

## THE EQUITY HOLDING TRUST™ FEATURES, BENEFITS...AND OTHER STUFF

“The past” is non-existent because it is *gone forever*.  
“The future” is non-existent because it *has not happened yet*.  
Therefore, that which we dub ‘the present’ is no more than  
an *imaginary demarcation* between illusions. A rational mind  
can only conclude then that we, the very inventors of *time*,  
by which we mete out *our own existences*-are, ourselves,  
timeless and eternally magnificent.

-B. Gatten-

The *Equity Holding Trust™* transfer system was designed to provide a legal, safe and unique shield for, and means of, acquiring (or disposing of) the many benefits of real estate ownership, without the necessity of new financing or particular down payment requirements. It is a most effective way to avoid a lender’s “due on sale” clause, which allows a new “owner” to silently take over payments on an otherwise non-assumable mortgage loan. The Equity Holding Trust™ system allows an mortgagor (a would-be “seller”) to place his/her property into a special revocable trust (as described in previous chapters) and after so doing, sell a portion of the trust's beneficial interest to another party, rather than selling the property itself. Upon the buyer’s acquisition of the beneficial interest in such a trust, and upon its possession of the trust property, virtually all of the same benefits can be afforded the buyer. *income tax deduction, use, occupancy, possessory interest and profit-potential*—as would be any homeowner.

An assignment of beneficial interest in a trust is, in effect, an assignment of an interest in *personal property* (personalty) rather than in *real property* (realty). In such an assignment, all the benefits of homeownership can be conveyed to another party without jeopardy to the property’s title. As mentioned earlier, neither does such conveyance openly violate a mortgage lender’s regulations relative to disposition of the property without a loan payoff (re. the “*due-on-sale clause*”). The benefits for a buyer in an Equity Holding Trust™ arrangement are virtually identical to those that *any* real estate acquisition might provide. but without the necessity of loan qualification, standard down payment, or stringent credit qualification requirements (if any...the seller or transferring investor makes the credit decision).

By this simple process, any seller of real estate who would be willing to remain on the existing mortgage loan (keeping it in his/her name) can effectively allow another party to assume all of the costs and tax benefits of the mortgage. In so doing, the property owner is relieved of the burden of the monthly payments, while the property’s upkeep and repair becomes solely the resident beneficiary’s responsibility.

The Equity Holding Trust™ concept is a welcome reprieve for any over-burdened seller who is facing taxable “debt-relief,” damage to his/her credit, or who is faced with being forced to walk away empty-handed from a property that may no longer be a viable or desirable asset. No longer does an anxious seller need to resort to legally volatile “creative financing” schemes to escape the burdens of an unwanted property.

If one is considering *renting* or *leasing* a property out, the Equity Holding Trust™ concept should be seriously considered as a means of eliminating the mentioned concerns (especially in the face of negative cash-flow, vacancy potential, maintenance and management costs). Invariably, a buyer in an Equity Holding Trust™ scenario will gladly accept all of those costs and responsibilities in exchange for income tax write-off, potential for appreciation, and the numerous other benefits of income property ownership or homeownership.

*However* ... before we explore the Equity Holding Trust™ in more detail, let us first review some of the many features and benefits afforded buyers and sellers who understand and use the system.

## **Features**

**PRIVACY/ANONYMITY.** Except for the original owner’s conveyance of title to the nominated trustee, the land trust and related documents are never placed into the public record (e.g., nothing is “recorded”). Furthermore, a land trust trustee is exempt from any requirement to reveal information about the trust, or the identity of its beneficiaries...to anyone, absent a court order.

**PROBATE AVOIDANCE.** In the event of the death of any beneficiary, ownership of the property doesn’t change. One’s interest in, responsibility for, and burdens of, ownership inures to the heirs or estate of the deceased party.

**LIMITED TITLE TRANSFER AND TITLE INVOLVEMENT.** The legal and equitable ownership of (title to) a property having been placed in an Equity Holding Trust™ passes only to the trust’s nominated trustee. The full Power of Direction (over the actions of the trustee) stays with the beneficiaries. The original owner, the grantor (settlor) as beneficiary, or that party’s appointed beneficiary, maintains exclusive control and management of all matters relative to the property and its title, until a silent transfer of a partial beneficiary interest to a co-beneficiary (to be-named later) takes place.

