



# THE SHIELD

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## Secrets of the Irrevocable Private Contract Trust Organization

Shopping for a good business trust to protect your business and personal assets can be a confusing experience. Don't feel lost, even attorneys are often confused or even worse, misinformed with little or no training about the Irrevocable (Common Law) Contract Business or Asset Holding Trust.

Throughout this document, we discuss the Irrevocable Pure Common Law Contract Business Trust. That is a very long name for what is also known as a Contract Trust, Private Trust, Pure Common Law Trust, or Business Trust. Whatever the many names, they are all the same **non-grantor** trust document. We will refer it as the **Irrevocable Contract Trust**.

Many trust promoters adamantly feel that "their business trust" is the only good one on the market. They typically cite numerous case law decisions to support their positions. I.E., ..."It is established by legal precedent that Business Trusts are lawful, valid business organizations"(58 ALR 462), and "if the trust is free of control by its certificate holders then it is a pure trust" (*Hecht v. Malley* 256 US 144) and on and on...so who's right?... who's wrong?... who can we trust when we seek liability protection for our personal and business assets by means of a trust? The intent of this review is to clarify some typical misunderstandings regarding the Irrevocable Contract Trust. We do this with a simple direct comparison to Legislative created Statutory Trusts.

**Many of us are fooled by the word 'trust' as it usually implies some sort of protection or security.** In many cases, especially with statutory Revocable Living Trusts (RLT), this is untrue, as they offer little or no asset or estate protection.

There are literally dozens of different kinds of trusts. A look at Black's Law Dictionary confirms the formidable array of equitable trust documents, all of which have been subject to litigation. This categorization of trusts also suggests to the uninitiated that all trusts must follow very strict guidelines and rules or else it will be broken in court. The real truth is that although **statutory trusts** must conform to prescribed rules, the **Irrevocable Contract Trust need** not and should not conform to any specific "rule of law" for *statutory trusts*. This is because the Irrevocable Contract Trust is not really a trust at all. **It is a Contract in the form of a Trust.** This is the big "**SECRET**" that has so often confused and misled so many trust writers and users.

### *Two Categories of Trusts*

It is helpful to divide trusts into two broad categories: the first being those trusts that are created by statutory privilege, and the second, which are created by or as a matter of constitutional right. The trusts that are created by a matter of statutory privilege are by far the most common. A brief discussion of both types of trust illustrates the essential differences between the two.

### **Statutory Trusts**

Statutory trusts came to be through some body of deciding or assumed authority, usually legislatures, organizations like the Internal Revenue Service, the American Law Institute's Committee on Trusts or some other body of government, agency, committee or institution. These trusts fall into the category of trusts that are created and get their authority through or by **statutory privilege**. Statutory trusts are defined in precise terms and they are all bound by a strict structural procedure. The groups creating

them have based their findings upon judiciary conclusions as provided by court case law decisions. In the *Restatement of the Law of Trusts*, which is an encyclopedia of legal opinions about trusts, the sections of the 'Restatement' express the result of a careful analysis of the body of trusts by a thorough examination and discussion of court case decisions regarding trusts. Statutory trusts are a product of recognized expert legal opinion. Statutory trusts are usually dependent upon prior case law. *The authority for that law* is based upon collective opinion and it is the *expression of the law* by the legal profession.

When we think of the law, we usually think of law that is passed by our legislature, not rules passed by administrative agencies, or opinions of judiciary committees based upon prior case history. The legislature does not fully describe the form a particular trust is to take; however the legislature does have the authority to delegate certain powers to governmental agencies, including the authority to make their own rules. These rules are termed "*administrative law*" and are or become "*the rule of law*" simply by being published by the authority.

As a trust user, you must choose from the many types of trust that are offered. When you do so, you are accepting a *privilege* from (ultimately) the legislature. A *privilege*, of course (it even sounds wonderful) is that which is granted by the pleasure of the author of the privilege. Privileges can be withdrawn, revised and or modified by the maker of the privilege. The judiciary, on the other hand, is faced with what is known as the "*Rule of Law*" which is a formidable combination of rules and case law decisions. Case law can be flexible and directional; for every case law decision that points in one direction there always seems to be one or more that point in other or opposite directions. We can be as careful as possible complying with the *rule of law* when forming a statutory trust, and yet because of the numerous case law decisions out there it can still be challenged in court.

