasons to use testamentary trust:**

Characteristics

- **1. Transfer other property to trust?**
 - **Funded**
 - **Unfunded**

Characteristics

- **2. Allow settlor to undo plan?**
 - **Revocable**
 - **Irrevocable [ILIT]**

Introduction to Trust Administration

Overview of Administration

- **1. Trustee accepts (or not)**
 - **Review § 112.009**
 - **Signature = conclusive evidence**
 - **Exercise power or duty = presumption**
 - **No liability until accept**

Overview of Administration

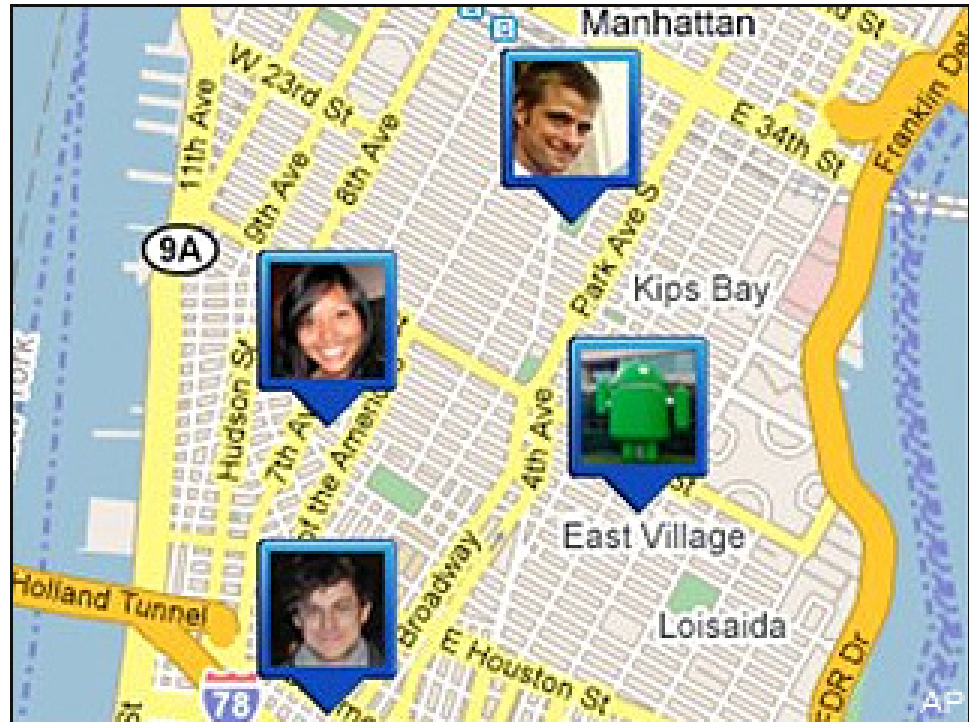
- **2. Post bond**
 - Review § 113.058
 - Required unless:
 - Settlor waives
 - Trustee is a corporation

Overview of Administration

- **3. Obtain possession and/or control of trust property.**

Overview of Administration

- 4. Ascertain identity and location of beneficiaries.



Overview of Administration

- **5. Follow settlor's instruction in the trust**
 - Investments
 - Management
 - Distribution



Overview of Administration

- 6. Follow requirements of Trust Code

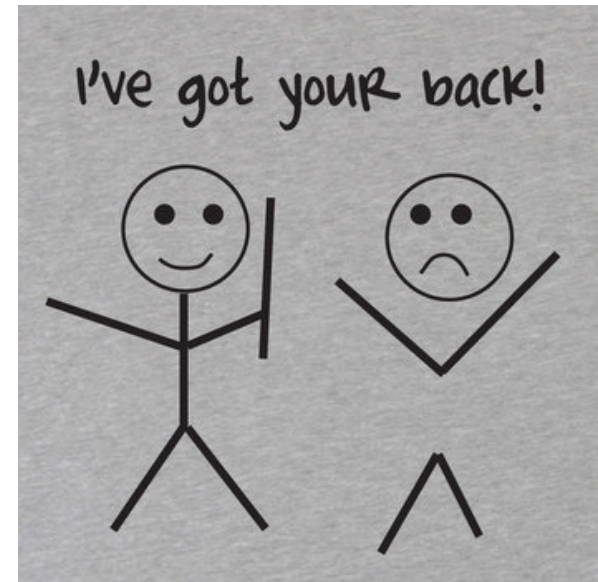


Overview of Administration

- **7. Exercise appropriate standard of care**
 - **Management**
 - **Investment**
 - **Distribution**

Overview of Administration

- 8. Act with high degree of fiduciary loyalty
 - Avoid self-dealing
 - Avoid conflicts of interest



Overview of Administration

- 9. Personal liability for failure to comply

- Civil
- Criminal



Safeguarding and preserving trust property

- **§ 117.004**
- **Exercise reasonable care, skill, and caution.**
- **Example actions:**

Duty to Earmark

- **Common law rule = strict**
- **Modern rule = liable only if failure to earmark causes loss.**
- **Holding as nominee -- § 113.017**
 - **Corporate stocks and other securities**
 - **Other assets?**

Commingling Prohibited

- **1. With trustee's own assets**
 - **Strictly liable**

Commingling Prohibited

- **2. With assets of other trusts**
 - **Why would a trustee want to do so?**
 - **“Common trust funds” for corporate trustees under §§ 113.171 & 113.172.**
 - **How does non-corporate trustee obtain these benefits?**

Duty to Support Trust

- **Defend trust from attacks.**
- **Attorney fees and court costs of reasonable defense paid by trust even if trustee loses.**
- **Duty to appeal, unless no reasonable ground.**



Certification of Trust -- § 114.086

- **Alternative to providing copy of trust to a person other than beneficiary.**
- **Allows third parties to get assurance that trustee has authority.**
- **But, keeps terms of trust (e.g., who gets how much, when, and why) private.**

Investments Standard of Care

Basic Idea

- **Trustee must invest following the appropriate standard of care.**
- **Personally liable for failure to do so.**
- **But, trustee is not an insurer; only liable if conduct breaches standard.**

Possible Standards of Care -- Generally

- Prudent person with respect to own property.
 - Common law rule
 - Former Texas approach
- Prudent person with respect to another's property.
- Prudent Investor
 - Majority rule in U.S. today; Uniform Prudent Investor Act
 - Adopted by Texas effective 1/1/2004 [Chapter 117]

Historical Development of Standard of Care

Historical Development of Standards of Care

- **1. Very safe (conservative) investments only**
 - Government liabilities
 - First mortgages on real property

Historical Development of Standards of Care

- **2. “Legal Lists”**
 - **Statutes contained list of investment types deemed permissible.**

Historical Development of Standards of Care

- 3. Prudent Person Rule
 - Formerly, majority U.S. rule and Texas rule
 - Each investment viewed as a prudent person would make permanent disposition of property (not speculation) considering probable:
 - Income
 - Appreciation
 - Safety

Historical Development of Standards of Care

- **4. Prudent Investor Rule**
 - Modern rule used in majority of states.
 - Uniform Prudent Investor Act
 - Restatement of Trusts
 - Property Code Ch. 117

Settlor's Instructions Trump Prudent Investor Rules

- Settlor can limit or expand. § 117.003(b).
- Warning: Prudent investor rule triggered by language in trust that sounds like prudent person rule. § 117.012.

Lowering Standard of Care

- **1. Settlor's express instructions in the trust**
 - Why would settlor do so?
 - § 117.003(b)

Lowering Standard of Care

- **2. Exculpatory clause**
 - **Excuse breach (rather than lower standard)**

Lowering Standard of Care

- **2. Exculpatory clause – Exceptions**
 - **Bad faith breaches**
 - **Intentional breaches**
 - **Breaches with reckless indifference to beneficiary's interest**
 - **Trustee's profit from breach of trust**
 - **If clause inserted because of abuse of:**
 - **Fiduciary duty to settlor, or**
 - **Confidential relationship with settlor**

Lowering Standard of Care

- **2. Exculpatory clause – Strict construction**
 - **Courts construe exculpatory clauses strictly against trustee.**

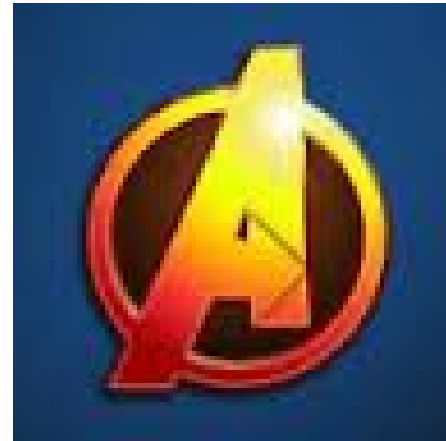
Lowering Standard of Care

- 2. Exculpatory clause – bottom line
 - Only effective to exculpate **negligent conduct.**

Lowering Standard of Care

- **2. Exculpatory clause – attorney as trustee**
 - **Can lawyer take advantage of exculpatory clause given DR 1.08?**

Trust Protectors -- § 114.0031



Trust Protectors – Basic Idea

- **Settlor appoints a person who has ability to:**
 - **Watch over the trustee, and/or**
 - **Direct the trustee to take (or not take) certain actions (e.g., investment decisions).**
- **Evolved from off-shore trusts which require foreign trustees.**
- **Texas Trust Code § 114.0031**

Trust Protectors – Key Features

- **Settlor may grant protectors powers such as:**
 - **Remove and appoint trustees**
 - **Modify or amend trust for tax purposes**
 - **Modify or amend trust to facilitate efficient trust administration**
 - **Modify, expand, or restrict terms of power of appointment the settlor granted to a beneficiary**

Trust Protectors – Key Features

- **Is the Protector a fiduciary?**
 - Presumption = yes.
 - Settlor may provide otherwise.

