

76 Am. Jur. 2d Trusts Summary

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Trusts

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76 Am. Jur. 2d Trusts Summary

American Jurisprudence, Second Edition
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Trusts

Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

Summary

Scope:

This article discusses trusts and trustees, with specific discussion of express trusts, spendthrift and similar protective trusts, trusts by operation of law, including resulting and constructive trusts, trustees and beneficiaries, trust property, the administration of trusts, including duties, liabilities, and compensation, reimbursement and exoneration of trustees therefor, and actions and proceedings regarding trusts and trustees, including jurisdictional and practice matters arising therefrom.

Federal Aspects:

Particular rules apply as to the federal taxation of trusts. As to federal taxation relating to a particular issue, see Am. Jur. 2d, Federal Taxation.

Treated Elsewhere:

Alimony and child support, trusts for enforcement of payment of, see [Am. Jur. 2d, Divorce and Separation §§ 759, 1017 to 1019](#)

Amalgamation of corporate trusts, see Am. Jur. 2d, Monopolies § 1029

Assignment of trustee power for benefit of creditors, see [Am. Jur. 2d, Assignments for Benefit of Creditors § 8](#)

Bank deposits in trust for another and Totten trusts, see [Am. Jur. 2d, Banks and Financial Institutions §§ 689 et seq.](#)

Bankruptcy, trust law as relating to, see Am. Jur. 2d, Bankruptcy; trustees in bankruptcy, generally, see [Am. Jur. 2d, Bankruptcy §§ 259 et seq.](#)

Business or "Massachusetts" trusts, see Am. Jur. 2d, Business Trusts

Cestui que trust, federal courts, diversity and alienage cases, see [Am. Jur. 2d, Federal Courts §§ 894, 913, 982](#)

Charitable trusts, see [Am. Jur. 2d, Charities §§ 4 et seq.](#)

Child, trust fund for support and maintenance of, see [Am. Jur. 2d, Parent and Child § 65](#)

Common or collective trusts, see [Am. Jur. 2d, Pensions and Retirement Funds § 432](#)

Deeds of trust given as security, generally, see [Am. Jur. 2d, Mortgages §§ 146 et seq.](#)

Deeds of trust, trustees in, generally, see [Am. Jur. 2d, Mortgages, §§ 146 et seq.](#)

Enforcement against trust or trust interests by: attachment, see 6 Am. Jur. 2d, Attachment and Garnishment; execution, see [Am. Jur. 2d, Executions and Enforcement of Judgments §§ 176 et seq.](#)

Estates, generally, see Am. Jur. 2d, Estates

Fraudulent transfer, property held by transferor as trustee, see [Am. Jur. 2d, Fraudulent Conveyances and Transfers § 85](#)

Guardian, distinction from trustee, see [Am. Jur. 2d, Guardian and Ward § 2](#)

Homestead property, title as trustee, see [Am. Jur. 2d, Homestead § 52](#)

Husbands and wives, constructive trusts arising with regard to property rights and interests between, generally, see [Am. Jur. 2d, Husband and Wife §§ 105 et seq.](#)

Life estate, invasion or consumption of principal or corpus by beneficiary of, see [Am. Jur. 2d, Life Tenants and Remaindermen §§ 49 et seq.](#)

Particular institutions, law of trusts as applied to or affecting: banks, see Am. Jur. 2d, Banks and Banking Institutions; corporations, see Am. Jur. 2d, Corporations; fraternal orders and benefit societies, see Am. Jur. 2d, Fraternal Orders and Benefit Societies; insurance companies, see Am. Jur. 2d, Insurance; labor organizations, see Am. Jur. 2d, Labor Relations; and religious organizations, see Am. Jur. 2d, Religious Societies

Particular persons holding legal capacities, trust principles as applicable to: executors and administrators, see Am. Jur. 2d, Executors and Administrators; landlords and tenants, see Am. Jur. 2d, Landlord and Tenant; life tenants or trustees for life interests in property, see [Am. Jur. 2d, Life Tenants and Remaindermen §§ 49 et seq.](#); mortgagors and mortgagees, see Am. Jur. 2d, Mortgages; vendors and purchasers, see Am. Jur. 2d, Vendor and Purchaser; creditors, see Am. Jur. 2d, Creditors' Bills; donors and donees of gifts, see Am. Jur. 2d, Gifts; and holders, transferors, and transferees of bills and notes, see Am. Jur. 2d, Bills and Notes

Pour-over provisions from will to inter vivos trust; Uniform Testamentary Additions to Trusts Act, generally, see [Am. Jur. 2d, Wills § 196](#)

Rule against perpetuities and restraints on alienation as affecting trusts, see [Am. Jur. 2d, Perpetuities and Restraints on Alienation §§ 63 to 68, 106](#)

Security interest created by assignment of beneficial interest in trust, see [Am. Jur. 2d, Secured Transactions § 434](#)

Special trust limiting use of school funds, see [Am. Jur. 2d, Schools § 119](#)

Time of ascertainment of settlor's heirs or distributees on failure of trust, see [Am. Jur. 2d, Descent and Distribution § 98](#)

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Wills, generally, see Am. Jur. 2d, Wills

Research References:

Bogert, The Law Of Trusts And Trustees (Rev. 2d ed.)

Uniform Common Trust Fund Act

Uniform Custodial Trust Act (1987)

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Restatement Second, Trusts

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Trusts

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I. Introduction

A. General Nature and Definition of Trust

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76 Am. Jur. 2d Trusts § 1

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I. Introduction

A. General Nature and Definition of Trust

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§ 1. Generally

West's Key Number Digest

West's Key Number Digest: [Trusts](#) [1](#)

Model Codes and Restatements

[Restatement Third, Trusts § 2](#)

The trust originated and was reduced to practice under the jurisdiction of courts by the civil law, was expanded and developed in the courts of chancery, and has been employed in nearly every field of human activity.^[FN1] The fundamental nature of a trust is the division of title, with the trustee being the holder of legal title and the beneficiary that of equitable title.^[FN2] By definition, the creation of a trust must involve a conveyance of property.^[FN3]

A "trust" exists where the legal title to property is held by one or more persons, under an equitable obligation to convey, apply, or deal with such property for the benefit of other persons.^[FN4] A trust has been defined as a fiduciary relationship^[FN5] with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.^[FN6] The Restatement definition is similar, providing that a trust, when not qualified by the word "resulting" or "constructive," is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.^[FN7]

Caution: A trust consists not only of property, but also of the trust instrument, the trust's beneficiaries and trustees, and the trust administrator.^[FN8]

Observation: The Uniform Trust Code (2000) ("U.T.C."), which was approved by the National Conference of Commissioners on Uniform State Laws on August 3, 2000, is the first comprehensive uniform act on the subject of trusts, although comprehensive trust statutes are already in effect in several states. The drafting of the

U.T.C. was prompted by the much greater use of trusts in recent years. This greater use of the trust and consequent rise in the number of day-to-day questions involving trusts led to a recognition by the Commissioners that the trust law in most states is thin, leaving many gaps between the often few statutes and reported cases.[\[FN9\]](#)

CUMULATIVE SUPPLEMENT

Cases:

In general, a "trust" is defined as the right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another. [Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 \(2008\)](#).

The elements necessary to establish a trust are: (1) trustees who hold property and are subject to equitable duties to deal with the property for the benefit of others; (2) beneficiaries to whom the trustees owe these equitable duties; and (3) trust property that is held by the trustees for the beneficiaries. [Wisconsin Medical Society, Inc. v. Morgan, 2010 WI 94, 787 N.W.2d 22 \(Wis. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Schumann-Heink v. Folsom, 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 \(1927\)](#).

-

[\[FN2\] Moore v. Moore, 111 S.W.3d 530 \(Mo. Ct. App. S.D. 2003\)](#), reh'g and/or transfer denied, (July 22, 2003) and transfer denied, (Aug. 26, 2003).