Granted, statutes rarely directly address trusts; but, for convenience to the reader, let us refer to "*the rule of law*" comprising case law and agency regulations along with legislative law published in government annals as simply 'statutes' or in this case "statutory trusts".

A traditional statutory trust of this nature, like a Revocable Living Trust, has as its feature benefit the provision to avoid probate, however it **provides no asset or liability protection**. As mentioned before, most of us believe the word "trust" implies some sort of *protection*. **The truth is that with this type of trust there is absolutely no protection for the owner at all.**

So what about total liability protection? What about privacy and tax reduction? Unfortunately most statutory trusts fail miserably in this arena. They fail because they compromise the basic principle which lies at the foundation of all trusts, that is the direct transfer of *ownership*; which carries with it the consequent transfer of *liability*. **Liability always follows direct ownership**. The use of a trust transfers ownership to an artificial body which is the trust entity itself. **Often the transfer of property to a statutory trust is not a complete transfer. The grantor still retains some ownership and is therefore liable for the asset(s), including state (estate) and federal (inheritance) taxes.**

### **Constitutional Right to Contract**

The other category of trust is the type created by *constitutional contractual right* as contrasted to the *privileges* provided by statutory trusts which can be withdrawn, revised or modified by their giver. **A constitutional right is that which is incapable of revision or modification, and cannot be statutorily abridged or changed.**

From *The Restatement of the Law of Trusts*,...

"A statement of the rules of law relating to the employment of a trust as a device for carrying on business is not within the scope of the 'Restatement' of this Subject. Although many of the rules applicable to statutory trusts are applied to Business Trusts, many of the rules are not applied, and there are other rules that only apply to Common Law Contract Business

Trusts. The Common Law Contract Trust is a special kind of business organization, and is best dealt with in connection, or compared with other business or holding organizations."

The American Law Institute's multi-volume classic study of trusts fails to even discuss the Irrevocable Common Law Contract Trust! Why is this so?...they don't discuss Contract Business Trusts because even though they are called contract trusts they aren't really trusts at all. **They are in fact a contract in trust format and the rules for statutory trusts simply don't apply to Contract Business Trusts.** That is the important difference. Here is where many in the legal community sometimes get confused by mixing statutory rule of law with constitutional contract law. **The reason agreements and Contracts are called Trusts is that a person called a "Trustee" is named to administer the Agreement or Contract.**

As homeowners and businesspeople alike, we all want security for our assets and businesses. In addition, we certainly don't want anyone telling us how to organize and run our lives, assets and businesses. We conduct business by entering into a series of contracts. An Irrevocable Contract Trust organization permits us to organize our affairs upon the **principle of contract in trust**, rather than a quasi-legislative privilege. Article 1 Section 10 of our Constitution provides that: ... **"No state shall... pass... any law impairing the Obligation of Contracts."** That section of the Constitution provides, in a nutshell, the sum strength of the Irrevocable Contract Trust.

Indeed, the Courts have ruled that "A business trust is not so much a trust as it is a contractual relationship in trust form." (*Berry v. McCourt*, 204 NE2d 236). The right to contract is protected, as pointed out in the Constitution; "A business trust is established by contract, and any law or procedure in its operation denying or obstructing contract rights impairs contract obligations and is, therefore, violative of the United States Constitution." (*Smith v. More* 2 CA 524) "The right to create the Business Trust is

based on the Common Law *right* to contract by individuals establishing it." (*Gleason v. MacKay*, 134 Mass, 419).

It is very important to construct the contract trust so that every officer or party of interest has a contract relationship to the trust; otherwise, the protection of the contract is lost. The trustees must be appointed and must accept their position by contract. The business or trust manager, if any, must also be contracted in the same manner. If the trust should ever once partake of the "*privileges*" afforded by legislative agencies, then it can/will compromise the strength of its own position and will lose the right to the unassailable protection of a contract that is guaranteed by our Constitutional Common Law.