Trust Protectors – Key Features

- For following the Protector's directions, trustee is normally liable only for:
 - Willful misconduct, and
 - Gross negligence.

Trust Protectors – Key Features

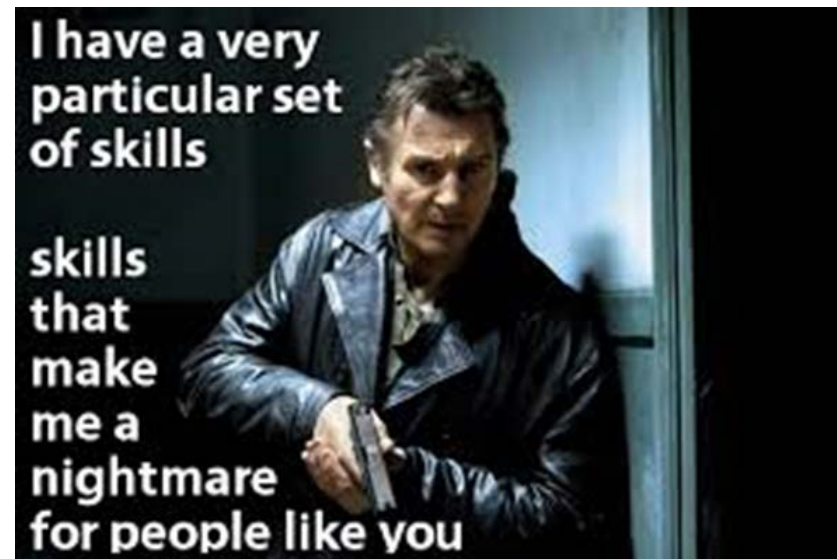
- **Trustee has no duty to:**
 - **Actively monitor the Protector's conduct, or**
 - **Tell the beneficiaries that the trustee would have acted differently but for the Protector's directions.**

Trust Protectors – Other issues

- Protectors in charitable trust context are governed by § 114.003 which is more restrictive.
- There is a Uniform Directed Trustee Act but not enacted in Texas.

Trustee with special skills

- Must exercise those higher or special skills.
- Thus, a professional trustee or attorney may be held to higher standard.
- § 117.004(f)



Trustee representation of special skills

- Trustee who claims to have higher or special skills is bound by those claims.
- § 117.004(f)

Trustee with lower skills

- **Trustee still must follow Prudent Investor standard.**

Time trustee's conduct evaluated

- Facts and circumstances at time trustee made the decision.
- Trustee not required to be psychic.
- § 117.010

Factors trustee must consider

- **1. Basic Factors -- § 117.004(a)**
 - Trust purposes
 - Trust terms
 - Distribution requirements
 - Circumstances generally

Factors trustee must consider

- 2. Portfolio Approach -- § 117.004(b)
 - View investments collectively.
 - Not individually as under Prudent Person Rule.



I AM PART
OF THE
COLLECTIVE

Factors trustee must consider

- **2. Portfolio Approach -- § 117.004(b)**
 - “context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.”
 - Thus, trustee must take reasonable risk.
 - Practical ramifications?

Factors trustee must consider

- **3. Comprehensive Factors -- § 117.004(c)**
 - **General economic conditions**
 - **Possible effect of inflation or deflation**
 - **Tax consequences**
 - **Role of each investment within the portfolio**
 - **Income expected**
 - **Appreciation expected**

[continued]

Factors trustee must consider

- 3. Comprehensive Factors -- § 117.004(c)
[continued]
 - Beneficiary's other resources
 - Need for liquidity
 - Need for regular income
 - Importance of preserving trust property
 - Importance of appreciation
 - Special relationship or value of an asset to the purposes of the trust or a beneficiary

Diversification -- § 117.005

- **General rule = required**



- **Exception = trustee reasonably determines that because of special circumstances, the purposes of the trust are better served without diversifying**

Duty to review investments –

§ 117.006

- Trustee must bring trust assets into compliance with Prudent Investor Rule.
- Warning: Significant change from prior law which allowed trustee to retain property settlor placed into the trust without regard for diversification.

Duty to review investments – § 117.006

- **Advice when take over as trustee:**
 - **Review all trust investments**
 - **With regard to improper investments:**
 - **Change ASAP**
 - **Sue former trustee**

Loyalty -- § 117.007

- **Trustee must invest and manage solely in the interests of the beneficiaries.**
- **Accordingly, social investing is prohibited unless:**
 - **Permission in trust, or**
 - **Proof that non-social investing would not have produced better results**

Impartiality -- § 117.008

- **Trustee cannot favor one beneficiary over another absent authority in the trust.**

Trustee Powers



Sources of Trustee's Powers

- **1. Trust Instrument**

Sources of Trustee's Powers

- 2. Trust Code
 - §§ 113.001-113.029

Sources of Trustee's Powers

- **3. Granted by Equity (Implied Powers)**
 - § 113.002 – “necessary or appropriate”
 - § 113.024 – implied powers “not inconsistent”

Sources of Trustee's Powers

- **4. Court Order**
 - **May expand or limit**
 - **§ 113.001 & § 115.001**

Delegation of Trustee Duties

Delegation -- Introduction

- Issue = May trustee properly delegate powers and duties to others?
- If yes, trustee may escape personal liability to beneficiary for agent's conduct if delegation properly done.
- If no, trustee personally liable to the beneficiary for agent's conduct.

Delegation – Common Law Rule

- **Permitted delegation**
 - Ministerial duties
- **Prohibited delegation**
 - Discretionary duties
- **Problem with rule**
 - vague and uncertain

Delegation – Modern Rule

- May delegate if “reasonably necessary” in the administration of the trust.
 - § 113.018

Delegation of Investment and Management Duties

- **1. Common Law**
 - **Not allowed as they are discretionary acts.**

Delegation of Investment and Management Duties

- **2. Texas 1999-2003**
 - **Delegation to “investment agent” allowed.**
 - **Written notice to beneficiaries at least 30 days prior to delegation required.**
 - **Governed by former § 113.060.**

Delegation of Investment and Management Duties

- 3. Texas 1/1/2004 to present -- § 117.011
 - Standard for delegation
 - Would a “prudent trustee of comparable skills” delegate?
 - No notice to beneficiaries needed.
 - In other words, trustee knows he/she is not a “prudent investor.”

Delegation of Investment and Management Duties

- **3. Texas 1/1/2004 to present**
 - **Duty of trustee – Use reasonable care, skill, and caution in:**
 - **Selecting agent**
 - **Establishing scope and terms of delegation**
 - **Periodically reviewing agent's actions**

Delegation of Investment and Management Duties

- **3. Texas 1/1/2004 to present**
 - **Duty of agent**
 - **Reasonable care to comply with terms of delegation**

Delegation of Investment and Management Duties

- **3. Texas 1/1/2004 to present**
 - **Liability of trustee to beneficiary for agent's actions – General rule:**
 - **Not liable if trustee used reasonable care, skill, and caution to select, establish scope, and review.**

Delegation of Investment and Management Duties

- **3. Texas 1/1/2004 to present**
 - **Liability of trustee to beneficiary for agent's actions – Exceptions where trustee is liable:**
 - Agent is affiliate of trustee (e.g., relative, partner, employee).
 - Trustee or beneficiary is required to arbitrate.
 - Shortening of statute of limitations against agent.