-

[\[FN3\] Jewish Community Ass'n of Casper v. Community First Nat. Bank, 6 P.3d 1264 \(Wyo. 2000\)](#).

- A "trust" is a method used to transfer property. [Faulkner v. Bost, 137 S.W.3d 254 \(Tex. App. Tyler 2004\)](#).

-

[\[FN4\] From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\)](#), cert. denied, [537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\)](#).

-

[\[FN5\] State v. Parris, 353 S.C. 582, 578 S.E.2d 736 \(Ct. App. 2003\)](#).

- A promise to hold property in trust for another, standing alone, will not create an equitable interest in that property. [Farmers Ins. Exchange v. Zerlin, 53 Cal. App. 4th 445, 61 Cal. Rptr. 2d 707 \(3d Dist. 1997\)](#).

-

[\[FN6\] California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church, 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 \(5th Dist. 2004\)](#), review filed, (Sept. 22, 2004); [Matter of Catanio, 306 N.J. Super. 439, 703 A.2d 988 \(App. Div. 1997\)](#); [In re Estate of Flake, 2003 UT 17, 71 P.3d 589 \(Utah 2003\)](#).

- The question of the existence of a fiduciary relationship between the settlor and beneficiaries of a trust is always whether or not a trust is reposed with respect to the property or business affairs of the other. [Tobias v. Korman, 141 S.W.3d 468 \(Mo. Ct. App. E.D. 2004\)](#).

- In general terms, a "trust" may also be defined as the right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another. [In re Guardianship of Lombardo, 86 Ohio St. 3d 600, 1999-Ohio-132, 716 N.E.2d 189 \(1999\)](#).

- As to intent to create the trust as a prerequisite to the creation of an express trust, generally, see [§ 51](#).

-

[\[FN7\] Restatement Third, Trusts § 2.](#)

- As to trusts by operation of law, including resulting and constructive trusts, see §§ [101](#) to [172](#).

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[\[FN8\] In re Trusteeship Created by City of Sheridan, 593 N.W.2d 702 \(Minn. Ct. App. 1999\).](#)

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[\[FN9\] English, The Kansas Uniform Trust Code. 51 U. Kan. L. Rev. 311 \(2003\); English, The Uniform Trust Code \(2000\) and its application to Ohio. 30 Cap. U. L. Rev. 1 \(2002\).](#)

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AMJUR TRUSTS § 1

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§ 2. Parties to trust agreement

West's Key Number Digest

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Model Codes and Restatements

[Restatement Third, Trusts § 3](#)

The "settlor" is a person who creates a trust.[FN1] The term "settlor" includes a person who creates a trust by will as well as a person who creates a trust inter vivos.[FN2] It is also said that a "settlor" is one who provides the consideration for a trust, even though in form the trust is created by another person.[FN3] In creating a trust, the settlor or grantor transfers interest in the trust property to the beneficiaries designated by the trust.[FN4] If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.[FN5]

A "trustee" is defined as the person appointed, or required by law, to execute a trust, and the one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit of another.[FN6] In other words, a trustee is a person who holds legal title to property under an express or implied agreement to apply it, and the income arising from it, to the benefit of another.[FN7]

The person for whose benefit property is held in trust is the "beneficiary,"[FN8] sometimes referred to as the "cestui que trust." [FN9] A "beneficiary" is one for whose benefit a trust directly and specifically provides.[FN10] The Uniform Trust Code defines a beneficiary as a person that has a present or future beneficial interest in a trust, vested or contingent, or in a capacity other than that of trustee, holds a power of appointment over trust property.[FN11]

Observation: Property may be held in trust by several persons as trustees,[FN12] and may be held for the benefit of several beneficiaries.[FN13]

[FN1] [In re Last Will and Testament of Tamplin](#), 48 P.3d 471 (Alaska 2002); [California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church](#), 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 (5th Dist. 2004), review filed, (Sept. 22, 2004).

[FN2] [Restatement Third, Trusts § 3](#), Comment a.

[FN3] [In re Green Valley Financial Holdings](#), 32 P.3d 643 (Colo. Ct. App. 2001).

[FN4] [In re Herbst](#), 206 Ariz. 214, 76 P.3d 888 (Ct. App. Div. 1 2003).

[FN5] [Uniform Trust Code § 103](#)(14).

[FN6] [The Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp.](#), 368 N.J. Super. 425, 846 A.2d 659 (App. Div. 2004).

[FN7] [State ex rel. Oklahoma Bar Ass'n v. Taylor](#), 2000 OK 35, 4 P.3d 1242 (Okla. 2000); [Hamiter v. Retirement Div. of the South Carolina Budget and Control Bd.](#), 326 S.C. 93, 484 S.E.2d 586 (1997).

[FN8] [Restatement Third, Trusts § 3\(4\)](#).

[FN9] [Restatement Third, Trusts § 3](#), Comment d.

[FN10] [Scott v. United Carolina Bank](#), 130 N.C. App. 426, 503 S.E.2d 149 (1998).

[\[FN11\] Uniform Trust Code § 103\(2\)](#).

- While the holder of a power of appointment is not considered a trust beneficiary under the common law of trusts, holders of powers are classified as beneficiaries under the Uniform Trust Code. [Uniform Trust Code § 103\(2\)](#), Comment.

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[\[FN12\] Restatement Third, Trusts § 3](#), Comment c.

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[\[FN13\] Restatement Third, Trusts § 3](#), Comment d.

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§ 3. Trust as legal entity

West's Key Number Digest

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Model Codes and Restatements

[Restatement Third, Trusts § 2](#)

A trust is not a legal entity.[\[FN1\]](#) A trust is not an entity distinct from its trustees and capable of legal action on its own behalf, but merely a fiduciary relationship with respect to property.[\[FN2\]](#) A trust is not a legal

"person" which can own property or enter into contracts, rather, a trust is a relationship having certain characteristics.[\[FN3\]](#)

Observation: The Restatement states that increasingly modern common-law and statutory concepts and terminology tacitly recognize the trust as a legal "entity," consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries. This is increasingly and appropriately reflected both in language (referring, for example, to the duties or liability of a trustee to "the trust") and in doctrine, especially in distinguishing between the trustee personally or as an individual and the trustee in a fiduciary or representative capacity.[\[FN4\]](#)

[\[FN1\] Stevens Family Trust v. Huthsing, 81 S.W.3d 664 \(Mo. Ct. App. S.D. 2002\)](#), reh'g and/or transfer denied, (July 12, 2002).

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[\[FN2\] Roberts v. Lomanto, 112 Cal. App. 4th 1553, 5 Cal. Rptr. 3d 866 \(3d Dist. 2003\)](#), review denied, (Feb. 24, 2004).

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[\[FN3\] Dennett v. Kuenzli, 130 Idaho 21, 936 P.2d 219 \(Ct. App. 1997\)](#).

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[\[FN4\] Restatement Third, Trusts § 2](#), Comment a.