Following such conveyance of title to the trustee, and the appointment of a “remainder director (co-beneficiary),” the trust property itself can be leased to that same party as a would-be homebuyer, turned co-beneficiary. This duality of roles within the arrangement allows a tenant/beneficiary (“buyer”) the advantages of virtually all of the benefits of *Fee-Simple* or *Fee Defeasible* ownership of real estate (i.e., that means all the

ordinary benefits of ownership of real property...the ‘Bundle of Rights’), even though he or she has absolutely no legal or equitable title interest in the property itself.

Whether the trust property is leased first, with beneficial interest being conveyed later on, or beneficial interest is conveyed first and the leasehold conveyed later, is inconsequential provided that the trust itself is legitimately established in advance of either of these secondary actions.

**CURRENT PROPERTY TAX BASIS CAN REMAIN UNCHANGED.** In that the land trust underlying the Equity Holding Trust™ arrangement is a bona fide inter vivos (living) trust, conveyance of a property into it does not constitute a taxable sale or divestiture of real estate. Since no profit or recognized capital gain takes place by transferring “bare” legal title to such an asset protection device, the current property tax assessment remains unaltered, as no “sale” of the property is entered into the public record. As well, the subsequent unrecorded assignment of leasehold and/or beneficial interest in the trust is seen as assignment of personalty (personal property) only, which is not subject to conveyance or transfer taxation, or to alteration of the property-tax assessment basis.

**FREEDOM FROM A JUDGMENT-LIEN'S ATTACHMENT TO THE PROPERTY.** In a properly constructed land trust in states wherein land trust are viable (all but Tennessee and Louisiana), judgment liens of any kind against beneficiaries do not attach to the land (even including IRS and State Welfare liens).<sup>1</sup>

**AVOIDANCE OF LITIGATION.** When it would appear that a person to be sued had no assets, especially *real estate assets*, most attorneys will wrinkle up their protrusive noses and eschew any further process unless a giant retainer fee is available.

**EASE OF TRANSFERRING OWNERSHIP INTEREST.** A beneficiary in a land trust merely needs to complete a simple assignment form and notify the trustee of the assignment to sell his interest to another. No waiting. No Realtors®. NO Escrow. No new title insurance. No new hazard insurance. No settlement statements. No table closings, etc.

**EASE OF MULTIPLE OWNERSHIP AND CONTROL OVER THE PROPERTY.** When a property's legal and equitable titleholder is a third-party trustee, and when multiple beneficiaries hold mutual powers of direction, the trustee may respond only to unanimous *express* (written) and constructively delivered instructions (i.e., via certified mail). This prevents any party from acting on its own to the detriment of the others. and it avoids *partition* by dissident beneficiaries in a properly constructed land trusts is not allowed.

**EASIEST FORECLOSURE.** Since the interest held by a beneficiary in a land trust is clearly *personal estate* versus *real estate*, a lender need merely “repossess” beneficiary interest

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<sup>1</sup> First Fed. v. Pogue, 389 N.E. 2d 652 (1979). Chi. Fed. S&L v. Cacciatore, 185 NE 2d, 670, 25 Ill. 2d 535 (1962). Nelson v. Fogelstrom, 284 NE2d 339, 5 Ill.App3d 804 (1972)

as one might repossesses a car, boat, trailer, furniture, business machinery etc. In other words, a lender can fully secured a loan to a homeowner by having the homeowner place its property into a bona fide land trust, and then taking a collateral assignment of the borrower's beneficiary interest in the land trust, along with the filing of a UCC-1 Financing Statement<sup>2</sup> as its security. Then, in the event of a default by the borrower, the beneficiary interest could be foreclosed upon, the trust terminated, and the property sold without the standard Notice-of-Default or lis pendens period. without a mandated publication period. and without a redemption period. In such an arrangement, the lender is granted a mutual power of direction. or the trustee could merely be directed to respond only to beneficiary instructions by the secured party upon prove of default.

**EASIER AND SAFER “CREATIVE FINANCING”...OF ALL TYPES.** Through the use of the Equity Holding Trust™ process, one can emulate all the objectives and end-results of any creative financing arrangement without the downsides of standard “creative” schemes or seller-carry arrangements (straight leases, straight options, lease options, lease purchases, rent-to-own, wrap-around, equity share, contract for deed, land-sale contract, etc.). The idea being, that once a property is vested in a land trust, its beneficiaries can agree on any plan for, or outcome of, the arrangement they would desire (contingent purchase, lease with option, profit share, shared payment stream, shared tax write-off, time-shared occupancy, etc.).