Delegation of Investment and Management Duties

- **3. Texas 1/1/2004 to present**
 - **Delegation to co-trustee -- § 113.085(e)**
 - **Allowed unless trust requires joint exercise**

Multiple Trustees

- **1. Majority may act**
 - Unlike common law rule
 - § 113.085(a)

Multiple Trustees

- **2. Vacancies**
 - Remaining trustees may act
 - § 113.085(b)

Multiple Trustees

- **3. Duty of co-trustee to participate**
 - § 113.085(c) & (d)
 - **Exceptions:**
 - Cotrustee is unavailable
 - Cotrustee has properly delegated
 - **Then, remaining trustees may act to administer trust efficiently or avoid injury to beneficiary.**

Multiple Trustees

- **3. Duty to exercise reasonable care to:**
 - **Prevent another cotrustee from committing a serious breach**
 - **Compel breaching cotrustee to redress a serious breach**
 - **§ 114.006**

Multiple Trustees

- **4. Protection of dissenting trustee from normal rule of joint and several liability**
 - Not join, or
 - Express dissent, even if join
 - Exercise reasonable care
 - Dissent in writing
 - Give dissent to any cotrustee
 - At or before time of action
 - § 114.006

Trust Distributions

General Rule

- **Trustee has an absolute and unqualified duty to pay the correct beneficiary.**

Exception -- § 114.004

- A trustee is not personally liable for a mistake of fact regarding a distribution which is made before the trustee has:
 - Actual knowledge, or
 - Written notice.
- Of course, trustee must seek return of improperly distributed property.

To whom should trustee distribute?

- **1. As settlor directed in the trust.**

To whom should trustee distribute?

- **2. If beneficiary is a competent adult:**
 - To beneficiary
 - Unless trust provides otherwise
 - For example, pay expenses directly.

To whom should trustee distribute?

- 3. Beneficiaries with reduced capacity –
§ 113.021. Who?
 - Minors
 - Person who in judgment of trustee is incapacitated.
 - Note: Judicial or medical determination of incapacity is not needed.

To whom should trustee distribute?

- 3. Beneficiaries with reduced capacity --
§ 113.021. Distribution options:
 - Beneficiary
 - Guardian of person or estate
 - Directly for HEMS
 - Custodian (TUTMA)
 - Reimburse person caring for beneficiary
 - Manage as separate fund on B's behalf subject to B's right to withdraw

To whom should trustee distribute?

- 4. May trustee deviate from settlor's instructions?
 - General rule = no
 - Seek court permission under § 112.054.

Duty of Loyalty

**“With great power,
comes great
responsibility”**

Stan Lee

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Introduction

- Trustee owes duty of undivided loyalty:
 - Avoid self-dealing.
 - Avoid conflicts of interest.
- Trustee can make no profit (except trustee fee) for being a trustee, even without a breach of duty. § 114.001(a).



Standard

- **Strictly liable for breach**
 - **Trustee is personally liable regardless of:**
 - Trustee's good faith
 - Fairness of transaction
 - Trustee did not personally benefit



Standard

- **Reasons for strict rule:**
 - **Eliminate motive to breach**
 - **Deterrence**
 - **Actual “evil” hard to prove**

Avoid Self-Dealing

- **1. Buy/Sell -- § 113.053**
 - **Trustee cannot buy trust assets from the trust.**
 - **Trustee cannot sell his/her assets to the trust.**
 - **Prohibition includes affiliates, employees, relatives, employers, etc.**

Avoid Self-Dealing

- **2. Lending -- § 113.052**
 - **Trustee cannot lend trust funds to trustee or the other prohibited persons.**
 - **Exceptions:**
 - **Settlor expressly authorized the loan in trust.**
 - **Corporate trustee deposits under § 113.057 if**
 - **Authorized in trust, or**
 - **Pending investment, distribution to beneficiaries, or debt payment if FDIC insured or security fund maintained.**

Avoid Conflicts of Interest

- **1. Purchase of Trustee's Securities -- § 113.055**
 - **Corporate trustee**
 - **Cannot purchase own or affiliate's securities.**
 - **Individual trustee**
 - **Cannot purchase if individual connected as director, owner (shareholder), manager, etc.**
 - **But, trustee may retain stock already in the trust if reasonable to do so.**

Avoid Conflicts of Interest

- **2. Sales from one trust to another**
§ 113.054
 - **Policy?**
 - **Exception = Obligation issued or fully guaranteed by U.S. government sold for its current market price.**

Avoid Conflicts of Interest

- **3. Other transactions with beneficiary**
 - **Trustee owes duty of fair dealing to beneficiary in non-trust transactions.**
 - **Full disclosure of all applicable facts and law.**
 - ***Not* an arms-length transaction.**

Conflicts of Interest

4. Trustee employing self



Settlor's Authorization of Breach of Loyalty

- Settlor may waive the self-dealing and conflict of interest restrictions.
- But, waivers are strictly construed against the trustee.
- *Price v. Johnston* – p. 603

Contract Liability

Warning

- **Do not sue a trust!**
- **A trust is not a legal entity.**
- **You must sue the trustee in the trustee's representative capacity.**

Suit against Trustee, in representative capacity

- Common law = not allowed
- Texas = allowed if contract was within trustee's capacity to make.
 - § 114.084(a).

Suit against Trustee personally

- **General Rule = yes**
- **Exceptions:**
 - **Express provision in contract (not trust) excluding trustee from personal liability.**
 - **Trustee signing contract “as trustee” is prima facie evidence of intent to exclude personal liability.**

Duty of Attorney

- **If represent Trustee:**
- **If represent other contracting party:**

Notice duty of Plaintiff -- § 115.015

- Purpose = alert beneficiaries that trustee is breaching contracts; beneficiaries may intervene.
- Plaintiff must give notice to beneficiaries by registered or certified mail:
 - Within 30 days of filing suit, and
 - At least 31 days before judgment.
- If plaintiff submits written request, trustee must provide names and addresses within 10 days.
- Notice to the “list” beneficiaries deemed sufficient.

Tort Liability

Suit against Trustee personally

- **Trustee personally liable:**
 - Own torts, and
 - Torts of employees, agents, etc.
 - Note that in UTC states, trustee does not have respondent superior liability.
- **Trustee may seek reimbursement or exoneration from the trust property in certain situations.**
 - § 114.083
 - § 114.062

Suit against Trustee in representative capacity

- Allowed, but only in situations where trustee would be entitled to reimbursement or exoneration.

When Trustee entitled to reimbursement or exoneration

- **1. Common incident tort.**
- **2. Strict liability.**
- **3. Conversion.**

Notice duties of tort plaintiff

- Same as for contract plaintiff.

Charitable Immunity

- **Common law = yes.**
- **Texas as of March 9, 1966 = abolished by Texas Supreme Court opinion, but**
- **Charitable Immunity and Liability Act limits liability in some cases.**

Duty of Attorney for Trustee

- **What should attorney recommend?**

Principal and Income

Conflict between beneficiary types

What does
income B
want?



What does
remainder
B want?

- Trustee owes duty of impartiality. § 117.008.

History of determining principal and income

- **Before January 1, 2004 = 1962 version of Uniform Principal and Income Act.**
- **Beginning January 1, 2004 = 1997 version of Uniform Principal and Income Act.**
 - **Many items significantly different from 1962 Act.**
 - **Texas made some unique changes.**
 - **Chapter 116.**

Methods of allocating receipts and charging expenses -- § 116.004

- **1. Settlor's instructions prevail**
 - **Specific allocation rules**
 - **Trustee's discretion**
 - **Note that following UPIA deemed fair and reasonable to all beneficiaries.**

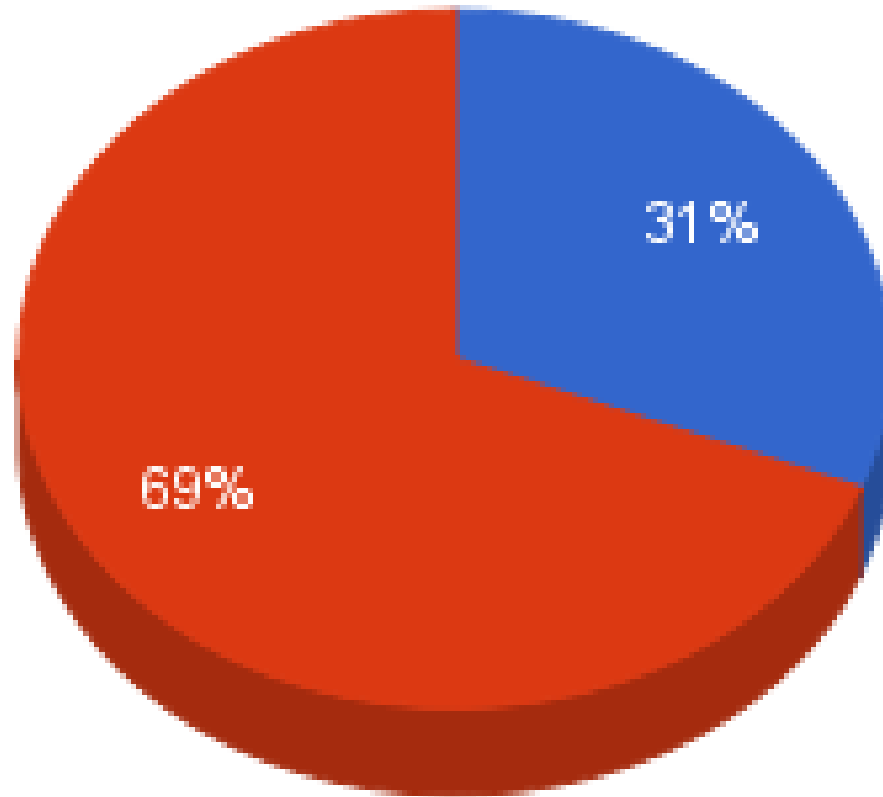
Methods of allocating receipts and charging expenses -- § 116.004

- 2. Trust Code rules

Methods of allocating receipts and charging expenses -- § 116.004

- 3. If no settlor instruction or Trust Code rule, allocate to principal.