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[Uniform Trust Code § 402](#)

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§ 4. General classifications

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 1

It has been said that trusts are generally divided into two main classes: private trusts and charitable trusts.[FN1] A "charitable trust" is one in which the beneficiary is a governmental entity or in which the purpose of the trust is to implement public welfare or convenience.[FN2] The primary differences between a charitable trust and other private trusts are that a charitable trust may be perpetual, the denominated recipients of the trust income may be indefinite, and the intended beneficiary is the community itself.[FN3] It has also been said that the fundamental distinction between private trusts and charitable trusts is that in a private trust, property is devoted to the use of specified persons who are designated as the beneficiaries of the trust, while a charitable trust has as a beneficiary a definite class and indefinite beneficiaries within a definite class, and has a purpose which is beneficial to the community.[FN4]

Another traditional classification of trusts, from the viewpoint of whether they become effective after the death of the settlor or during his or her life, is into testamentary trusts or trusts inter vivos, or as the latter are sometimes called, "living trusts." [FN5] An "inter vivos trust" is a trust that is created and becomes effective during the lifetime of the settlor.[FN6] The "inter vivos trust" is a unique legal entity through which the settlor may transfer property to a trustee reserving for the life of the settlor the beneficial use of the property with the remainder to designated beneficiaries.[FN7] To create an inter vivos trust, a settlor must have an intent to create a presently enforceable trust, the trust property must be clearly specified and set aside, and the essential terms of the trust must be clear enough for the court to enforce the equitable duties that are the sine qua non of a trust relationship.[FN8] Inter vivos trusts are designed in large measure to bypass probate of a decedent's estate, allowing the decedent's property to be managed and distributed immediately following his or her death.[FN9]

Observation: An inter vivos trust is operative from the date of its creation. On the other hand, because a will is not operative until the death of the testator, an interest in a testamentary trust cannot vest prior to that event.[FN10]

From the viewpoint of the creative force bringing them into existence, trusts may be classified as "express trusts" or as "trusts by operation of law," the latter being either resulting or constructive trusts.[FN11]

[FN1] [Barton v. Parrott, 25 Ohio Misc. 2d 8, 495 N.E.2d 973 \(C.P. 1984\)](#), judgment aff'd, [1986 WL 6993](#) (Ohio Ct. App. 5th Dist. Delaware County 1986).

- As to charitable trusts, see [Am. Jur. 2d, Charities §§ 4 et seq.](#)

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[FN2] [Louisiana Public Facilities Authority v. Foster, 795 So. 2d 288 \(La. 2001\)](#).

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[FN3] [Forest Guardians v. Powell, 130 N.M. 368, 2001-NMCA-028, 24 P.3d 803, 155 Ed. Law Rep. 851 \(Ct. App. 2001\)](#).

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[FN4] [Jeffs v. Stubbs, 970 P.2d 1234 \(Utah 1998\)](#).

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[FN5] [Pitt v. U.S., 319 F.2d 564 \(8th Cir. 1963\)](#).

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[\[FN6\] In re Guardianship of Lombardo, 86 Ohio St. 3d 600, 1999-Ohio-132, 716 N.E.2d 189 \(1999\); Matter of Estate of Lohrie, 950 P.2d 1030 \(Wyo. 1997\).](#)

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[\[FN7\] In re Estate of Weitzman, 724 N.E.2d 1120 \(Ind. Ct. App. 2000\).](#)

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[\[FN8\] In re Estate of Flake, 2003 UT 17, 71 P.3d 589 \(Utah 2003\).](#)

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[\[FN9\] Lehmann v. Brown, 230 F.3d 916 \(7th Cir. 2000\).](#)

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[\[FN10\] First Nat. Bank of Bar Harbor v. Anthony, 557 A.2d 957 \(Me. 1989\).](#)

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[\[FN11\] From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\).](#)

- As to express trusts generally, see [§ 17](#).

- As to trusts by operation of law, generally, see [§ 101](#)

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§ 5. General classifications—"Executed" or "executory" trusts

West's Key Number Digest

A distinction has been recognized between executed and executory trusts, the import of such distinction being that where a trust is intended, if the transaction still remains imperfect and executory, equity will not aid in its enforcement,[\[FN1\]](#) at least not in the absence of consideration therefor.[\[FN2\]](#) An executory trust requires a consideration to support it; an executed trust is valid and enforceable without a consideration.[\[FN3\]](#)

It has been said that, where the trust instrument vests title in the trustee and appropriates the property to the purpose of the trust and nothing remains to be done by the grantor, an executed trust is created,[\[FN4\]](#) but that in executory trusts, something remains to be done by the trustee, either to secure the property, to ascertain the objects of the trust, or to distribute according to a specified mode, or some other act, the doing of which requires the trustee to retain the legal estate.[\[FN5\]](#) Stated otherwise, an executory trust is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done, in order to complete and perfect the trust, and to give it effect.[\[FN6\]](#) When the limitations of a trust are fully and perfectly declared, the trust is regarded as an executed trust.[\[FN7\]](#)

Where a conveyance is directed to a trustee and such conveyance has not yet been made, the trust is unexecuted.[\[FN8\]](#) However, a trust has been said to be executed rather than executory where there has been an assignment to the trustee of the specified fund subject to the trust and an agreement to pay it over to the trustee as it accrued.[\[FN9\]](#)

[\[FN1\]](#) [In re Smith's Estate, 144 Pa. 428, 22 A. 916 \(1891\).](#)

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[\[FN2\]](#) [Mattsen v. U.S. Ensilage Harvester Co., 171 Minn. 237, 213 N.W. 893 \(1927\).](#)

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[\[FN3\]](#) [§ 44.](#)

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[\[FN4\]](#) [Mattsen v. U.S. Ensilage Harvester Co., 171 Minn. 237, 213 N.W. 893 \(1927\).](#)

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[\[FN5\]](#) [Singer v. First Nat. Bank & Trust Co., 195 Ga. 269, 24 S.E.2d 47 \(1943\).](#)

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[\[FN6\]](#) [In re Smith's Estate, 144 Pa. 428, 22 A. 916 \(1891\).](#)

- A gift to a woman in trust for herself and children "born and to be born" creates an executory trust, and one which cannot be executed by a division of the trust estate among the beneficiaries until the death of such woman, since until such death, the possibility of issue is not extinct. [In re Dougan, 139 Ga. 351, 77 S.E. 158 \(1913\).](#)

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[\[FN7\]](#) [In re Smith's Estate, 144 Pa. 428, 22 A. 916 \(1891\).](#)

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[\[FN8\]](#) [Cruse v. Kidd, 195 Ala. 22, 70 So. 166, 2 A.L.R. 36 \(1915\).](#)

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[\[FN9\]](#) [Mattsen v. U.S. Ensilage Harvester Co., 171 Minn. 237, 213 N.W. 893 \(1927\).](#)

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§ 6. General classifications—"Active" or "passive" trusts

West's Key Number Digest

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[Restatement Third, Trusts § 6](#)

A trust is active if, by the terms of the trust, the trustee has affirmative duties to perform.^[FN1] A trust is active if it has a purpose and, under it, the trustee is engaged in doing something for the benefit of others.^[FN2] On the other hand, a trust is passive if the trustee's sole duty is to not interfere with the enjoyment of the trust property by the beneficiaries.^[FN3] If a trustee's responsibilities are entirely negative, such as a duty not to interfere with the right of a beneficiary to use and enjoy the trust property, the trust is passive.^[FN4] A trust may also be passive even though the trustee has the purely ministerial duty of making distribution of the trust property to a single beneficiary, or merely making distribution in kind to multiple beneficiaries each of whom is to receive an appropriate undivided interest in each of the trust assets, and even though the trustee also has incidental custodial responsibility until such a distribution is made to beneficiaries who are immediately entitled to the property.^[FN5]

A beneficiary of a passive trust is entitled to receive, upon demand, transfer of the property passively held for that beneficiary.^[FN6] Accordingly, in a passive trust, the legal and equitable titles are merged in the beneficiaries, and the beneficial uses converted into legal ownership; in an active trust, the title remains in the trustee for the purpose of the trust.^[FN7] The Restatement provides that if the Statute of Uses or a similar statute applies to the property of a trust, the trustee's title to that property is extinguished and the title is held by the beneficiary or beneficiaries in accordance with the equitable interests of each.^[FN8] A statute may provide that

a passive trust vests no title or power in the trustee, but the beneficiary takes a title corresponding in extent to the beneficial interest given the beneficiary.[FN9]

Under the Uniform Trust Code, while trustee duties are usually active, a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the trustee's enjoyment of the trust property.[FN10] Such passive trusts, while valid under the Uniform Trust Code, may be terminable under the enacting jurisdiction's Statute of Uses.[FN11]

[FN1] [Restatement Third, Trusts § 6\(1\)](#).

- An "active trust" is an instrumentality of property ownership and administration. [Louisiana Public Facilities Authority v. Foster, 795 So. 2d 288 \(La. 2001\)](#).

