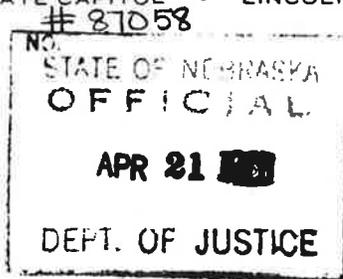


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

April 21, 1987



ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

SUBJECT: L.B. 337 (The Business Trust Act)

REQUESTED BY: Senator Jerry D. Miller  
Legislature of the State of Nebraska

OPINION BY: Bernard L. Packett  
Assistant Attorney General

In your recent letter you have asked if the provisions of L.B. 337, The Business Trust Act, violates the provisions of Article XII, Section 8 of the Constitution, also known as Initiative 300.

L.B. 337 simply provides that a business trust may hold title to real estate used for farming or ranching and may engage in farming or ranching.

It is a well-established principle of law that the substance of the law takes precedence over the form of the law. Or stated another way, you cannot do indirectly what you cannot do directly. It is our conclusion that a court could find a "business trust" to be the same thing as a "syndicate" under the meaning of Article XII, Section 8 of our Constitution. (Initiative 300). This is a fact determination. If the court so found, the "business trust" would fall within the "syndicate" prohibition of Section 8(1). The point is this: No matter what an entity is called, if it in fact operates like a syndicate a court would find it violative of Section 8(1). Our reasoning for this conclusion is as follows.

Section 2 of L.B. 337 describes a business trust as "an entity separate and distinct from other forms of commercial organizations in Nebraska including partnerships, corporations, associations, syndicates, and other types of trust."

In determining who may or may not own farm or ranch land in Nebraska, it is necessary to look primarily to the provisions of Article XII, Section 8 of the Constitution which provides that no corporation or syndicate shall acquire farm or ranch land or engage in farming or ranching.

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It would appear that a business trust referred to in L.B. 337 would not fall within the Constitutional definition of a corporation but the distinction between a business trust and a syndicate, as defined by Article XII, Section 8 of the Constitution is not as clear.

From an examination of the provisions of L.B. 337, it would appear that although Section 1 provides that a business trust is separate from "partnerships", it does not appear that the provisions of the bill contain any information which would clearly distinguish a business trust from a partnership.

In Adams v. United States, 328 F.Supp. 228, the court said that "the existence of a partnership is a matter of contract, and no particular form of contract is necessary to create the entity known as a partnership, and that any statutory definition of a partnership, as far as it goes, is controlling, but, beyond it, one must look to the general law." The court went on to say that although no one test is controlling, the test that have been found indicative of the existence of a partnership are:

- 1.) Mutual interest in profits,
- 2.) mutual liability, joint and several, for debts and loss of capital,
- 3.) mutual agency and responsibility in the conduct of the business,
- 4.) common contribution and ownership of the partnership property,
- 5.) the rendition of services by all partners and
- 6.) the non-alien ability of an interest in the business.

In South Sioux City Star v. Edwards, 218 Neb. 487, 357 N.W.2d 157 (1984), our Supreme Court said:

Baum v. McBride, 143 Neb. 629, 630, 10 N.W.2d 477, 478 (1943), quoting Waggoner v. First Nat. Bank of Creighton, 43 Neb. 84, 61 N.W.112 (1894), defines a partnership as "'a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.'" Although the existence of a partnership depends upon the intention of the parties to form such an entity, that intention, where in dispute, is to be ascertained objectively from all the evidence and circumstance. Byram v. Thompson, 154 Neb. 756, 49 N.W.2d 628 (1951); Baum v. McBride, supra.

The sharing of profits is a primary factor to be considered in ascertaining the intention of the parties.

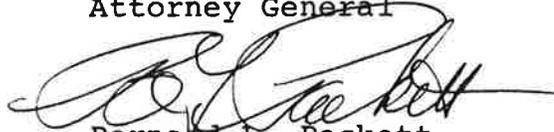
Considering the Constitutional definition of syndicate, the fact that a syndicate includes a limited partnership, and the above court's statements with regard to evidence to be considered in determining whether or not a partnership exists, we are unable to determine from the provisions of L.B. 337 how a business trust differs from a partnership, other than in name.

If there is a distinction, consideration must be given to that part of Article XII, Section 8, which provides that the Legislature "may enact, by general law, further restrictions prohibiting certain agricultural operations that the Legislature deems contrary to the intent of this section."

From the above, it is our conclusion that in an actual case in which the ownership of farm or ranchland by a "business trust" was an issue under the provisions of Article XII, Section 8 of the Constitution, considering the fact that the Legislature can only make the ownership of such land more restrictive, if the evidence before a court was that all of the elements of the syndicate, as defined in Article XII, Section 8 were present, the court would hold that the ownership would be in violation notwithstanding the fact that the land was held by a business trust.

The question would, in our opinion, seem to be not so much is the Business Trust Act in violation of Article XII, Section 8 of the Constitution, as do the facts in a particular case fall within the Constitutional definition of ownership by a "syndicate". If the entity which purchases farm or ranchland falls within the definition of a syndicate, whatever it may be called, we believe the courts would find it to be in violation.

ROBERT M. SPIRE  
Attorney General

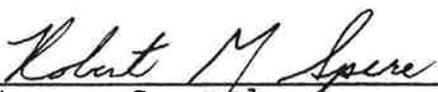


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cc: Patrick J. O'Donnell  
Clerk of the Legislature

Approved:

  
Attorney General