

Transfers into trust: A new reality?

BY ROBERT W. KAUFMAN

In the October 2015 *Trusts & Estates* newsletter, we reported on the then-recent decision of the Second District Appellate Court in the *Estate of Diane Mendelson v. Michael Mendelson*¹ (“Mendelson I”), and noted that the decision had sparked a wide-range of comments as to whether or not it established new law in Illinois with respect to transfers of real estate into trusts. In what appears to be a response to that decision, and perhaps without regard to the fact that a key element of that decision, in an opinion filed on March 8, 2016, was reversed upon rehearing, the Illinois legislature passed, and the Governor has signed, Public Act 099-0743, which adds a new provision to the Illinois Trusts and Trustees Act which reads as follows:

(760 ILCS 5/6.5 new)

Sec. 6.5. Transfer of property to trust.

- (a) The transfer of real property to a trust requires a transfer of legal title to the trustee evidenced by a written instrument of conveyance and acceptance by the trustee.
- (b) If the transferor is a trustee of the trust, an interest in real property does not become trust property unless the instrument of conveyance is recorded in the office of the recorder of the county in which the property is located.

MENDELSON I:

Mendelson I provided that the failure to create, let alone, record, a deed, did not negate the grantor’s stated intention to dispose of her home in accordance with the terms of her trust. Rather, Mendelson I held that “a settlor who declares a trust naming herself as trustee is not required to separately and formally transfer the designated property into the trust.”²

The decision was premised upon provisions of the Restatement (Second) of Trusts, which are similar to those in Sections 401 and 402 of the proposed Illinois Trust Code (which will hopefully be acted upon by the legislature in its next session), and which provide that a trust may be created by “declaration by the owner of property that the owner holds identifiable property as trustee.”

THE NEW LEGISLATION

Section 6.5(a) of the new Act requires both “a written instrument of conveyance” and “acceptance by the trustee” in order for real property to be considered as an asset of a trust. This clearly is a significant departure from a mere “declaration by the owner of property.” It also raises questions of both what constitutes “acceptance,” and whether such acceptance must appear on the “written instrument of conveyance,” or if it can be addressed in a different manner. This obviously could impact the status of title to property if, for example, a Deed in Trust is recorded, but no acceptance is on the face of the instrument. And, what of the Deed which is signed before the death of a transferor, but is sitting on the desk of a corporate trustee awaiting “acceptance” when the transferor dies? Even the Cook County form which releases an Estate’s interest in real property currently effectuates a transfer of Probated real estate to the beneficiaries has no provision for acceptance as such. This could be an issue since the new law appears to require that even a trust which is an estate beneficiary must “accept” the property before such transfer is complete.

Section 6.5(b) of the new Act raises additional questions, by requiring that the instrument be recorded if the transferor is also “a trustee” of the trust into which the property is being transferred. This would run contrary to the general rule that treats recording simply as notice of a transfer to third parties which triggers certain rights

and obligations. Again, title issues could arise if an executed and “accepted” Deed is not recorded in a timely manner.

While we did question the state of the law in our earlier article, and raised issues that resulted from *Mendelson I*, the new legislation appears to be an overreaction to that case. Unless and until we get further guidance from the legislature or the courts, or the new Trust Code overrides these provisions, we again return to uncharted waters in the land of trusts. ■

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1. 2015 IL App (2nd) 150084.
2. *Mendelson*, at ¶ 35.



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