Basic Allocation Rules



Basic Allocation Rules

- 1. Capital gains = principal
 - Basis = \$10,000
 - Sales price = \$15,000
 - Income = ?
 - Principal = ?
 - § 116.161

Basic Allocation Rules

- **2. Interest earned = income**
 - CD face value = \$10,000
 - Interest received = \$50

 - Income = ?
 - Principal = ?

 - § 116.163

Basic Allocation Rules

- 3. Rent = Income
 - House value = \$250,000
 - Rent received each month = \$1,000
 - Income = ?
 - Principal = ?
 - § 116.162

Basic Allocation Rules

- 4. Eminent Domain Award = Principal
 - House basis = \$175,000
 - Government pays FMV = \$225,000
 - Income = ?
 - Principal = ?
 - § 116.161

Basic Allocation Rules

- 5. Insurance Proceeds = Principal
 - House basis = \$175,000
 - House burns
 - Insurance company pays FMV = \$225,000

 - Income = ?
 - Principal = ?

 - § 116.161

Basic Allocation Rules

- **6. Dividends**
 - Cash dividend = income
 - Stock dividend = principal
 - Stock split = principal
 - Stock received because of merger = principal
- **§ 116.151**

Basic Allocation Rules

- **7. Business & Farm Receipts**
 - **Determined according to GAAP (generally accepted accounting principals).**
 - **§ 116.153**

Basic Allocation Rules

- **8. Liquidating or “Wasting” Asset**
 - **Definition = Asset which goes down in value as it used in an amount greater than depreciation.**
 - **Examples = _____**
 - **Note that natural resources have different rules.**

Basic Allocation Rules

- 8. Liquidating or “Wasting” Asset
 - Prior Law
 - Income = receipts up to 5% of asset’s value
 - Principal = receipts over 5% of asset’s value
 - Current Law
 - Income = 10% of each receipt
 - Principal = 90% of each receipt
 - § 116.173

Basic Allocation Rules

■ 8. Liquidating or “Wasting” Asset

Example:

- Book royalty interest FMV = \$100,000
- Royalties received in year = \$7,500

- **Prior Law**
 - Income = \$5,000
 - Principal = \$2,500

- **Current Law**
 - Income = \$750
 - Principal = \$6,750

Basic Allocation Rules

- **9. Oil & Gas Royalties**
 - **Prior Texas Law**
 - Income = 72.5%
 - Principal = 27.5%
 - **Uniform Law**
 - Income = 10%
 - Principal = 90%
 - **Current Texas Law -- § 116.174**
 - Equitably
 - If trust owned royalty interest on 1/1/2004, may use prior Texas law.
 - Following IRS depletion allowances deemed equitable.

Basic Allocation Rules

- **10. Timber**
 - **Income = timber removed that does not exceed regrowth**
 - **Principal = timber removed that exceeds regrowth**
 - **Texas -- § 116.175**

Basic Allocation Rules

- **11. Non-income Earning Property**
 - When sold, all proceeds are principal
 - Doctrine of “delayed income” which allocated some of the proceeds to income no longer followed.
 - Texas -- § 116.176

Trustee's Adjustment Power

§ 116.005

- **Basic Idea = allow trustee to ignore basic rules under certain circumstances.**
- **Very controversial**
 - **Delayed wide-spread adoption of UPIA.**
 - **Many states omit or substantially revise.**
- **Example:**

Trustee's Adjustment Power

§ 116.005

- **Factors trustee must consider:**
 - **Nature, purpose, and expected duration of trust**
 - **Settlor's intent.**
 - **Identity and circumstances of the beneficiaries**

Trustee's Adjustment Power

§ 116.005

- **Factors trustee must consider (continued):**
 - **Need for liquidity, income, preservation, and appreciation.**
 - **Is asset from settlor, used by beneficiary, or a mere investment?**
 - **Terms of trust regarding principal invasion and income accumulation.**

Trustee's Adjustment Power

§ 116.005

- **Factors trustee must consider (continued):**
 - Tax consequences.
 - Statute has others.

Trustee's Adjustment Power

§ 116.005

- When adjustment not allowed:
 - Specifically prohibited by settlor (not just a statement of “no adjustment”).
 - Trustee is a beneficiary.
 - Trustee would directly or indirectly benefit from the adjustment.
 - Adverse tax consequences.

Trustee's Adjustment Power

§ 116.005

- No notice to beneficiaries needed
 - But, some states add this requirement
- Court may reverse trustee's decision to adjust (or not adjust) only if it finds trustee abused its discretion. § 116.006.
- Trustee may seek court approval of an adjustment if trustee reasonably believes a beneficiary will object.

Apportionment Timing

- Detailed rules exist for apportionment when:
 - Trust begins (inter vivos and testamentary)
 - Beneficiaries change
 - Trust ends
- §§ 116.051 through 116.103.

Disbursements

- **1. Trustee Compensation**
 - **Presumption**
 - Principal = 50%
 - Income = 50%
 - **But, trustee may allocate in any manner as long as it is consistent with the trustee's fiduciary duties.**
 - **§§ 116.201 & 116.202**

Disbursements

- **2. Accounting Expenses**
 - **Principal = 50%**
 - **Income = 50%**
 - **§§ 116.201 & 116.202**

Disbursements

- **3. Ordinary Repairs**
 - **Income**
 - **§ 116.201**

Disbursements

- **4. Capital Improvements and Extraordinary Repairs**
 - Principal
 - § 116.204

Disbursements

- **5. Debt Payment** (including mortgages)
 - **Interest = Income**
 - § 116.201
 - **Principal = Principal**
 - § 116.202

Disbursements

- **6. Insurance Premiums on Principal**
 - **Income**
 - § 116.201

Disbursements

- **7. Income Taxes**
 - If based on receipts allocated to income = income
 - If based on receipts allocated to principal = principal
 - § 116.205

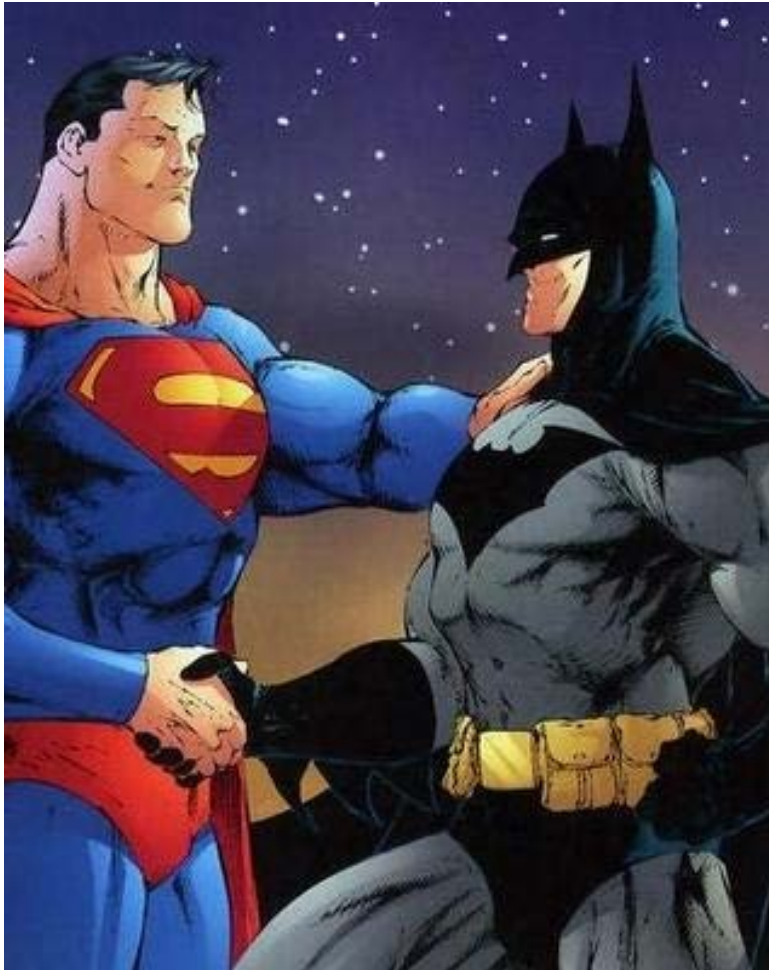
Disbursements

- **8. Property Taxes**
 - **Income**
 - **116.201(3)**

Disbursements

- **9. Depreciation**
 - **Does some income need to be allocated to principal to compensate for depreciation?**
 - **Prior law = yes**
 - **Current law = trustee's discretion**
 - **§ 116.203**