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[FN2] [Townsend v. Rainier Nat. Bank, 51 Wash. App. 19, 751 P.2d 1214 \(Div. 1 1988\)](#).

- A trustee's duty to deliver title to the beneficiaries of the trust property at the death of the settlor was sufficient to mark the trust as an active trust for purposes of a statute abolishing passive trusts. [McMahon v. Standard Bank and Trust Co., 202 Wis. 2d 564, 550 N.W.2d 727 \(Ct. App. 1996\)](#).

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[FN3] [Restatement Third, Trusts § 6\(1\)](#).

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[FN4] [Restatement Third, Trusts § 6](#), Comment on Subsection (1).

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[FN5] [Restatement Third, Trusts § 6](#), Comment on Subsection (1).

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[FN6] [Restatement Third, Trusts § 6\(2\)](#).

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[FN7] [Johnson v. Thornton, 264 S.C. 252, 214 S.E.2d 124, 87 A.L.R.3d 918 \(1975\)](#).

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[FN8] [Restatement Third, Trusts § 6\(3\)](#).

- Before 1535, the term "use" referred to a passive trust of land in England. The Statute of Uses provided that where any person should thereafter be seised of land "to the use, confidence or trust" of any other person, the latter person shall be seised and possessed of the land in the same estate as that person would otherwise have in use. When the Statute thus "executed" a use, not only was the interest of the beneficiary made legal but the Statute also extinguished the interest of the person who otherwise would hold title subject to the use.

[Restatement Third, Trusts § 6](#), Comment on Subsection (3), a.

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[FN9] [McMahon v. Standard Bank and Trust Co., 202 Wis. 2d 564, 550 N.W.2d 727 \(Ct. App. 1996\)](#).

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[FN10] [Uniform Trust Code § 402](#), Comment.

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[FN11] [Uniform Trust Code § 402](#), Comment.

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§ 7. Definitions of trusts of particular types or for particular purposes

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[Pour-over provisions from will to inter vivos trust, 12 A.L.R.3d 56](#)

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Sprinkling trusts—Forms. [Am. Jur. Legal Forms 2d, Trusts §§ 251:136 to 251:141](#)

Model Codes and Restatements

[Restatement Third, Trusts § 26](#)

An accumulation trust is a trust whereby the trust interest or income is added to the principal or corpus so as to prevent expenditure of the interest or income.[[FN1](#)]

One of the distinctive devices by means of which individuals may combine their resources to operate a business for profit is the so-called business trust, or "Massachusetts trust" or "common-law trusts," which may be comprehensively defined as an unincorporated business organization created by an instrument by which property is to be held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing the beneficial interests in the trust estate.[FN2]

An "illusory trust" is one in which the settlor retains such control over the trust that it is held to be a testamentary substitute, invalid unless executed in accordance with the statute of wills.[FN3]

A "living trust" is a trust which takes effect during the life of the settlor, as distinguished from a testamentary trust which is created upon the settlor's death.[FN4]

A "nominee trust" is a trust in which the trustee holds legal title to the trust property for the trust's beneficiaries, but the beneficiaries exercise the controlling powers, and the actions that the trustees may take on their own are very limited. Such trusts are a common device for holding title to real estate, and afford certain tax advantages.[FN5] A nominee trust is not a trust in the strict classical sense, because of the trustee-beneficiary relationship.[FN6] Despite a nominee trust's nontraditional relationship between trustee and beneficiary, such a trust must still adhere to the rule that no trust exists when the same individual is the sole settlor, sole trustee, and sole beneficiary.[FN7]

A pour-over trust is a trust created with the intention that it be named as beneficiary under a will, usually the grantor's.[FN8]

A "qualified personal residence trust" is an estate-planning device which permits the grantor to place a piece of real estate in trust, yet allows the grantor to retain a possessory interest in the property for a term of years.[FN9] The creation of a "qualified personal residence trust" results in three distinct interests in property: (1) a possessory interest, or the right retained by the grantor to use the residence for a term of years; (2) a reversionary interest, which would be the value of the interest that could potentially come back to the grantor; and (3) the remainder interest which would pass to the eventual beneficiaries of the trust.[FN10]

A revocable trust is a form of living trust that may be revoked by the grantor.[FN11] A revocable trust is a unique type of transfer, as, by definition, when a settlor sets up a revocable trust, he or she has the right to recall the trust at any time, and thereby regain absolute ownership of the trust property.[FN12] This retention of control over property distinguishes a revocable trust from the other types of conveyances in which the principle of undue influence is applied, that is, gifts, deeds, wills, and contracts.[FN13]

A "special needs trust" is a trust designed to defray the costs of medical care that are not covered by any other public or private benefits program.[FN14]

A support trust is a trust created where the trustee is directed to use trust income or principal for the benefit of an individual, but only to the extent necessary to support the individual.[FN15]

A "Totten trust" is created when a bank deposit is made by a person (the holder) of his or her own money in his or her own name as trustee for another.[FN16] A "Totten trust" is essentially a device for the testamentary disposition of an estate or a portion of the estate.[FN17]

A voting trust, as it is commonly understood, is a device whereby persons owning stock with voting powers divorce the voting rights therefor from the ownership, retaining the ownership to all intents and purposes and transferring the voting rights to trustees in whom the voting rights of all depositors in the trust are pooled.[FN18]

CUMULATIVE SUPPLEMENT

Cases:

In a securitization trust, investors' relationship is with special purpose vehicle holding the trust assets, and their right to payment comes from cash generated by these assets, not from originator of the assets itself. [In re Inkeepers USA Trust, 448 B.R. 131 \(Bankr. S.D. N.Y. 2011\).](#)

[END OF SUPPLEMENT]

[\[FN1\] Jones v. Ellis, 551 So. 2d 396 \(Ala. 1989\).](#)

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[\[FN2\] Am. Jur. 2d, Business Trusts § 1.](#)

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[\[FN3\] In re Klosinski, 192 Misc. 2d 714, 746 N.Y.S.2d 350 \(Sur. Ct. 2002\).](#)

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[\[FN4\] Limb v. Aldridge, 1999 OK CIV APP 31, 978 P.2d 365 \(Div. 1 1998\).](#)

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[\[FN5\] Vittands v. Sudduth, 49 Mass. App. Ct. 401, 730 N.E.2d 325 \(2000\).](#)

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[\[FN6\] Vittands v. Sudduth, 49 Mass. App. Ct. 401, 730 N.E.2d 325 \(2000\).](#)

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[\[FN7\] Vittands v. Sudduth, 49 Mass. App. Ct. 401, 730 N.E.2d 325 \(2000\).](#)

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[\[FN8\] Am. Jur. 2d, Wills § 196.](#)

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[\[FN9\] Skokos v. Skokos, 344 Ark. 420, 40 S.W.3d 768 \(2001\).](#)

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[\[FN10\] Skokos v. Skokos, 344 Ark. 420, 40 S.W.3d 768 \(2001\).](#)

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[\[FN11\] Florida Nat. Bank of Palm Beach County v. Genova, 460 So. 2d 895 \(Fla. 1984\).](#)

- As to reservation of the power to revoke trust, see [§ 25](#).

- As to exercise of power to revoke trust, see [§ 76](#).

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[\[FN12\] Florida Nat. Bank of Palm Beach County v. Genova, 460 So. 2d 895 \(Fla. 1984\).](#)

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[\[FN13\] Florida Nat. Bank of Palm Beach County v. Genova, 460 So. 2d 895 \(Fla. 1984\).](#)

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[\[FN14\] Lewis ex rel. Lewis v. Catastrophic Illness in Children Relief Fund Com'n of State of N.J., 336 N.J. Super. 361, 764 A.2d 1035 \(App. Div. 2001\).](#)

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[\[FN15\] In re Estate of Brown, 148 Vt. 94, 528 A.2d 752 \(1987\).](#)

- As to the validity of support trusts, generally, see [§ 109](#).