**BYPASSING REAL ESTATE LAWS AND RESTRICTIONS·** In that the sale of beneficiary interest in a land trust is declaredly personalty and not realty, one doesn't need a real estate license to deal in it, especially when is a principal in the transaction. Few states, if any, would have specific Business and Professions Code regulation requiring a license for dealers in the purchase and sale of beneficiary interest in land trusts. However, (carefully note) irrespective of the forgoing comments, it is recommended by yours truly that if you are not a licensed Realtor®, you would be well advised to take care to be at least a temporary principal in any land trust transaction with which you would be associated. In other words, “wear a belt with your suspenders” by selling your own option to acquire, rather than selling direct interest in a land trust or property in which you are not a principal. Obviously this is just a formality, but it is one that will cause the watchdogs and jealous Realtors® to think it over before presuming they can jump on you and eat you.

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<sup>2</sup> Uniform Commercial Code filing with the Secretary of State, which documents one's ownership or contingent ownership of a personal property asset.

## Benefits for a Buyer

Compared to more common (and more precarious) forms of seller-assisted real estate financing, the *Equity Holding Trust*<sup>TM</sup> system provides virtually all the same benefits of home ownership that any new mortgage might, with minimum effort, and maximum safety and convenience. For example, some of those benefits might include.

1. Easier credit qualification and payment arrangements for a buyer (e.g., the buyer is qualified by the property owner on his/her own terms, not as dictated by a conservative bank underwriter).
2. The buyer need only pay low, minimal or maybe *NO* down payment. The Equity Holding Trust<sup>TM</sup> buyer often pays closing costs only (which include escrow fees, miscellaneous set-up fees and charges and perhaps all or a portion of the real estate commission).
3. Even though title is not passed to the buyer, that party is entitled to all income tax deduction for *mortgage interest* and *property tax* payments.
4. A party who would otherwise be just a “tenant” can receive equity build-up due to reduction of the mortgage principal as payments are made. Note that the older the loan at start, the more the principal is reduced with each successive payment.
5. The equity trust buyer/investor receives appreciation and greatly increased profit potential by controlling the property and the income tax benefits associated with the property and the mortgage.
6. The property in an equity holding trust is protected (*shielded*) from creditor judgment, tax lien, lawsuit, bankruptcy or claims in marital dispute by an [ex]spouse of either party (resident or non-resident beneficiary).

7. A tenant buyer or investor in an equity holding trust can enjoy “pride-of-ownership,” without the rules and constraints of conventional real estate acquisition and mortgage processes.

8. Ownership via the equity holding trust needn’t impact a beneficiary’s financial statement (if listed at all, only the equity interest in the title-holding trust would need to show, not ownership and debt on realty) ... a real benefit when applying for credit.

9. All beneficiaries in an equity holding trust are protected from illicit or untoward acts of any of the “other parties” (e.g., a seller’s neglect in paying related bills. non-responsiveness to city ordinances. damaging the property’s title by improper, illegal or neglectful acts).

10. The would-be homeowner or investor no longer needs to scrimp and save and accumulate cash “forever” in order to begin enjoying the benefits of real estate ownership and the wealth and peace of mind that comes with it.

### **Benefits for a Seller**

Compared with virtually any other “non-traditional” financing program, the *Equity Holding Trust*<sup>TM</sup> system affords a seller maximum protection and safety, as well as.

**EASE OF DEALING WITH DEFAULT.** In the event of a tenant beneficiary’s default, eviction of an Equity Holding Trust<sup>TM</sup> resident beneficiary bypasses the costly and arduous processes of *Foreclosure*. That is because the resident’s ownership rights remain limited to a beneficial interest in the trust in which the property’s title is vested...not in the property itself. In essence, a defaulting resident beneficiary is seen and treated as a defaulting *tenant* rather than as a defaulting *owner of record*. For example, in the event of non-payment, such default can be met with a *Notice-to-Pay-or-Quit*, and, if necessary, an *Unlawful Detainer Action to regain possession*. From the inception of the NARS Equity Holding Trust, all parties have agreed that any uncured default by anyone who is a tenant in the trust property will result in.

- A) Immediate eviction
- B) A *Fair Market Value Buy-Out* of the defaulting beneficiary's interest by the non-defaulting beneficiaries,
- C) Revocation of the underlying land trust, and
- D) Sale of the property

Note that when the offer is made to acquire the interest of a defaulting party, if the amount offered is considered unsatisfactory (I usually offer the remaining loan amount plus, the past-due amounts and a dollar), the defaulting party, after having vacated the property, is entitled to challenge the offer. How? By ordering a full M.A.I. Appraisal ("Member American Appraisal Institute") by which all parties agree to abide in order to determine the true amount that should be paid.