Unitrust



Unitrust -- Operation

- **Basic idea = Current beneficiary receives a fixed percentage of trust's fair market value each year.**
- **Thus, all beneficiaries want value of trust to increase.**
- **Not concerned about why – income or principal.**

Unitrust -- Issues

- **How to set the unitrust rate?**
- **Can P/I trusts be converted to unitrusts?**

Duty to Inform Beneficiaries

Development of Duty

- **1. Before January 1, 2006**
 - **Trustee had a common law duty to disclose:**
 - **Upon beneficiary's request, and**
 - **When trustee is about to take a material unusual action.**

Development of Duty

- 2. January 1, 2006 to June 15, 2007
 - Former § 113.060 imposed on the trustee a duty to keep beneficiaries *reasonably informed* of:
 - Trust administration, and
 - Material facts necessary for beneficiaries to protect their interests.
 - Problems with this duty?

Development of Duty

- **3. Beginning June 15, 2007**
 - **Statutory duty repealed**
 - **Common law duty restored.**

Development of Duty

- **3. Beginning June 15, 2007**
 - **When settlor may limit the common law duty to inform beneficiaries under § 111.0035(c):**
 - **Trust is revocable, or**
 - **Beneficiary is under age 25, or**
 - **Beneficiary is “remote,” that is not eligible for**
 - **(1) current distribution, or**
 - **(2) distribution if trust were to terminate now.**

Accountings

Generally

- Purpose = Allow beneficiary to obtain information to see if trustee is breaching duties.
- Texas does *not* require regular accountings.
 - Some states *require* annual accountings even without beneficiary request or court order.

Who may request an accounting?

- **1. Beneficiary -- § 113.151(a)**
 - **Written demand to trustee.**

Who may request an accounting?

- **1. Beneficiary -- § 113.151(a)**
 - Written demand to trustee.
 - Trustee must provide accounting within 90 days.

Who may request an accounting?

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 - Written demand to trustee.
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 - If trustee does not, any beneficiary may sue.

Who may request an accounting?

- **1. Beneficiary -- § 113.151(a)**
 - Written demand to trustee.
 - Trustee must provide accounting within 90 days.
 - If trustee does not, any beneficiary may sue.
 - Court may award beneficiary's attorney fees and court costs against:
 - trust, or
 - trustee personally.

Who may request an accounting?

- **1. Beneficiary -- § 113.151(a)**
 - Written demand to trustee.
 - Trustee must provide accounting within 90 days.
 - If trustee does not, any beneficiary may sue.
 - Court may award beneficiary's attorney fees and court costs against trust or trustee personally.
 - Only one accounting per 12 months unless court orders more.

Who may request an accounting?

- **2. Interested Person -- § 113.151(b)**
 - **File suit against trustee.**
 - **Court will order accounting if it finds the interested person's interest warrants an accounting.**

Contents of Accounting -- § 113.152

- **1. All new trust property not previously accounted for.**

Contents of Accounting -- § 113.152

- **2. Account of all:**
 - Receipts
 - Disbursements
 - Other transactions
 - Source and nature of each
 - Show income and principal separately

Contents of Accounting -- § 113.152

- 3. List and description of all trust property.

Contents of Accounting -- § 113.152

- 4. Cash balance on hand and where kept.

Contents of Accounting -- § 113.152

- 5. All known liabilities

Settlor's Ability to Alter Accounting Rules

- **1. Settlor may require accountings at a stated time, interval, or event.**

Settlor's Ability to Alter Accounting Rules

- 2. Total waiver of accountings not allowed
 - Against public policy
 - Without accountings, beneficiaries unable to ascertain if trustee in breach
 - *Hollenbeck v. Hanna* – p. 617

Settlor's Ability to Alter Accounting Rules

- **3. Limitations allowed under § 111.0035(b)(4)(A):**
 - **Trust is revocable, or**
 - **Beneficiary of irrevocable trust is remote:**
 - **Not entitled to current distribution.**
 - **Not entitled to distribution if trust ended now.**

Advice

1. **Keep trust records in accounting form from Day 1.**



2. **Render regular accountings even if not asked.**

- Easier to obtain records
- Good reflection on trustee
- Good psychological effect on beneficiaries

3. **Respond to accounting requests promptly.**

Trustee Compensation

Common Law

- **No compensation unless settlor provided for compensation in the trust.**
- **Policy – fear that trustee would act to increase compensation even if not in trust's best interests.**

Modern Law

Assuming trust instrument is silent:

- **1. Court Determination**
 - Trustee petitions court for compensation approval.

Modern Law

- **2. Trustee Determination**
 - **Trustee determines trustee's own "reasonable compensation."**
 - **Trustee takes from trust.**
 - **Interested persons may sue trustee for taking excessive compensation.**

Modern Law

- **3. Schedule or Scale**
 - **Based on, for example,**
 - **Value of trust**
 - **Amount of trust income**

Texas -- § 114.061

- **Presumption = reasonable compensation**
- **Exceptions:**
 - **Settlor provides otherwise**
 - No compensation
 - Exact amount
 - Method
 - **Court may deny compensation if trustee breaches the trust. § 113.082**

Compensation Issues

- **Should settlor waive compensation?**
- **Should settlor provided a fixed fee?**
- **Should settlor “shop around” for fees if using corporate trustee?**

Factors to Determine Reasonable Fee

- **1. Gross income of trust**

Factors to Determine Reasonable Fee

- **2. Success or failure of trust administration**

Factors to Determine Reasonable Fee

- **3. Trustee's skill and experience**

Factors to Determine Reasonable Fee

- 4. Trustee's fidelity or disloyalty

Factors to Determine Reasonable Fee

- **5. Amount of trustee's liability exposure and responsibilities assumed**

Factors to Determine Reasonable Fee

- 6. Time spent

Factors to Determine Reasonable Fee

- **7. Custom in the community**

Factors to Determine Reasonable Fee

- **8. Character of work**
 - Skill and judgment, or
 - Routine

Factors to Determine Reasonable Fee

- **9. Trustee's estimate of value of services**

Trust Modification

Court Alterations

Deviation
Cy pres

Deviation Goal

- Do what the settlor would have done had the settlor thought about the current situation.



Deviation -- § 112.054

- **Who may request?**
 - **Trustee**
 - **Beneficiary**

Deviation -- § 112.054

- **Discretionary with court**
 - **Court can refuse to authorize deviation even if trustee has a “good” reason as long as not an abuse of discretion.**

Deviation -- § 112.054

- **When is deviation possible?**
 - **1. Purposes of trust fulfilled.**

Deviation -- § 112.054

- **When is deviation possible?**
 - **2. Purposes of trust have become illegal.**

Deviation -- § 112.054

- **When is deviation possible?**
 - **3. Purposes of trust are impossible to fulfill.**

Deviation -- § 112.054

- **When is deviation possible?**
 - **4. Change will further the purposes of trust because of circumstances the settlor:**
 - Did not know, and
 - Could not anticipate.

Deviation -- § 112.054

- **When is deviation possible?**
 - **5. Modification of administrative provision is necessary or appropriate to prevent waste or avoid impairment of trust's administration.**

Deviation -- § 112.054

- **When is deviation possible?**
 - **6. Necessary or appropriate to achieve settlor's tax objectives and is not contrary to settlor's intent.**

Deviation -- § 112.054

- **When is deviation possible?**
 - **7. Continuance of the trust is not necessary:**
 - **To achieve any material purpose of trust, and**
 - **All beneficiaries consent**
 - **Directly**
 - **By virtual representation**
 - **Through guardian ad litem**

Deviation -- § 112.054

- **When is deviation possible?**
 - **8. Not inconsistent with material purpose of trust, and**
 - **All beneficiaries consent**
 - Directly
 - By virtual representation
 - Through guardian ad litem

Deviation -- § 112.054

- Permitted deviations:
 - 1. Change trustee

Deviation -- § 112.054

- Permitted deviations:
 - 2. Modify terms of trust

Deviation -- § 112.054

- **Permitted deviations:**
 - **3. Permit or direct trustee to do acts not authorized or forbidden by the trust.**

Deviation -- § 112.054

- **Permitted deviations:**
 - **4. Prohibit trustee from performing acts required by the terms of the trust.**

Deviation -- § 112.054

- Permitted deviations:
 - 5. Terminate the trust, in whole or in part.

