



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 601

March 20, 2024

ISSUE

How various provisions of title 15 of the Texas Election Code apply to a Texas “purpose trust” formed under Section 112.121, Texas Property Code. (AOR-697).

SUMMARY

A trust is not a separate legal entity and therefore not a distinct “person” for the purposes of determining political committee status and the application of campaign finance rules generally. Therefore, the general campaign finance restrictions and reporting rules apply to the people comprising the trust, i.e., the people funding or making contribution or expenditure acceptance decisions on behalf of the trust.

The people providing money to a trust and deciding how money will be spent on behalf of a trust may be treated as a Texas political committee if, just like any other group of people acting in concert, they meet the generally applicable criteria for forming a political committee.

A purpose trust comprised entirely of funds from an individual is not subject to the corporate contribution ban under Section 253.093 of the Election Code and may make political contributions to candidates, officeholders, and political committees.

A purpose trust that is not a political committee will be subject to the corporate contribution ban if the trust organizes itself as a corporation—even it incorporates for liability purposes only.

FACTS

The requestor asks various questions relating to the application of campaign finance rules to an unincorporated Texas “purpose trust.”

Texas law defines a trust as:

a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property:

- (A) for the benefit of another person; or
- (B) for a particular purpose, in the case of a [purpose trust].

Tex. Prop. Code § 111.004(4) (defining “express trust”); *see also Ray Malooly Tr. v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006).

A “purpose trust” is a unique type a trust created by the 88th Legislature. Acts 2023, 88th Leg. R.S., Ch. 112 (H.B. 2333), Sec. 2., codified as Subchapter F of Chapter 112, Tex. Property Code. Typically, a trust requires an identifiable beneficiary to be effective. However, a “purpose trust” may be “created for a noncharitable purpose without a definite or definitely ascertainable beneficiary.” Tex. Prop. Code § 112.121(a).

Under Texas law, a purpose trust has the following characteristics:

- It is enforced by one or more trust enforcers named in the trust instrument;
- Its trust enforcers are fiduciaries required to enforce the purpose and terms of the trust;
- Its trust enforcers are entitled to reasonable compensation;
- The trust instructions may provide for successor trust enforcers; and
- If a purpose trust ends up with no trust enforcer, a court properly exercising jurisdiction shall appoint one.

See Tex. Prop. Code § 112.121 et seq.

The requestor is considering creating a purpose trust under Section 112.121 of the Property Code. He plans to use at least some trust assets to make political expenditures and political contributions to Texas candidates and officeholders. The requestor states the trust’s only source of funds and assets would be “[the requestor’s] personal funds and assets, including shares of stock in corporations that are held by [the requestor] personally, as well as any investment income the trust may earn from its funds and assets” and would not accept any corporate funds.

The purpose of the requestor’s trust would be “bringing about civic betterments and social improvements.” The requestor believes it would “qualify as a social welfare entity under Section 501(c)(4) of the Internal Revenue Code.”

ANALYSIS

The requestor asks a series of questions regarding the application of title 15 of the Election Code to a trust. Most of the questions turn on whether a trust is treated as distinct and singular “person.” For the reasons explained below, a trust is not a distinct, singular person for purposes of campaign finance. In essence, the trust form is ignored and the normal campaign finance restrictions and reporting rules apply to the trust’s constituent parts: the people funding the trust and making decisions about funding or how to spend the trust assets.

Unlike a corporation, a trust is not a separate legal entity.

In Texas, “the term ‘trust’ refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property.” *Juhl*, 186 S.W.3d at 570

(citing *Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996) (holding that treating trust rather than trustee as attorney’s client “is inconsistent with the law of trusts”)).

This stands in contrast to a corporation, which is a distinct legal entity. Texas’ Third Court of Appeals has held that a corporation acting alone did not have standing to challenge the law related to political committees because the corporation was a single person, not a group of persons. *Tex. Home Sch. Coalition Ass’n v. Tex. Ethics Comm’n*, No. 03-17-00167-CV, 2018 Tex. App. LEXIS 9075, at *10 (Tex. App.—Austin Nov. 7, 2018, no pet.) (mem. op.). A federal district court reached the same conclusion. *Lake Travis Citizens Council v. Ashley*, No. 1:14-CV-994-LY, 2016 U.S. Dist. LEXIS 151797, at *4-5 (W.D. Tex. 2016) (“[TEC] argues that [nonprofit corporation] is not at risk of regulation as a political committee because it is a nonprofit corporation and therefore treated as a singular person, not a group of persons, under the Texas Election Code. *See* Tex. Gov’t Code § 311.005(2). The court agrees.”).