Should the defaulting party actually go through these steps after payment of a *Default Fee* of some stipulated amount (\$2-3,000 usually), and after bringing all payments and charges current (should he or she be able to prove being owed more money), the non-defaulting party/ies is/are obligated to pay that amount. However, the sum proven to be due is paid in the form of an UNSECURED promissory note, whose principal amount is mutually agreed to become payable only when the trust terminates and property is ultimately sold or refinanced.

**INCOME TAX DEFERMENT.** Again, the *Equity Holding Trust*<sup>TM</sup> constitutes divestiture of personal property rather than of real estate. The establishment of a sales price per sé would eliminate the possibility of the transaction being seen as a "contingent sale." The parties therefore settle on a "Mutually Agreed Value" at inception, rather than there being a "*selling price*" per sé. The documents make it clear that this *Mutually-Agreed-Value* ("MAV") has been established solely for determining the estimated amount equity in the property at start. A sales price, therefore, will not be determinable until the actual termination of the trust and completion of the related lease agreement (possessory agreement) in from, say, one to twenty-one years (or more if extended by mutual agreement of beneficiaries).

Since this type of contract doesn't actually constitute a sale of real estate. income tax on capital gains that would otherwise be due upon the transfer of title and possession, can logically be deferred until the termination of the underlying land trust and the ultimate disposition of the trust property.

**Re. IRC §§671 et seq.** (i.e., "et. Seq." means *everything else in the sequence*)

The IRS considers a revocable, living trust such as the Title-Holding Land Trust, in the same light as if title were in the name of beneficiary/ies. So a property vested in a trustee for a land trust is treated for federal income tax purposes the same as if the property were owned outright by, and in the names of, the beneficiaries. And note that a transfer into

such a trust is not a taxable event from any local, state or federal standpoint. [See, for example, *Outlaw v. US* 494 F2d 1376 (1974)].

## TRUE ASSET PROTECTION FOR YOUR REAL ESTATE

Many people who commonly use or espouse the use of simple inter vivos trusts for asset protection, are often confused or misled relative to the real value of the Fully Funded (“Living”) Family Trust as an asset protective device. For example, such a trust (a “living trust”) provides virtually no protection at all relative to shielding the assets vested in it from judgment creditors and liens. Creditor claims, lawsuits, bankruptcy, marital dissolution, etc. will not be stopped, or even slowed down, by the existence of the so-called “family trust.” The primary and most valuable feature of such an arrangement is simply that it allows for avoidance of the Probate process upon the death of the settlor.<sup>3</sup> Other benefits might also include (so say the proponents). more effective prenuptial protection, reduced estate taxes, easier *gifting* of funds to others. and it does minimize the opportunities for a challenge of your Will (since there is no public notice of the death of the owner of the assets, most will not know that you are no longer among the corporeal community (er...”alive”). However, during your lifetime...a so-called “living family trust” just doesn’t do much in terms of protecting anything.

The single-beneficiary land trust is also an *inter-vivos (living) trust*, in that it’s created and functions during the life of the settlor. however, because of its structure, it provides significant asset protective features. It effectively hides assets from prying eyes (judgment creditors, neighbors, family and friends). albeit, without a lot of solid asset shielding within itself should the parties to it and their interests be discovered. In that the land trust vests a property’s ownership with the trustee rather than just appointing a manager for the trust. and in that the land trust leaves the beneficiaries with only an unrecorded personal property interest in the property, there are many steps that can be taken to provide some rather “bullet-proof,” if not “armor plated,” asset protection.

Naming a co-beneficiary (preferably with a different last name) in one’s land trust will inhibit, if not prevent entirely, any creditor’s lien from attaching to the property,<sup>4</sup> even including those of the state or IRS.<sup>5</sup> This is to say that a lien against a beneficiary in a land trust does not attach to the property. although it could attach to a single beneficiary’s interest. In such a case, the creditor would be allowed to dismantle the trust in favor of its judgment. However, due to beneficiary interests in land trusts being personal property (personalty) and not real estate (realty), a lien against one beneficiary of a multiple-beneficiary land trust would not attach to the asset vested in the trustee. This characterization of ownership is largely the reason for the prohibition of charging

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<sup>3</sup> Probate. The legal process through which your bills are paid by liquidation of your assets after you die or become mentally incapacitate. Fees are often excessive and cannot be avoided with a “living trust.”