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[\[FN16\] In re Estate of Weiland, 338 Ill. App. 3d 585, 273 Ill. Dec. 220, 788 N.E.2d 811 \(2d Dist. 2003\), as amended on reh'g, \(Apr. 25, 2003\) and appeal denied, 205 Ill. 2d 583, 281 Ill. Dec. 78, 803 N.E.2d 482 \(2003\); Farrell v. Coulter, 898 S.W.2d 139 \(Mo. Ct. App. E.D. 1995\).](#)

- A deposit by one person of his or her own money in his or her own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor, as it is a tentative trust merely,

revocable at will, until the depositor dies or completes the gift in his or her lifetime. [Farrell v. Coulter, 898 S.W.2d 139 \(Mo. Ct. App. E.D. 1995\)](#).

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[FN17] [Farrell v. Coulter, 898 S.W.2d 139 \(Mo. Ct. App. E.D. 1995\)](#).

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[FN18] [Am. Jur. 2d, Corporations § 956](#).

- The presumptive validity of a voting trust under Maine law was established by a voting trust agreement, which plainly separated the voting rights of stock from the other attributes of ownership, was implemented for a specific duration, and was created assertedly for the purpose of avoiding secret voting blocs and facilitating the transparency of corporate decision-making. [Lichtenstein v. Consolidated Services Group, Inc., 173 F.3d 17, 43 Fed. R. Serv. 3d 1161 \(1st Cir. 1999\)](#).

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Forms

Land trusts—Forms. [Am. Jur. Legal Forms 2d, Trusts §§ 251:142 to 251:151](#)

In some jurisdictions, a land trust is a form of trust in which the beneficiary's interest is an interest in personal property and not an interest in real property.^[FN1] In this type of land trust, both the legal and equitable title to the trust property lie with the trustee,^[FN2] while the duties, rights, and responsibilities tending upon real-property owners continue to reside in the beneficiaries.^[FN3] Such a land trust thus differs from a conventional trust under which the trustee holds legal title, and the beneficiary holds equitable title.^[FN4] This type of land trust, by its very nature, is characteristically different from common-law land trusts.^[FN5] Numerous authors have referred to the fictional nature of such trusts.^[FN6] The Illinois land trust is a species of trust that unlike other trusts is immune to the doctrine of merger under most circumstances.^[FN7]

^[FN1] [Chrysler Credit Corp. v. Louis Joliet Bank and Trust Co.](#), 863 F.2d 534 (7th Cir. 1988).

^[FN2] [Datwani v. Netsch](#), 562 So. 2d 721 (Fla. Dist. Ct. App. 3d Dist. 1990); [Melrose Park Nat. Bank v. Melrose Park Nat. Bank](#), 123 Ill. App. 3d 282, 78 Ill. Dec. 622, 462 N.E.2d 741, 39 U.C.C. Rep. Serv. 1799 (1st Dist. 1984).

^[FN3] [Datwani v. Netsch](#), 562 So. 2d 721 (Fla. Dist. Ct. App. 3d Dist. 1990).

^[FN4] [Melrose Park Nat. Bank v. Melrose Park Nat. Bank](#), 123 Ill. App. 3d 282, 78 Ill. Dec. 622, 462 N.E.2d 741, 39 U.C.C. Rep. Serv. 1799 (1st Dist. 1984).

- As to the requirement of separation of legal title and equitable ownership as basic to the creation of express trusts, generally, see [§ 43](#).

^[FN5] [Chrysler Credit Corp. v. Louis Joliet Bank and Trust Co.](#), 863 F.2d 534 (7th Cir. 1988).

^[FN6] [Chrysler Credit Corp. v. Louis Joliet Bank and Trust Co.](#), 863 F.2d 534 (7th Cir. 1988).

^[FN7] [Chrysler Credit Corp. v. Louis Joliet Bank and Trust Co.](#), 863 F.2d 534 (7th Cir. 1988).

- As to merger—the meeting of legal and equitable trust interests in one person—as grounds for termination of an express trust, generally, see [§ 90](#).

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§ 9. Generally

West's Key Number Digest

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Model Codes and Restatements

[Restatement Third, Trusts § 5](#)

Under the Restatement, the following are not trusts:

- successive legal estates
- decedents' estates
- guardianships and conservatorships
- receiverships and bankruptcy trusteeships
- durable powers of attorney and other agencies
- bailments and leases
- corporations, partnerships, and other business associations
- conditions and equitable charges
- contracts to convey or certain contracts for the benefit of third parties
- assignments or partial assignments of choses in action
- relationships of debtors to creditors
- mortgages, deeds of trust, pledges, liens, and other security arrangements[[FN1](#)]

[FN1] [Restatement Third, Trusts § 5](#).

- As to agency distinguished, see [§ 10](#).

- As to bailment distinguished, see [§ 11](#).

- As to contracts distinguished, see [§ 12](#).
- As to debts distinguished, see [§ 13](#).
- As to executorships and administratorships distinguished, see [§ 14](#).
- As to guardianships and conservatorships distinguished, see [§ 15](#).
- As to powers of attorney distinguished, see [§ 16](#).

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§ 10. Agency

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Model Codes and Restatements

[Restatement Third, Trusts § 5](#)

An agency is not a trust,^[FN1] as a fundamental difference exists between a trustee and an agent, and the distinction is chiefly in the character in which they act, and in the persons for whom they act.^[FN2] The term "agency" means a fiduciary relationship by which a party confides to another the management of some business to be transacted in the former's name or on his or her account, and by which such other assumes to do business and render an account of it.^[FN3] In an agency relationship, the agent is the representative of the principal, and acts for, in the place of, and instead of the principal.^[FN4] A trustee is not an agent of the trust estate or of the beneficiary, but acts for him or herself in the administration of the trust estate,^[FN5] although under restraint of

the terms of the trust and of the law of trusts.[FN6] In other words, a trust and an agency are distinguishable on the basis of the nonrepresentative role of the trustee and the representative role of the agent.[FN7]

A trustee holds legal title over the property, while an agent may hold legal title but usually does not hold any title at all, and while there is no polestar to guide one in the determination as to whether a given instrument creates a trust or the relationship of principal and agent, where there has been a transfer of title it is usually held that a trust is created.[FN8] Hence, in a trust relation, the principal or donor parts entirely with the control, possession, and right of disposition of the property involved, and the trustee acts in his or her own name, while an agent represents and acts for the principal.[FN9]

One of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent.[FN10] In this regard, while an agent undertakes to act on behalf of the principal and subject to the principal's control, a trustee as such is not subject to the control of the beneficiary, except that the trustee is under a duty to deal with the trust property for his or her benefit in accordance with the terms of the trust and can be compelled by the beneficiary to perform his or her duty.[FN11] The Restatement Second, Agency provides that a person who has title to property which the person agrees to hold for the benefit and subject to the control of another is an agent-trustee and is subject to the rules of agency.[FN12]

Other differences between an agency and a trust include the facts that ordinarily an agent may subject the principal to personal liabilities to third persons, while a trustee cannot subject the beneficiary to such liabilities,[FN13] that an agency is created by the consent of the principal and the agent, while a trust may be created without the knowledge or consent of the beneficiary or of the trustee,[FN14] and that an agency can be terminated at the will of either the principal or the agent and is terminated by the death or incapacity of either, while a trust is ordinarily not terminable at the will of either the beneficiary or the trustee or by the death or incapacity of either.[FN15]

[FN1] [Restatement Third, Trusts § 5\(e\)](#).

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[FN2] [In re Gillen's Will, 156 Pa. Super. 650, 41 A.2d 412 \(1945\)](#).

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[FN3] [Am. Jur. 2d, Agency § 1](#).

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[FN4] [Am. Jur. 2d, Agency § 1](#).

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[FN5] [Taylor v. Mayo, 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 \(1884\)](#).

- A trustee is a principal, and not an agent in the management and control of the property committed to him or her. [Darling v. Buddy, 318 Mo. 784, 1 S.W.2d 163, 58 A.L.R. 493 \(1927\)](#).