Both courts turned to the Texas Code Construction Act’s definition of “person” to reach the conclusion that a corporation is a singular person. *Tex. Home Sch. Coalition Ass’n*, 2018 Tex. App. LEXIS 9075, at *10; *Lake Travis*, 2016 U.S. Dist. LEXIS 151797, at *4-5. Subsequent to these opinions, the 86th Legislature amended the statutory political committee definition reviewed by the courts by deleting the phrase “group of persons” and replacing it with “two or more persons.” Acts 2019, 86th Leg., R.S., Ch. 1127 (H.B. 2586), Sec. 1, *codified at* Tex. Elec. Code § 251.001(12). The amendment does not substantively affect the analysis.

As defined by the Code Construction Act, “‘person’ includes corporation, organization, government or governmental subdivision or agency, business trust, estate, *trust*, partnership, association, and any other legal entity.” Tex. Gov’t Code § 311.005(2) (emphasis added). The requestor asserts that just like a “corporation,” a “trust” is a “person” under the Code Construction Act and therefore cannot meet the political committee definition of “two or more persons” when acting alone.

In *Juhl*, the Court expressly rejected the argument, raised by this requestor, that a trust should be treated a separate legal entity because the Code Construction Act definition of “person” includes a “trust.” *Juhl*, 186 S.W.3d at 570. The Court opined:

The definitions in the Code Construction Act apply unless other statutes or contexts require a different definition. Tex. Gov’t Code § 311.005(2). The most relevant code - the Texas Trust Code - explicitly defines a trust as a relationship rather than a legal entity. *See* Tex. Prop. Code § 111.004(4).

Id. Not only is a trust defined as a relationship rather than an entity in the Property Code, “trust” does not appear in the definition of a “person” in the Property Code. Tex. Prop. Code § 111.004(10). The definitions in the Property Code, as interpreted by the Texas Supreme Court, require a different definition of “trust” than that in the Code Construction Act. *See Juhl*, 186 S.W.3d at 570. Therefore, a trust is not a distinct and singular person.

For the purposes of title 15, the trust form is generally ignored, and the normal campaign finance and reporting rules are applied to the trust’s constituent parts.

The individuals contributing to or making contribution or expenditure decisions for a trust may be treated as a political committee if the group has a principal purpose making political expenditures or accepting political contributions.

A political committee is “two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures.” Tex. Elec. Code § 251.001(12) (emphasis added).

The law does not specify what two or more persons must do to “act in concert.” However, the phrase “in concert” is commonly defined as simply acting together. Merriam-Webster.com Dictionary, s.v. “concert,” accessed February 27, 2024, <https://www.merriam-webster.com/dictionary/concert>. There are also few organizational requirements of a political committee. It must appoint a campaign treasurer responsible for filing reports disclosing political contributions and expenditures. Tex. Elec. Code § 252.001. It must also disclose the person appointing the treasurer and the name of each person who determines to whom the committee makes contributions or the name of each person who determines for what purposes the committee makes expenditures. *Id.* § 252.003, .0031.

Therefore, whether a trust is a political committee requires the same analysis applicable to any group of people acting in concert. In the context of a trust, the trust donor(s) and the people responsible for deciding how trust assets are spent (presumably the trustee or trust enforcers) would constitute the people comprising a political committee if making political expenditures or accepting political contributions is a principal purpose of the trust. As defined by TEC rule, the trust would have such a principal purpose if making Texas political expenditures comprises more than 25 percent of its annual expenses. *See* 1 Tex. Admin. Code § 20.1(17) (defining “principal purpose” in part when “the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year.”); *see also id.* §20.18(A)(iv) (defining a political expenditure, in part, as making a political contribution to a candidate officeholder or political committee).

The trust form is disregarded for purposes of campaign finance reporting.

The requestor asks whom should be identified as the contributor by a recipient of a political contribution from the trust.

A candidate, officeholder, or political committee must report the “full name” of political contributions made by electronic transfer in any amount or made by other means above a threshold amount. Tex. Elec. Code § 254.031(a)(1), (1-a). The law prohibits a person from making a contribution in the name of or on behalf of another unless the person discloses in writing to the recipient the name and address of the person actually making the contribution. *Id.* § 253.001.

Therefore, the identity of the contributor is not only an important fact the recipient must know for proper disclosure, but also information the trust must know to follow the law.