<sup>4</sup> See *Kaiserman v. Ellenson*, 17 Ill.App.3d 923, 308 N.E. 2d 813 (1974)

<sup>5</sup> See *Chicago Fed. S&L v. Cacciatore*, 25 Ill.2d, 535, 185, N.E.2d 670 (1962)

orders against single members of such entities. And note that because ownership interest in an LLC or LP also involves ownership of personalty, irrespective of what the asset held may be,<sup>6</sup> any lien against the property would not incur liability for the members of the LLC (the same is true re. a limited partnership). Therefore, a combination of these two entities-the land trust whose beneficiary is one's LLC, and the LLC itself, may very well-quite effectively-insulate both the property and the beneficiary/ies.

Therefore, in this author's non-legal, wholly personal opinion, the most certain asset protection would seem to be a combining of business entities in order to create a virtually impenetrable stonewall against judgment liens or other assaults on the property or on the parties relative to the property.

One certainly can (and may be well advised to) vest his/her property with a land trust trustee to acquire all the benefits discussed above, thereupon appointing a corporation as the trustee. In doing so, the property can now be protected against Intestate defugalties (probate, gift or inheritance taxation squabbles by heirs, etc.). Next, the trust's beneficiary interest can be held in a *limited liability company* (LLC) or *limited partnership* (LP) to further protect the principals from legal claims that would involve the property (e.g., someone's injuring themselves on the property, lawsuit re. building ordinance violations, hazard materials claims etc.). In other words, because of the existence of the land trust, a claim against the parties would not attach to the property. whereas a claim against the property would not attach to the members of the LLC or LP).

#### **GENERAL BENEFITS (ALLOWS FOR...)**

1. A legitimate "take-over" of an existing loan's payments, without formal loan assumption or violation of a lender's alienation protection re. its "due-on-sale" provisions.
2. A better 'selling price.' In view of the many benefits derived by an offeror, an Equity Holding Trust™ System's *Mutually Agreed Value* ("MAV") is typically higher than a standard "purchase offer".
3. A faster sale and shorter escrow.

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<sup>6</sup> In states with high franchise fees (e.g., California and Texas) it may be less expensive to set up a Limited Partnership than an LLC

4. Avoidance of the IRS' imposition of tax on *debt-relief* (with reference to an over-encumbered property) when foreclosure or "short-sale" are the considered options. The Equity Holding Trust™ seller needn't destroy his/her credit and walk away with nothing to show for all those years of expense and hard work (see #13 below).
5. Freedom from loan payments that may no longer be affordable, as well as an escape from escalating insurance and maintenance costs-in that the resident beneficiary generally pays all such costs.
6. Enhanced income and profit potential, compared to what *renting* or *leasing* can provide.
7. Elimination of one's negative cash flow, management costs, maintenance and vacancies.
8. Gross rental income is often increased by 150 percent (or can even be *doubled* in many cases), while net rental profit can be quadrupled and quintupled by virtue of one's being able to control and assign the income tax benefits.
9. Protection from possible injurious actions of the "other party," (e.g., a resident's non-payment, disrepair, disregard or damage to the property).
10. In comparison with any other seller-assisted financing arrangement, The Equity Holding Trust™ shields the property from an errant resident's tax liens, lawsuits, bankruptcies, judgment liens or marital disputes.
11. Ease of collection of the resident's payments. disbursements to creditors. late notices. and any necessary admonitions, evictions or other legal processes-because the seller need not ever handle these functions.

12. Ease of eviction and avoidance of the anguish and expense of *judicial foreclosure*, *ejectment* and *quiet title* actions to regain possession following a buyer's default. A prominent advantage of the Equity Holding Trust™ over other types of seller assisted financing is that it allows for a standard eviction and *unlawful detainer* process rather than necessitating foreclosure.

13. Possible participation in the profit potential relative to a future sale, while throughout the term of the agreement *someone else* has paid all the bills and handled all the maintenance and repairs.

14. An Equity Holding Trust™ System seller could opt to retain-along with any beginning equity-a percentage of the property's future profit potential. The justification for such participation might simply be one's having obtained the original loan, having made the original down payment. an./or remaining *at risk* [re. the continuing mortgage responsibility] on behalf of the buyer.