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[FN6] [§ 316](#).

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[FN7] [Taylor v. Mayo, 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 \(1884\)](#); [Riedell v. Stuart, 1931 OK 475, 151 Okla. 266, 2 P.2d 929, 76 A.L.R. 1469 \(1931\)](#).

- The rules which determine the liability of an agent are not applicable to trustees. [McIntyre v. Williamson, 72 Vt. 183, 47 A. 786 \(1900\)](#).

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[FN8] [Anderson v. Abbott, 61 F. Supp. 888 \(W.D. Ky. 1945\)](#).

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[\[FN9\] Anderson v. Abbott, 61 F. Supp. 888 \(W.D. Ky. 1945\).](#)

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[\[FN10\] Am. Jur. 2d, Agency § 2.](#)

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[\[FN11\] Restatement Third, Trusts § 5, Comment e.](#)

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[\[FN12\] Restatement Second, Agency § 14B.](#)

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[\[FN13\] Restatement Third, Trusts § 5, Comment e.](#)

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[\[FN14\] Restatement Third, Trusts § 5, Comment e.](#)

- As to the creation of express trusts, generally, see [§ 14](#).

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[\[FN15\] Restatement Third, Trusts § 5 Comment e.](#)

- As to termination of trusts, generally, see §§ [64](#) to [72](#).

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§ 11. Bailment

West's Key Number Digest

A bailment is not a trust.[\[FN1\]](#) It is characteristic of a bailment that the bailee has possession of the property, and title or ownership remains in the bailor,[\[FN2\]](#) while in a trust relationship, legal title vests in the trustee and equitable title in the beneficiary or the trust.[\[FN3\]](#) While every bailment is a form of trust, since a bailment involves the delivery of personal property by one person to another in trust for a specific purpose, the mere reposing of confidence in a party does not of itself create a trust or make a trustee of one in whom confidence has been reposed, and more than this is required to establish a fiduciary relationship of the sort which characterizes the creation of a trust.[\[FN4\]](#) Furthermore, the subject matter of a bailment is always personal property,[\[FN5\]](#) but a trust may be created in either real or personal property.[\[FN6\]](#)

Observation: Delivery of a chattel to another, with no writing, may suffice either to pass title or merely to give possession. When the act is done for the benefit of the owner or a third person, or for the benefit of the bailee as well as for another, the potentially difficult question of whether a trust or a bailment is created depends on the intention manifested by the parties.[\[FN7\]](#)

[\[FN1\]](#) Restatement Third, Trusts § 5(f).

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[\[FN2\]](#) Am. Jur. 2d, Bailments § 18.

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[\[FN3\]](#) § 43.

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[\[FN4\]](#) Am. Jur. 2d, Bailments § 18.

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[\[FN5\]](#) Am. Jur. 2d, Bailments § 3.

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[\[FN6\]](#) § 41.

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[\[FN7\]](#) Restatement Third, Trusts § 5, Comment f.

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§ 12. Contract

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [1](#)

Model Codes and Restatements

[Restatement Third, Trusts § 5](#)

Trusts are distinguishable from contracts in that the parties to a contract may decide to exchange promises, but a trust does not rest on an exchange of promises and instead merely requires a trustor to transfer a beneficial interest in property to a trustee who, under the trust instrument, relevant statutes, and common law, holds that interest for the beneficiary.^[FN1] The undertaking between the settlor and trustee is not properly characterized as contractual and does not stem from the premise of mutual assent to an exchange of promises.^[FN2] Although the trustee's duties may derive from the trust instrument, they initially stem from the special nature of the relation between trustee and beneficiary, and thus, the trustee's undertakings or promises in a trust instrument are not normally contractual.^[FN3] A trust is also distinguishable from a contract in that a trust is a fiduciary relationship with respect to property.^[FN4] The relation ordinarily created by a contract is that of promisor and promisee, obligor and obligee, or debtor and creditor; in most contracts of hire, a special confidence is reposed in each other by the parties, but more than that is required to establish a fiduciary relation.^[FN5] An essential aspect of a trust is that the putative trustee has received property under conditions that impose a fiduciary duty to the grantor or a third person; a mere contractual obligation, including a contractual promise to convey property, does not create a trust.^[FN6]

One of the major distinctions between trust and contract is that in a trust, there is always a divided ownership of property, the trustee having usually a legal title and the beneficiary an equitable one,^[FN7] whereas in contract, this element of division of property interest is entirely lacking.^[FN8]

A contract to create a trust is distinguishable from a presently created trust in that the former is merely a promise, while the latter is a fact.^[FN9]

While the mere existence of a contractual relationship does not preclude the existence of a trust relationship between the parties to the same contract, a third-party beneficiary contract is not the equivalent of, or always, a trust.^[FN10] If property is transferred from one person to another who agrees to assume a personal liability to a third person, the resulting relationship is that of a third-party beneficiary contract, not that of a trust.^[FN11]

However, a voluntary trust deed, under the terms of which the income of the trust property is to be paid to the settlors during their lives, and upon the death of the survivor, with the principal to be divided among their sons, has been held to be a contract within the meaning of the contract clause of the Federal Constitution.^[FN12]

[FN1] [Schoneberger v. Oelze, 96 P.3d 1078 \(Ariz. Ct. App. Div. 1 2004\)](#).

- The contract law theory of no "meeting of the minds" did not apply to a trust agreement between the settlor and trustee, where the trust agreement was not a bilateral agreement, but rather reflected the settlor's unilateral decision to place her assets into a revocable inter vivos trust to be administered by the trustee for the benefit of the settlor and her two daughters. [Lah v. Rogers, 125 Ohio App. 3d 164, 707 N.E.2d 1208 \(11th Dist. Lake County 1998\)](#).

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[FN2] [In re Naarden Trust, 195 Ariz. 526, 990 P.2d 1085 \(Ct. App. Div. 1 1999\)](#), as amended, (June 16,1999).

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[FN3] [In re Naarden Trust, 195 Ariz. 526, 990 P.2d 1085 \(Ct. App. Div. 1 1999\)](#), as amended, (June 16, 1999).

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[FN4] [§ 1](#).

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[FN5] [Am. Jur. 2d, Contracts § 415](#).

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[FN6] [Lozano v. Summit Prairie Cattlemens Ass'n, 155 Or. App. 32, 963 P.2d 92 \(1998\)](#).

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[FN7] As to the separation of legal and equitable estates in trust property, generally, see [§ 43](#).

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[FN8] [In re Adkisson, 26 B.R. 879 \(Bankr. E.D. Tenn. 1983\)](#) (apparently recognizing distinction).

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[FN9] [Voelkel v. Tohulka, 236 Ind. 588, 141 N.E.2d 344, 70 A.L.R.2d 1349 \(1957\)](#).

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[FN10] [Christiansen v. National Sav. and Trust Co., 683 F.2d 520 \(D.C. Cir. 1982\)](#).

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[FN11] [Christiansen v. National Sav. and Trust Co., 683 F.2d 520 \(D.C. Cir. 1982\)](#).

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[FN12] [Coolidge v. Long, 282 U.S. 582, 51 S. Ct. 306, 75 L. Ed. 562 \(1931\)](#).