The "Ashwander Doctrine" explains this principle "...as anyone who partakes of the benefits or *privileges* of a given statute, or anyone who even places himself into a position where he may avail himself of those benefits at will, cannot reach constitutional grounds to redress grievances in the courts against the given statute." (*Ashwander v. T.V.A.*, 287 U.S. 288, 56 S. Ct. 466)

Thus the bottom line now becomes obvious. It is a matter of *rights* vs. *privilege*. **Why should we restrict the operation of our business or the protection of our assets to the territory granted by legislative "privilege" when it is not really necessary?** Not only is it not necessary, it can be downright foolhardy. Anyone from the legal profession can tell you that for every case law on one side of an issue there are usually many more on the other side. Case law is always a two edged sword. It cuts both ways. The Irrevocable Contract Trust is, on the other hand, "A contract organization, consisting of a U.S. Constitutional *right* to contract in trust format that cannot be abridged. The agreement, when executed, becomes a Federal Common Law Organization and not under the laws passed by any of the several legislatures." (*Crocker v. MacClay*, 649 U.S. Supp. 39 at 270) "A business trust is not

subject to legislative control." (*Elliott v. Freeman* 649 220 US 178)

In summary there is at least one very important difference between a true Irrevocable Contract Trust and *statutory* trusts. Those "statutory trusts" may even have the outward form and name of the Irrevocable Contract Trust, but they lack the substance thereof. *That difference lies in contract.* If the trust is formed and organized by contractual relationships, and protects the parties' interest by providing them an 'arm's length distance' relationship to the trust, then it is an Irrevocable Contract Trust. In other words, the trust must be mechanically adverse (at arm's length). If the trust partakes of statutory privileges then it is a "statutory trust", and the loopholes provided by privilege can be plugged at will by the legislature that has the power to suspend those privileges as easily as it can grant them. *We would be wise wherever possible not to rely upon statutory privilege and the rule of law and supporting case law that support those privileges. Rather, we should rely upon the superior Constitutional safeguard against the impairment of Contracts.*

This way we may avoid the contentious litigation that comes from challenges to statutory trusts. We are then out of the legislative statutory system and *under the protection and rights of constitutional common law.* We are in the *realm of positive law* as opposed to *manipulative* statutory law. We are in a position of strength by having separated ourselves from any connection with any trust property outside the bounds of a contractual relationship. *It is axiomatic that liability always follows direct ownership,* and the real ownership has been the object of innumerable IRS challenges to traditional statutory trusts.

The property of the Irrevocable Contract Trust is not the Trustee's property. If the Trustee doesn't own it then he or she is not personally liable for it unless he or she operates the trust or the property of the trust in a reckless or illegal manner. As Trustee one becomes a fiduciary or steward to the corpus of the trust. Even though

the Trustee(s) control and manage the property of the business trust, it is not part of his or her personal estate.

**The IRS, with its statutory and arbitrary rules cannot abridge the constitutional right to enter into a contract that you entered into. No authority body, including the IRS, can color the law and claim that because you as 'Trustee' control the property or assets of the Contract Trust the property (like in a grantor or revocable living trust) becomes part of your personal estate.** They confuse this with statutory trusts, especially Revocable Living Trusts that do not always completely transfer ownership. "The transfer of assets to a (contract) business trust is for full and adequate consideration." (*Carpenter v. White* 80 2d 145) "The value of property transferred by a decedent during his lifetime for adequate and full consideration is not included in his gross estate." (*Commerce Clearing House (CCH) Federal Estate and Gift Tax Reporter* paragraph 610). Therefore, the assets transferred to the business trust in exchange for trust certificates as part of the contract would not be subject to Estate or State Inheritance Taxes. This is because the Contract Trust does not die as does a natural person and the death of the Contract Trust Certificate Holder does not affect the Contract Trust or its assets in any way whatsoever. "Because contract trusts are created from a constitutional contract right, a contract provision can become null and void at the death of one of the parties." (*Babb v. US* 349) **The contract trust certificates become null and void upon the death of the holder.** If the Certificate Holder is a Trustee, other Trustees or Successor Trustees take control of the assets and continue to manage them as fiduciaries. **Remember, the contract trust does not die; it was born out of contract to live.**

**Creating a Contract Trust is the best thing that you can do for you and your family.**

**No amount of insurance, at any price, can give you the protection and peace of mind that this simple Contract Trust can provide.**

**Now it's up to you, the choice is yours!**