Deviation -- § 112.054

- **Goal**
 - Do what the settlor would have done had the settlor thought about it.
 - Court will examine:
 - Trust instrument, and
 - Extrinsic evidence.

Reformation – § 112.054(b-1)

- **Reformation allowed to:**
 - Prevent waste
 - Impairment of trust purposes
 - Achieve trust purposes
 - Correct scrivener's error
 - Even if trust is unambiguous
 - If clear and convincing evidence of the settlor's intent

Cy Pres

- **Method of saving failed charitable trusts.**
- **Settlor must have general charitable intent.**
- **Gift saved for equitably equivalent charity.**

[review cy pres from Wills segment of course]

Blocker v. State -- p. 622

- A gift to a charity has as its purpose the charity's organizational purpose.
- If charity ends, the remaining donated property must be used for similar charitable purposes (cy pres).

Other Cy Pres Issues

- **Note 1, page 629**
- **Advice when drafting charitable trusts**

Party Alterations

1. By the Settlor -- § 112.051

- **Presumption = Settlor may revoke, modify, amend, etc.**
- **Settlor can make trust irrevocable by express language. Why?**
 - Tax benefits
 - Beneficiary protection
 - Creditor protection

1. By the Settlor -- § 112.051

- **Revocation Methods**
 - **In writing, if trust created in writing.**
 - *Sanderson* – p. 630 (allowed revocation language to be in a will).
 - **Follow method settlor specified in the trust.**

2. By the Trustee

- **Generally, no power to modify.**
- **Possible situations:**
 - **Settlor granted power in the trust.**
 - **Division or combination of trusts on identical terms -- § 112.057**
 - **Non-judicial cy pres -- § 113.026**
 - **Decanting -- §§ 112.071-.087**

3. By Trustee and Beneficiaries Acting Together

- Merger -- § 112.034
- But, no merger of spendthrift trust unless settlor is the beneficiary.

4. By Beneficiaries

- **General U.S. Rule = Allowed as long as no *material* trust purpose remained unfulfilled (*Clafin* rule).**

4. By Beneficiaries

- Texas under *Frost Nat'l Bank v. Newton* (Tex. 1977) = Allowed only if *all* purposes satisfied.
- Texas under § 112.054(a)(5) if:
 - Obtain court approval,
 - Change not inconsistent with material purpose, and
 - All beneficiaries agree or are deemed to have agreed.

5. Settlor and All Beneficiaries

- *Musick v. Reynolds* – p. 634, 637
 - “[I]f a settlor of a trust is alive and all of the beneficiaries of an irrevocable spendthrift trust consent * * *, the settlor and all beneficiaries may consent to a modification or termination of the trust.”
 - What problem could this holding cause?

6. Family Settlements

- Favored by courts on public policy grounds.
- But, courts make certain controversy is genuine.

Termination

When does a trust terminate?



When does a trust terminate?

- **1. Express terms of trust**
 - Most common method
 - § 112.052

When does a trust terminate?

- 2. Settlor revokes

- § 112.051

When does a trust terminate?

- 3. Property exhausted
 - No trust without property
 - § 112.005

When does a trust terminate?

- **4. Uneconomical**
 - **Notice to beneficiaries**
 - **Current distributees**
 - **Permissible distributees**
 - **Distributees if trust terminated now**
 - **Value < \$50,000**
 - **Trustee determines purpose not justify cost of continuing trust**
 - **No adverse estate tax result**
 - **Trust not contain a conservation easement**

When does a trust terminate?

- 5. Court order
 - Deviation
 - § 112.054

When does a trust terminate?

- **6. Merger**
 - Legal and equitable title reunited.
 - § 112.034



When does a trust terminate?

- 7. All beneficiaries die



Trustee's duties upon termination

- **1. Wind up trust business**
 - Trustee retains trust powers for “reasonable” period.
 - How determine?
 - § 112.052

Trustee's duties upon termination

- **2. Distribute trust property to remainder beneficiaries**
 - **Must be done timely.**
 - **§ 112.052**

Trust Enforcement

Procedural Matters

Standing to enforce

- **Must be “interested person”**
 - § 115.011
 - Defined in § 111.004(7)
 - Beneficiary
 - Trustee
 - Others affected by the trust
 - Settlor?
 - Attorney general (charitable trusts)

Necessary Parties -- § 115.011

- **1. Beneficiary of trust on whose act or obligation the action is predicated.**

Necessary Parties -- § 115.011

- **2. Beneficiary designated by name in the trust unless the beneficiary's interest already:**
 - Distributed
 - Extinguished
 - Terminated
 - Paid
- **Does not matter that the beneficiary is not a current distributee.**

Necessary Parties -- § 115.011

- **3. Person receiving distributions from the trust.**
 - **Does not matter that this person is not named in the trust.**

Necessary Parties -- § 115.011

- **4. Trustee**
 - **But not alternate trustees.**

Necessary Parties -- § 115.011

- Beneficiaries merely designated by a class are not necessary parties.
- However, may be prudent to make them parties to bind them to decision.

Jurisdiction -- § 115.001

- District court.
- But, if county has a statutory probate court, district court and statutory probate court have concurrent jurisdiction.

Jurisdiction -- § 115.001

- **While estate is pending**
 - **If the estate is pending in a county court at law, this court will have jurisdiction of trusts while the estate is pending.**

Jurisdiction -- § 115.001

- Possible actions of court
 - Construe trust
 - Determine applicable law
 - Appoint or remove trustee
 - Determine trustee's powers, responsibilities, duties, and liability
 - Ascertain beneficiaries

Jurisdiction -- § 115.001

- Possible actions of court (continued)
 - Make fact determinations
 - Determine question arising in administration or distribution
 - Relieve a trustee of any or all duties, limitations, and restrictions under trust instrument or Trust Code
 - “Call to Governor”

Jurisdiction -- § 115.001

- Possible actions of court (continued)
 - Require and settle accountings
 - Review trustee fees
 - Surcharge trustee (hold personally liable)
 - Exercise powers of equity court (e.g., cy pres, estoppel, injunction, receivership, etc.)
 - May retain continuing supervision (but, presumption is that court does not do so)

Venue -- § 115.002

- **1. Single non-corporate trustee**
 - **County of trustee's residence**
 - **County of trustee's residence in past four years**
 - **County of situs of trust administration**
 - **County of situs of trust administration in past four years**

Venue -- § 115.002

- **2. Multiple individual trustees with principal office in Texas**
 - County of situs of trust administration
 - County of situs of trust administration in past four years
 - County in which trustees maintain principal office

Venue -- § 115.002

- 3. Multiple individual trustees with no principal office in Texas
 - County of situs of trust administration
 - County of situs of trust administration in past four years
 - County of any trustee's residence
 - County of any trustee's residence in past four years

Venue -- § 115.002

- **4. One or more trustees is a corporation**
 - **County of situs of trust administration**
 - **County of situs of trust administration in past four years**
 - **County in which trustee maintains its principal office in Texas**

Venue -- § 115.002

- 5. If estate is pending
 - Venue is also proper in the county in which the estate is pending.

Venue -- § 115.002

- Court may transfer case from one county of proper venue to another if there is just and reasonable cause such as
 - Location of trust records
 - Convenience of parties
 - Convenience of witnesses
- If all parties agree, court may transfer to any county.

Rules of Procedure -- § 115.012

- Unless Trust Code provides otherwise, the Texas Rules of Civil Procedure apply.

Virtual Representation-- § 115.013

- **1. Order binds holder of power to revoke (typically, settlor)**
 - **Binds everyone**

Virtual Representation-- § 115.013

- 2. Order binding guardian of estate or guardian ad litem binds ward
 - Minor
 - Incapacitated person

Virtual Representation-- § 115.013

- 3. Order binding trustee binds beneficiaries in proceedings to review acts of prior trustee and in actions involving creditors.

Virtual Representation-- § 115.013

- 4. If no guardian and no conflict of interest, parent may represent minor child.

Virtual Representation-- § 115.013

- **5. Unborn or unascertained person bound if:**
 - Interest was adequately represented by another party,
and
 - This party had a substantially identical interest

Guardians ad litem -- § 115.014

- **Discretionary, if beneficiary is:**
 - Minor
 - Unborn
 - Incapacitated
 - Unascertained
 - Unlocatable
- **Guardian ad litem may consider general benefit accruing to the living members of a person's family.**

Attorneys ad litem -- § 115.014

- Anytime the court considers it necessary to represent any interest.