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§ 13. Debt

West's Key Number Digest

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Model Codes and Restatements

[Restatement Third, Trusts § 5](#)

A debt is not a trust.^[FN1] Absent a contractual restriction under which a payment must be kept or used for the benefit of the payor, a debt, rather than a trust, is created by a payment, and the payor merely has a personal claim against the debtor.^[FN2] A trust is also distinguishable from a debt in that there is a fiduciary relation between a trustee and a beneficiary, but not between a debtor and a creditor.^[FN3] That is, while a debt arises when one incurs merely an obligation to pay a certain sum of money, a trust, on the other hand, exists where one takes on the duty to deal as a fiduciary with specific property for the benefit of another.^[FN4] If a creditor-debtor relationship, but not a fiduciary relationship, exists between the parties, there can exist no express trust.^[FN5] At times, whether a debt or a trust has arisen may not be clear.^[FN6] In general, it is understood that when the "trustee" of the funds is entitled to use them as his or her own and commingle them with his or her own money, a debtor-creditor relationship exists, not a trust.^[FN7]

However, when one person delivers money to another for a specific purpose, the transaction becomes a trust.^[FN8]

^[FN1] [State v. Marshall, 541 N.W.2d 330 \(Minn. Ct. App. 1995\).](#)

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^[FN2] [State v. Marshall, 541 N.W.2d 330 \(Minn. Ct. App. 1995\).](#)

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^[FN3] [State v. Marshall, 541 N.W.2d 330 \(Minn. Ct. App. 1995\).](#)

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^[FN4] [In re Shervin, 112 B.R. 724 \(Bankr. E.D. Pa. 1990\).](#)

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^[FN5] [In re Shervin, 112 B.R. 724 \(Bankr. E.D. Pa. 1990\).](#)

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^[FN6] [In re Shervin, 112 B.R. 724 \(Bankr. E.D. Pa. 1990\).](#)

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^[FN7] [In re Shervin, 112 B.R. 724 \(Bankr. E.D. Pa. 1990\).](#)

- As to the commingling by a trustee, without authorization from the express or implied terms of the trust, of

trust funds or property with the trustee's own or other property and funds as a violation of the trustee's duty rendering him or her liable for any loss therefrom, see [§ 353](#).

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[\[FN8\] Security State Bank v. Valley Wide Elec. Supply Co., Inc., 752 S.W.2d 661 \(Tex. App. Corpus Christi 1988\)](#), writ denied, (Nov. 23, 1988).

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§ 14. Executorship; administratorship

West's Key Number Digest

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Model Codes and Restatements

[Restatement Third, Trusts § 5](#)

Personal representatives of decedents' estates are fiduciaries, but they are not trustees.[\[FN1\]](#) Although many of the rules applicable to trustees are applicable to executors and administrators, and also to guardians and conservators, many other rules of trust law are not.[\[FN2\]](#) Furthermore, an executor or administrator owes duties to estate creditors in addition to the general duties the fiduciary owes to the beneficiaries of the estate.[\[FN3\]](#) There is also a difference between an executorship and a trust with regard to the property interests involved, as executors and administrators generally do not take title in the testator's real property;[\[FN4\]](#) the general rule is that real estate becomes vested on the death of the owner in his or her heirs or devisees, subject to the right of

the personal representative, where authorized by the court, to use it to pay creditors in case the personal estate is insufficient to pay the debts of the estate and the expenses of administration.[FN5] Furthermore, at common law, the real property of an intestate descends to the heirs, and the representative has no power over it.[FN6] A trustee, however, holds a legal interest in the trust property, subject to the beneficial interest of the beneficiary.[FN7] The intention to create a trust being a basic element necessary for the creation of an express trust,[FN8] absent manifestation of such intention by the testator, an executor retains a bequest in his or her capacity as executor, rather than as trustee.[FN9]

Definitions: An "executor" is one nominated by a testator to carry out the directions in his or her will and dispose of his or her property according to the will, after his or her decease.[FN10] An "administrator" is one appointed by a court to administer an intestate estate.[FN11]

[FN1] [Restatement Third, Trusts § 5](#), Comment c.

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[FN2] [Restatement Third, Trusts § 5](#), Comment c.

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[FN3] [Restatement Third, Trusts § 5](#), Comment c.

- As to duties of trustees regarding investments of trust property, generally, see [§ 432](#)

- As to rights, powers, duties, and liabilities of personal representatives, generally, see [Am. Jur. 2d, Executors and Administrators § 359](#).

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[FN4] [Restatement Third, Trusts § 5](#), Comment c.

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[FN5] [Am. Jur. 2d, Executors and Administrators § 535](#).

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[FN6] [Am. Jur. 2d, Executors and Administrators § 366](#).

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[FN7] [§ 1](#).

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[FN8] [§ § 76, 77](#).

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[FN9] [In re Schaefer's Estate, 121 N.Y.S.2d 233 \(Sur. Ct. 1953\)](#).

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[FN10] [Am. Jur. 2d, Executors and Administrators § 5](#).

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[FN11] [Am. Jur. 2d, Executors and Administrators § 6](#).

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§ 15. Guardianship; conservatorship

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Model Codes and Restatements

[Restatement Third, Trusts § 5](#)

Even though a guardianship has been characterized as a trust relation of the most sacred character,[[FN1](#)] a guardianship is not a trust.[[FN2](#)] The offices of trustee and of guardian may be distinguished in that while a trustee has title to trust property, a guardian usually does not.[[FN3](#)] A guardian ordinarily has only powers and duties respecting property to which the ward holds title.[[FN4](#)] Similarly, conservatorships are not trusts.[[FN5](#)]

[[FN1](#)] [Am. Jur. 2d, Guardian and Ward § 1.](#)

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[[FN2](#)] [Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963 \(Miss. 1999\).](#)

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[[FN3](#)] [Restatement Third, Trusts § 5](#), Comment c.

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[[FN4](#)] [Am. Jur. 2d, Guardian and Ward § 2.](#)

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[[FN5](#)] [Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963 \(Miss. 1999\).](#)

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§ 16. Power

West's Key Number Digest

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Although a power is in the nature of, or similar to, a trust,[FN1] a trust is distinguishable from a power in that a trust involves legal and equitable estates in different persons,[FN2] while a power of appointment is not an estate, or a property right, but is a mere right of power, a personal privilege or authority.[FN3] In this regard, a power over property has been defined as a liberty or authority reserved by or limited to a person to dispose of real or personal property for his or her own benefit, or for the benefit of others, and operating on an estate or interest vested either in him or herself or in some other person; that liberty or authority, however, is not derived out of such estate or interest, but overreaches or supersedes it, either wholly or partially.[FN4] A trust is always imperative in that it must be performed,[FN5] although the trustee can be vested with discretion in various respects,[FN6] while there is authority to the effect that some powers are imperative, ordinarily, the exercise of a power by a donee is purely discretionary or permissive and not imperative.[FN7] Even so, in some instances there may be a question as to whether a power of appointment is a mere power, discretionary in nature, or a power in trust, imperative in character and conferring a property interest upon the objects of the trust; the determinative factor in such instances is said to be the donor's intention.[FN8]

Furthermore, under some statutes, a trust authorizing a performance for a lawful purpose, but one not authorized for a trust by enumeration in the statute, is valid as a power in trust.[FN9]

It is possible for an instrument to create a power which is coupled with a trust,[FN10] as where a trustee is given power to appoint among a class.[FN11] Such a trust with power of appointment among a class of beneficiaries has been said to be akin to a power of appointment coupled with the trust imposed.[FN12] A power may be reserved to a trustor,[FN13] as where a trustor reserves a power of revocation[FN14] or modification.[FN15]

[\[FN1\] Am. Jur. 2d, Powers of Appointment and Alienation § 6.](#)

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[\[FN2\] §§ 40 et seq.](#)

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[\[FN3\] Am. Jur. 2d, Powers of Appointment and Alienation § 7.](#)

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[\[FN4\] Am. Jur. 2d, Powers of Appointment and Alienation § 1.](#)

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[\[FN5\] § 345.](#)

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[\[FN6\] § § 315, 318.](#)

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[\[FN7\] Am. Jur. 2d, Powers of Appointment and Alienation § 17.](#)

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[\[FN8\] Am. Jur. 2d, Powers of Appointment and Alienation § 17.](#)

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[\[FN9\] § § 19, 40.](#)

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[\[FN10\] Wetmore v. Henry, 259 Ill. 80, 102 N.E. 189 \(1913\).](#)

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[\[FN11\] §§ 295 et seq.](#)

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[\[FN12\] Brett v. St. Paul Trust Co., 49 N.D. 653, 193 N.W. 317 \(1923\).](#)