Again, the trust form is generally ignored and the normal reporting rules apply. If the trust is comprised of two or more people and has a principal purpose of accepting political contributions

or making political expenditures, it must file and report as a political committee. But if the trust does not constitute a political committee (either because it lacks the necessary principal purpose or involves only a single person acting alone), then recipients of its contributions must disclose the trust donor as the contributor, and any qualifying direct campaign expenditures made by the trust must be disclosed in the name of the trust donor. It would also be permissible to disclose the name of the trust donor with the notation that it was provided through a trust (e.g. Joe Smith (through the Joe Smith Purpose Trust)).

Under the facts presented, a purpose trust would not be subject to the ban on corporate contributions.

Corporations are generally prohibited from making political contributions to candidates. *See* Tex. Elec. Code § 253.094 (“[a] corporation or labor organization may not make a political contribution that is not authorized by [Subchapter D, of Chapter 253]”). Subchapter D does not authorize corporate or labor organization contributions to candidates or officeholders and allows corporations or labor organizations to contribute to political committees in only limited circumstances.

The corporate contribution restriction does not apply to all business forms. Instead, it “applies only to corporations that are organized under the Texas Business Corporation Act, the Texas For-Profit Corporation Law, the Texas Non-Profit Corporation Act, the Texas Nonprofit Corporation Law, federal law, or law of another state or nation.” Tex. Elec. Code § 253.091.

A trust is not a corporation organized under one of the laws specified in Section 253.091. Therefore, a purpose trust consisting of only the funds of an individual and not accepting any corporate funds would not be considered a corporation under Section 253.091.

The corporate contribution restriction also applies to certain associations, whether incorporated or not, including “trust companies.” *Id.* § 253.093(a). However, a trust is different from a “trust company.” A trust company is a company that acts as a trustee. *See* Trust Company Definition, Black’s Law Dictionary 121 (3rd Pocket ed. 1996); *see also* 10 Am. Jur. 2d Banks § 11 (defining a trust company as “a corporation, usually engaged in a general banking business, and in particular as a compensated trustee of funds or property. A bank for purposes of regulation.”).

A trust company acts as a trustee on behalf of a trust, but it is not itself a trust. A trust is therefore not considered organized as a corporation under Section 253.091 and is not one of the types of associations subject to the contribution restriction regardless of organization. As a consequence, a purpose trust comprised entirely of funds from an individual is not subject to the corporate contribution ban under Section 253.093 and may make political contributions to candidates, officeholders and political committees.¹

¹ The requestor does not ask and we do not reach the applicability of the corporate contribution restriction to trusts other than a purpose trust comprised entirely of funds from an individual.

A purpose trust that incorporates will be subject to the corporate contribution prohibition if it is not a political committee incorporating for liability purposes only.

The requestor asks whether the purpose trust would still be able to make contributions to candidates and unrestricted contributions to political committees if it incorporates for liability purposes only.

The requestor proposes stating in the trust's Certificate of Formation "that it is incorporating for liability purposes only, and that its principal purpose is to bring about civic betterments and social improvements (which may, in some instances, entail making political contributions pursuant to the purpose and terms of the trust)."

The Election Code allows a "political committee the only purpose of which is accepting political contributions and making political expenditures" to incorporate for liability purposes only without being subject to the restriction on corporate contributions. Tex. Elec. Code § 253.092. A political committee may avail itself of this exception by "providing in its official incorporation documents that it is a political committee that is incorporating for liability purposes only, and that its only principal purpose is to accept political contributions and make political expenditures." Tex. Admin. Code § 24.1(d).

Political committees are generally subject to registration and periodic reporting obligations to disclose all political contributions accepted by the political committee and spent by the political committee. *See generally*, Tex. Elec. Code, Chapters 252, 254.

The plain text of the statute applies the exception to only (1) "a political committee" (2) "the only principal purpose of which is accepting political contributions and making political expenditures." *Id.* We decline to extend the statutory exception beyond entities expressly identified by the legislature. Therefore, if the purpose trust is not a political committee with its only principal purpose of accepting political contributions and making political expenditures, it would not be able to incorporate for liability purposes only and still make political contributions to candidates and officeholders or unrestricted political contributions to political committees.

However, if the trust instrument establishes the trust to have as its only principal purpose accepting political contributions and making political expenditures and the trust is a political committee, it would be able to incorporate for liability purposes only and continue to make political contributions under Section 253.092.