Remedies Against Trustee

1. Money Damages (trustee not in breach) -- § 114.001

- Any profit through or arising out of the administration of the trust.
 - Exception for trustee's compensation

1. Money Damages (trustee in breach) -- § 114.001

- 1. Lost value to trust
 - Causation required
 - No requirement that trustee personally benefited

1. Money Damages (trustee in breach) -- § 114.001

- 2. Profit made by trustee
 - Causation required
 - No requirement that trust have suffered a loss

1. Money Damages (trustee in breach) -- § 114.001

- 3. Lost profits
 - Causation required
 - Difficult to show

1. Money Damages (trustee in breach)

- 4. Punitive damages
 - “[A]n intentional breach of a fiduciary duty is a tort justifying the award of exemplary damages.”

2. Remove trustee -- § 113.082

- **Grounds are discretionary**
 - **Evaluated under “abuse of discretion” standard**

1. Trustee has materially violated the trust (or attempted to do so)

AND

Trust suffered a material financial loss.

2. Remove trustee -- § 113.082

2. Trustee becomes incompetent

3. Trustee becomes insolvent

4. For other cause, in the discretion of the court

2. Remove trustee -- § 113.082

- Court's "attitude" toward removal
 - Reluctant to remove settlor-chosen trustee.
 - Hesitant to remove because of conflict between trustee and beneficiary.

2. Remove trustee -- § 113.082

- **Consequences of Removal**
 - **Court may deny all or part of trustee's compensation.**
 - **Removal may be treated as breach of trust.**

2. Remove trustee

- ***Ditta v. Conte* – Texas Supreme Court 2009 – p. 186**
 - “[N]o statutory limitations period restricts a court’s discretion to remove a trustee. A limitations period, while applicable to suits seeking damages for breach of fiduciary duty, has no place in suits that seek removal rather than recovery.”

3. Decree to carry out the trust

4. Injunction

- **Used if trustee threatens to commit a breach of trust.**
- **If trustee does not obey, punishable as contempt.**

5. Receivership

- **Used when court fears trustee will not obey injunction.**
- **“Receivership is an extraordinary harsh remedy and one that courts are particularly loathe to utilize.”**

6. Require or increase bond

7. Declaratory Judgment

- Court may determine any question arising during the administration of a trust.
 - Civ. Prac. & Rem. Code § 37.005

8. Award Attorney Fees -- § 114.064

- Standard = equitable and just.
- Award may be against any party.
- Thus, *all* parties should request fees.

9. Criminal Sanctions – Penal Code

§ 32.45



9. Criminal Sanctions – Penal Code

§ 32.45

Misapplication by Fiduciary

- **State of mind**
 - Intentional
 - Knowing
 - Reckless

9. Criminal Sanctions – Penal Code

§ 32.45

Misapplication by Fiduciary

- **Evil Act**
 - **Misapply trust property which involves**
 - In violation of trust instrument
 - In violation of Trust Code
 - **Substantial risk of loss to beneficiary**

9. Criminal Sanctions – Penal Code

§ 32.45

Misapplication by Fiduciary

- **Penalty**
 - If amount involved greater than \$300,000, up to life sentence.
 - No requirement that trustee have personally benefited.
 - If trustee personally benefited, then it may be theft under Penal Code Chapter 31.

10. Liability for acts of prior trustee

§ 114.002

- **1. Knowledge**
 - **New trustee knows (subjective)**
 - **New trustee should know (objective)**

and

10. Liability for acts of prior trustee

§ 114.002

- **2. Improper Conduct**
 - Allows bad conduct to continue, or
 - Fails to make reasonable effort to compel old trustee to deliver trust property, or
 - Fails to make reasonable effort to compel redress of breach (e.g., sue prior trustee)

Remedies Against Beneficiary

1. Misappropriation -- § 114.031

- Beneficiary has misappropriated or otherwise wrongfully dealt with trust property.

2. Involved with breach -- § 114.031

- Consented to breach
- Participated in breach
- Agreed to be liable for trustee's breach

3. Failure to repay loan or advance

§ 114.031

4. Failure to repay excess distribution -- § 114.031

- E.g., mistaken payment under § 114.004.

5. Breach of contract to contribute to trust -- § 114.031

- **E.g., beneficiary promises to add his/her own property to the trust and then fails to do so.**

Trustee's right of offset -- § 114.031

- Trustee may offset even if trust has a spendthrift provision.

Remedies Against Trust Property

1. Tracing

- Goal = recover actual trust property from trustee or non-BFP.
- Double recovery (money and property) not allowed.
- What is the key benefit of the tracing remedy?

Tracing into Commingled Account

	Trustee's \$	Trust's \$	Acc't Balance
Opening Balance (that is, before Trustee turns evil)	500	0	500

Tracing into Commingled Account

	Trustee's \$	Trust's \$	Acc't Balance
Opening Balance	500	0	500
Trustee embezzles \$300	500	300	800

Tracing into Commingled Account

	Trustee's \$	Trust's \$	Acc't Balance
Opening Balance	500	0	500
Trustee embezzles \$300	500	300	800
Trustee withdraws \$400	100	300	400

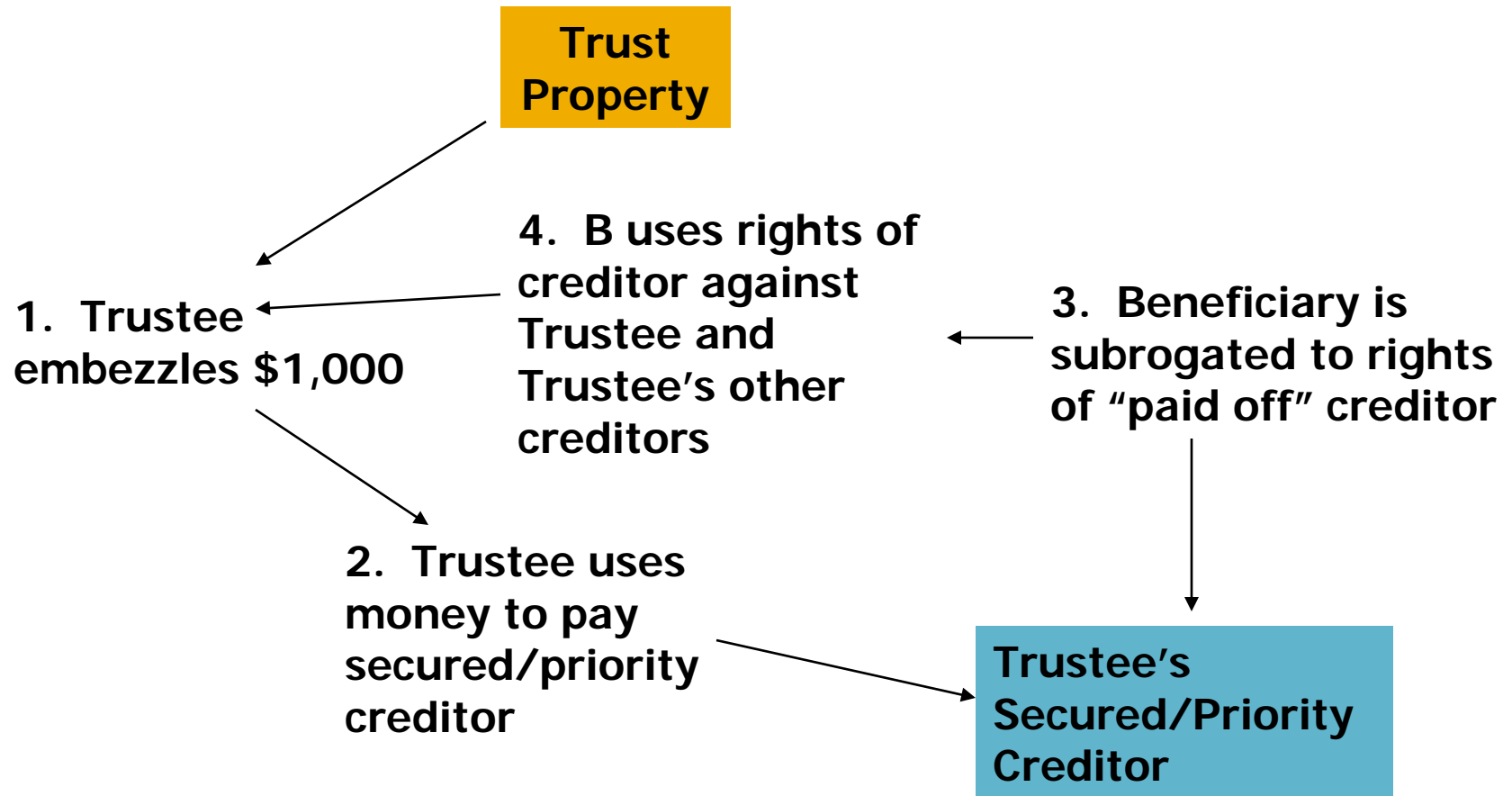
Tracing into Commingled Account

	Trustee's \$	Trust's \$	Acc't Balance
Opening Balance	500	0	500
Trustee embezzles \$300	500	300	800
Trustee withdraws \$400	100	300	400
Trustee withdraws \$300	0	100	100

Tracing into Commingled Account

	Trustee's \$	Trust's \$	Acc't Balance
Opening Balance	500	0	500
Trustee embezzles \$300	500	300	800
Trustee withdraws \$400	100	300	400
Trustee withdraws \$300	0	100	100
Trustee deposits income tax refund of \$600	600	100	700

2. Subrogation



3. Marshaling

- **A creditor with the right to recover from several funds/items, must first resort to fund/item not subject to the rights of another creditor who has recourse to only one of the funds/items.**

3. Marshaling

Example

- Trustee personally owns two assets:
 - Asset A = \$10,000
 - Asset B = \$6,000
- Beneficiary has claim for \$5,000 against Asset A via subrogation due to Trustee's embezzlement; no claim against Asset B
- Creditor has priority claim against both assets totaling \$10,000.

