

Leimberg Newsletter

The Continuing Rise of the Purpose Trust

By Alexander A. Bove, Jr. & Melissa Langa

Introduction

Little by little the purpose trust has been making its way into U.S. law and estate planning. In the Leimberg Newsletter #2711, LISI contributor Alexander Bove reviewed the basics of purpose trusts and how they could be used to hold a family business in perpetuity, while still retaining control and providing benefits for the family. He pointed out that, although several states permit the use of purpose trust through Uniform Trust Code section 409, the only state that at that time had a “stand-alone” purpose trust statute was South Dakota. South Dakota must now make room for Oregon, which just passed its own purpose trust law, this one with a special feature – the Oregon purpose trust must have a “business purpose.” Thus, there remains a question as to whether it can be established to maintain a family compound, for example, or a family art collection, but in any event, Oregon may be complimented for its innovative move.

Executive Summary

A purpose trust is one that is established to carry out a purpose rather than to provide for beneficiaries.¹ Examples would include a trust for a pet, or to hold an art collection, or, more relevant to estate planning, to hold and operate a business. The advantage of the last example is that, in a suitable jurisdiction, the business may be held and operated by the trustees of the trust in perpetuity, with no exposure to hostile take overs, family disputes, or estate taxes, if properly planned. Because of the unique flexibility, protective value, and estate planning potential offered

Reprinted with permission of Leimberg Information Services, Inc.

by a purpose trust, more and more states are considering stand-alone purpose trust statutes, Oregon is now the latest.

Discussion

After a great deal of thought, professional input, and consideration of the ways in which a purpose trust statute can attract businesses to the state, Oregon has just recently adopted its own special, stand-alone purpose trust statute.² The seed for this interesting Oregon project was planted by a company called Organically Grown Company (“OGC”), a wholesale distributor of organic produce, located in Eugene, Oregon. In 2018 OGC transferred 100% of its shares to a purpose trust which will operate the company, claiming to be the first company in the United States to be wholly owned by a perpetual purpose trust.³ OGC had the right idea and the right advisors to help them carry out the plan, but not exactly the right law. It wasn’t the wrong law, by any means, however, and their plan went exactly as envisioned. The point is that the law OGC used was almost exactly the same as the bare bones purpose trust law of two dozen other states that contained almost no details other than the stipulation that a trust could be established without beneficiaries, so long as the trust contained a provision for enforcement.⁴ Nevertheless, OGC’s advisors took that and ran with it, developing a trust that provided for management and long term operation of OGC’s business without outside shareholders.

The many details that are absent from the basic UTC purpose trust statute are present in the thoughtfully drafted Oregon statute, which chose to label the trust a “stewardship trust”.⁵ One thing that is unique about the Oregon law is that the trust must have a “business purpose” (not defined) and may hold an ownership interest in any type of recognized entity, from a corporation to an LLC to a joint venture.⁶ Most other purpose trust statutes do not specify the

Reprinted with permission of Leimberg Information Services, Inc.

purpose, except to provide that it must be lawful, not against public policy, not wasteful, and capable of attainment. Oregon law, statute of course also requires that a purpose trust meet those requirements, but with a business purpose. (Oregon pet trusts are an exception under a different statute.⁷)

Additional unique features of the Oregon trust include the way it calls for the administration of the trust. Instead of being managed by trustees (though trustees still have an administrative role), the statute provides that the trust will be managed by a “stewardship committee” of at least three persons.⁸ In fact, though, the statute does not actually state that the stewardship committee will manage the trust, but it seems it can only be interpreted that way, as the stewardship committee has the power (unless stated otherwise in the trust) to remove and replace trustees, enforcers, and members of its own committee, may direct trust distributions, and “exercise all rights belonging to the trustee.”⁹ And the foregoing powers are given to the committee, “in carrying out the purposes of the trust”¹⁰ (sounds to us like managing the trust). In addition, the statute requires the committee to account to the trustee (and the enforcers) annually.¹¹ While the requirement of the stewardship committee to account to the enforcers is quite standard and important, the requirement to account to the trustees is the reverse of the typical trust (and purpose trust) model. One effect of this reversal of roles is to make the trust a “directed” trust, where the trustees will simply follow the orders and instructions of the committee.

Interestingly, the statute does not provide for or even mention the appointment of a trust protector, which again is a customary position in purpose trusts, but the statute does defer to the “provisions of the trust” in most instances, so if a protector is desired, it appears that that be accommodated. Whether the protector must act in a fiduciary capacity is totally a side issue,

Reprinted with permission of Leimberg Information Services, Inc.

although both the position of the stewardship committee and that of the enforcers are specifically stated to be fiduciary, with no allowance “for the trust to provide otherwise.”¹² Speaking of the terms of the trust, the statute does allow some flexibility in allowing the trust to vary specific provisions of the statute, including for example, the powers granted to the stewardship committee,¹³ and also allows amendment and termination of the trust.¹⁴ Unfortunately, it is not at all clear whether this is a carte blanche, in which case some of the important provisions of the statute could be overridden.

We applaud the thought and effort that went into this statute, though we are a bit concerned as to how effectively the reversal of roles of the stewardship committee and the trustee will work in practice, but time will tell. And while we also applaud the “business purpose” of the statute to propagate the idea of attracting businesses to the state, we feel the legislature may have overlooked the potential of attracting other forms of purpose trusts.¹⁵ Lastly, as with any new statute, a number of its provisions will have to be tested and ironed out in practice.

¹ Leimberg Newsletter 2711, March 20, 2019

² Oregon Legislative Assembly, House Bill 2598. Key parties who should be credited with the formidable task of drafting and redrafting to reach the finished product include Professor Susan Gary of the University of Oregon School of Law; Steve Bell of Stoel Rives law firm, Portland, Or, and Natalie Rintman-White, an executive with Organically Grown Company of Oregon.

³ RSFsocialfinance.org

⁴ OR. Rev. Stat. Ann. 130.190

⁵ Supra note 2, section 2 (1), (2)

⁶ Id.

⁷ ORS 130.185

⁸ Supra note 2, section 2 (4)

⁹ Id at section (7)

¹⁰ Id

¹¹ Id at section (9)

¹² Id at sections (3) and (4)

¹³ Supra note 2 at section (7)

¹⁴ Id at section (11)

¹⁵ Other types of purpose trusts are allowed under ORS 130.190, but their term is limited to 90 years.