Protections

Purchaser from Trustee
Debtors paying Trustee

Bona Fide Purchasers from Trustee

- **Common Law**
 - Purchaser not protected as knew purchasing property subject to equitable interest of another.
 - What is the problem with this rule?

Bona Fide Purchasers from Trustee

- **Texas Protections**
 - **Purchaser or Debtor only needs to satisfy requirements of one of the protections to prevail.**
 - **There is overlap in the protections.**

Bona Fide Purchasers from Trustee

- **1. Bona Fide Purchaser**
 - Purchase in good faith, and
 - Pay fair value.
 - BFP protected even if trustee exceeded trustee's authority.
 - § 114.081(a)

Bona Fide Purchasers from Trustee

- **2. Dealings with trustee**
 - Not a beneficiary
 - Good faith
 - Obtain copy of trust or trust certification
 - No duty to inquire into extent of trustee's powers
 - § 114.081(b)

Bona Fide Purchasers from Trustee

- **3. Delivery of money or other property to trustee**
 - **Good faith**
 - **No duty to ensure the trustee properly uses the money or property.**
 - **§ 114.081(c)**

Bona Fide Purchasers from Trustee

- **4. Dealing with trustee of terminated trust**
 - Not a beneficiary
 - Good faith
 - Without knowledge of trust termination
 - Protected as if former trustee were still a trustee
 - § 114.081(d)

Bona Fide Purchasers from Trustee

- 5. Conveyances from trustee which do not:
 - Identify the trust, or
 - Disclose the names of the beneficiaries.
 - E.g., “To Mike Sorrentino, in trust” and then Mike sells.
 - Purchaser not subject to beneficiary’s claims.
 - § 114.082 & § 101.001
 - Why two sections with virtually identical language?

Causes of Actions Against Third Parties

Trustee may sue others:

- Party who breaches contract with trust.
- Tortfeasor who damages trust property.
- Etc.

Enforcement of Charitable Trusts

Challengers

- **Anyone who would receive property if trust were invalid:**
 - Heirs
 - Will beneficiaries

Enforcers

- 1. Settlor, but only if special interest not shared by general public so can qualify as “interested person.” – *Lokey* p. 657
- 2. Attorney General
- 3. Charitable beneficiary
- 4. Anyone else who can qualify as “interested person.”

Notice to Attorney General – Ch. 123

- Application to “charitable trusts”
- Note special definition in § 123.001(2):
 - Charities, even if not run as a trust
 - Trusts to benefit charities
 - Inter vivos outright gifts to charities
 - Testamentary outright gifts to charities

Notice to Attorney General – Ch. 123

- Proper party to virtually all actions involving a charitable trust, e.g.,
 - Terminate
 - Distribute to non-charitable donees
 - Cy pres
 - Construe instrument
 - Will contest if will makes charitable gift
 - Obtain declaratory judgment

Notice to Attorney General – Ch. 123

- **AG has right to intervene in any proceeding and to join in any settlement.**

Notice to Attorney General – Ch. 123

- **Notice:**
 - Given by party initiating the action
 - Certified or registered mail service
 - Include copy of pleadings
 - Give within 30 days of filing
 - Give at least 25 days before hearing
 - File (1) affidavit swearing to compliance with notice duty and (2) return receipts from the mail service

Notice to Attorney General – Ch. 123

- **Failure to give notice:**
 - **AG may set aside as voidable:**
 - Any judgment
 - Any settlement
 - **AG may consent and thus be unable to set aside later.**

Notice to Attorney General – Ch. 123

- **Practice Notes**
 - **Do not forget to give the AG notice.**
 - **In most cases, the AG will decline to get involved as many charities are strong enough to defend themselves.**

Trust Bank Accounts

Defined

- **Not a real trust; just an account at a bank, credit union, or other financial institution.**
 - "A in trust for B."
 - "A, trustee for B."
- **Other terms:**
 - *Totten* trust
 - Savings account trust
 - Tentative trust

Ownership during T's lifetime

- **Trustee (depositor) has all rights.**
 - **May withdraw without notice to or consent of B.**
 - **No split of title.**
 - **No imposition of duties.**
- **If more than one trustee (depositor), they own in proportion to their net contributions.**

Ownership After T's death

- **Beneficiaries have rights only after:**
 - **All trustees have died, and**
 - **Beneficiary has survived all trustees.**

Potential Benefits

- **Avoid probate – money immediately available to beneficiary**
- **Inexpensive**
- **Depositor gives up no control**
- **Effective to make small gifts in large estates**

Potential Disadvantages

- **No professional management**
 - Low rate of return
- **No tax benefits**
- **Confusing to clients**
 - Use Pay on Death accounts instead

Resulting Trusts

Basic Concepts

- Implied by conduct (rather than words).
 - Goal = do what settlor would have done had settlor thought about it
- Who benefits?
 - Settlor, or
 - If settlor is dead, settlor's successors in interest
- Not governed by Trust Code as not a real trust
 - § 111.003(1)

Situations where resulting trusts arise

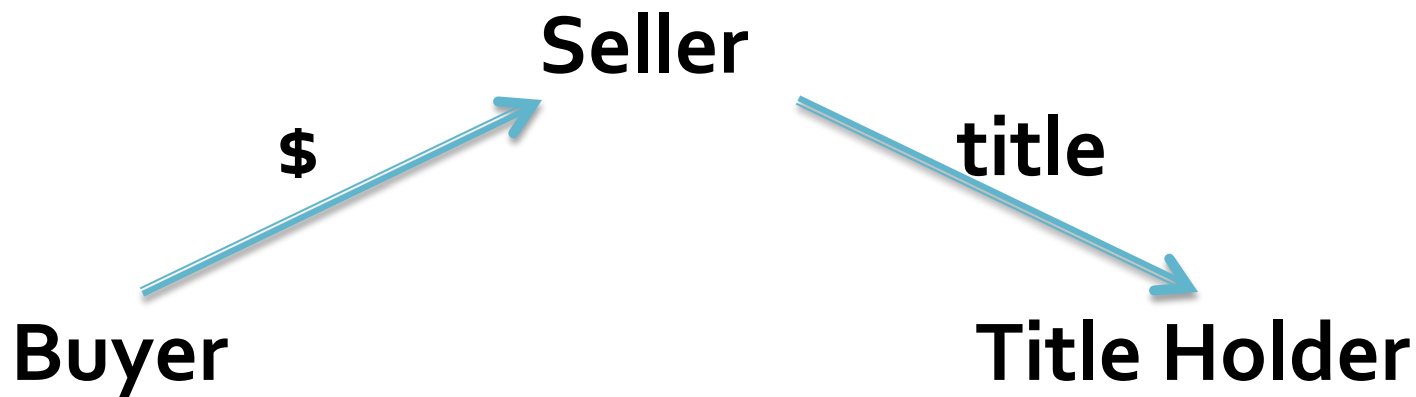
- **1. Express trust property excessive and trust instrument does not provide instructions.**
 - “implied reversionary interest”

Situations where resulting trusts arise

- **2. Failure of express trust**
 - Settlor attempts to create a trust (conveys legal title to the trustee) but the attempt fails.
 - Thus, settlor still has the property.
 - **Examples**
 - “To Natasha Romanoff, in trust” and there is no actual trust.
 - Beneficiaries described as, “my friends.”

Situations where resulting trusts arise

■ 3. Purchase-money resulting trust



1. Donor ————— Donee
2. Creditor ————— Debtor
3. B of PMRT ————— T of PMRT

Constructive Trusts

Basic Concepts

- Equitable remedy to prevent unjust enrichment.
- Trust Code does not apply.
 - § 111.003(2)
- Person seeking must request.
- Bad conduct must have nexus to property.

Grounds to impose constructive trust

1. **Fraud**
2. **Abuse of confidential relationship**
3. **Promises made in contemplation of death**
4. **Any other evil conduct which the court finds merits the remedy.**
 - **Heir murdering intestate**
 - **Beneficiary murdering testator**
 - **Breach of contractual will**