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[\[FN13\] Chickering v. Commissioner of Internal Revenue, 118 F.2d 254, 139 A.L.R. 508 \(C.C.A. 1st Cir. 1941\).](#)

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[\[FN14\] § 25.](#)

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[\[FN15\] § 26.](#)

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[4B Am. Jur. Legal Forms 2d, Charities § 55:38](#)

17A, 17B, 17C Am. Jur. Legal Forms 2d, Trusts §§ 251:273, [251:5](#) to [251:14](#), [251:37](#), [251:39](#) to [251:45](#), [251:48](#) to 251:64.2, [251:65](#), [251:173](#), [251:273](#), [251:503](#) to [251:511](#), [251:515](#), [251:522](#), [251:577](#), [251:582](#), [251:583](#), [251:599](#) to [251:607](#)

[Am. Jur. Pleading and Practice Forms, Trusts §§ 7, 9, 19 to 23, 29](#)

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[Uniform Trust Code §§ 105, 404, 417](#)

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§ 17. Generally

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Forms

Checklist—Drafting complaint in action to determine existence of or to enforce express trust. [Am. Jur. Pleading and Practice Forms, Trusts § 7](#)

"Express" trusts, which are sometimes referred to as "direct,"^[FN1] "technical,"^[FN2] or "voluntary"^[FN3] trusts, are those trusts created by the manifest intention of the settlor to create them.^[FN4] Express trusts depend upon intention, as distinguished from implied trusts, such as constructive or resulting trusts, which arise by operation of the law,^[FN5] or upon fraud or wrong irrespective of the intention of the parties concerned.^[FN6]

Definitions: An "express trust" is created by the direct and willful acts of the parties, some writing or deed, or words expressly evidencing the intention to create a trust;^[FN7] while a "resulting trust" is one arising from a presumed intent of the parties at the time title is taken by one party under facts and circumstances showing that a beneficial interest in real or personal property is in another; and a "constructive trust" is a duty imposed by courts of equity to prevent the unjust enrichment of a holder of title to property which such holder acquired through fraud, breach of duty, or some other circumstance making it inequitable for him or her to retain it.^[FN8]

An express trust is generally created in one of two ways: (1) a declaration of trust, by which the owner of property declares that he or she holds it as trustee for some beneficiary; or (2) a transfer in trust, by which the

owner transfers to another as trustee for some beneficiary, either by deed or other transfer inter vivos, or by will.[FN9]

A valid trust is not created merely by the creation of a moral, ethical, or honorary obligation or trust.[FN10] An honorary trust is not a true trust, since an honorary trust does not conform to the time-honored requirement that there be a beneficiary capable of enforcing the trust's terms.[FN11]

Once established and acknowledged, a trust does not need to be constantly reiterated or confessed.[FN12]

Observation: The Uniform Trust Code states the law relating to express trusts.[FN13]

[FN1] [Des Moines Terminal Co. v. Des Moines Union Ry. Co., 52 F.2d 616 \(C.C.A. 8th Cir. 1931\).](#)

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[FN2] [In re Holmes, 117 B.R. 848 \(Bankr. D. Md. 1990\); In re Freeman, 101 B.R. 698 \(Bankr. E.D. Okla. 1989\).](#)

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[FN3] [In re Marriage of Malquist, 234 Mont. 419, 763 P.2d 1116 \(1988\).](#)

-

[FN4] [Tartaglia v. Hodges, 129 N.M. 497, 2000-NMCA-080, 10 P.3d 176 \(Ct. App. 2000\).](#)

- An express trust is one in which the circumstances show that the grantor of the property intended to create a trust. [Lozano v. Summit Prairie Cattlemens Ass'n, 155 Or. App. 32, 963 P.2d 92 \(1998\).](#)

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[FN5] [Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 \(1997\).](#)

- As to trusts arising by operation of the law, see [§§ 101 et seq.](#)

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[FN6] [§ § 103, 137.](#)

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[FN7] [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\).](#)

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[FN8] [Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 \(1996\).](#)

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[FN9] [California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church, 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 \(5th Dist. 2004\), review filed, \(Sept. 22, 2004\).](#)

- Express trust is created by terms of will, deed, or other writing or arising from direct and positive action of parties as evidenced by written instrument. [Kurtz v. Solomon, 275 Ill. App. 3d 643, 212 Ill. Dec. 31, 656 N.E.2d 184 \(1st Dist. 1995\).](#)

- As to methods of creating trusts, see [§ 18.](#)

-

[FN10] [Seabrook v. Grimes, 107 Md. 410, 68 A. 883 \(1908\); McCoy v. McCoy, 1911 OK 472, 30 Okla. 379, 121 P. 176 \(1911\).](#)

- A trust in realty given by a mother to her son is not created by her statement of her desire that the proceeds of the property, if sold, shall go to designated persons. [Minella v. Phillips, 245 F.2d 687, 65 A.L.R.2d 994 \(5th Cir. 1957\).](#)

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[FN11] [Phillips v. Estate of Holzmann, 740 So. 2d 1 \(Fla. Dist. Ct. App. 3d Dist. 1998\).](#)

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[\[FN12\] Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co., 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219 \(1920\).](#)

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[\[FN13\] English, The Uniform Trust Code \(2000\) and its application to Ohio, 30 Cap. U. L. Rev. 1 \(2002\).](#)

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§ 18. Creation of trusts

[Comment Note.—Creation of express trust in property to be acquired in future, 3 A.L.R.3d 1416](#)

West's Key Number Digest

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Testamentary trust provision. [4B Am. Jur. Legal Forms 2d, Charities § 55:38](#)

Form drafting guide—Checklist—Drafting a declaration of trust. [17A Am. Jur. Legal Forms 2d, Trusts § 251:5](#)

Declaration of trust by owner or grantor of property. [17A Am. Jur. Legal Forms 2d, Trusts §§ 251:6 to 251:10](#)

Declaration of trust by grantee. [17A Am. Jur. Legal Forms 2d, Trusts §§ 251:11 to 251:14](#)

Deed poll creating trust—General form. [17A Am. Jur. Legal Forms 2d, Trusts § 251:37](#)

Inter Vivos Trust Agreements—Forms. [17A Am. Jur. Legal Forms 2d, Trusts §§ 251:39 to 251:45](#)

Form drafting guide—Checklist—Drafting a testamentary trust. [17C Am. Jur. Legal Forms 2d, Trusts § 251:173](#)

Recordation of trust instrument. [17C Am. Jur. Legal Forms 2d, Trusts § 251:582](#)

Complaint, petition, or declaration—For declaratory judgment—To establish existence of testamentary trust and rights of beneficiaries thereunder. [Am. Jur. Pleading and Practice Forms, Trusts § 9](#)

Complaint, petition, or declaration—Allegation—Creation of express trust—By declaration. [Am. Jur. Pleading and Practice Forms, Trusts § 19](#)

Complaint, petition, or declaration—Allegation—Creation of express trust—By inter vivos or testamentary transfer. [Am. Jur. Pleading and Practice Forms, Trusts §§ 20, 21](#)

Complaint, petition, or declaration—Allegation—Creation of express trust—By power of appointment. [Am. Jur. Pleading and Practice Forms, Trusts § 22](#)

Complaint, petition, or declaration—Allegation—Creation of express trust—By promise to trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 23](#)

Model Codes and Restatements

[Restatement Third, Trusts § 10](#)

Except as prevented by the doctrine of merger, a trust may be created by:[FN1]

- (1) a transfer by the will of a property owner to another person as trustee for one or more persons;
- (2) a transfer inter vivos by a property owner to another person as trustee for one or more persons;
- (3) a declaration by an owner of property that he or she holds that property as trustee for one or more persons;
- (4) an exercise of a power of appointment by appointing property to a person as trustee for one or more persons who are objects of the power; or
- (5) a promise or beneficiary designation that creates enforceable rights in a person who immediately or later holds those rights as trustee, or who pursuant to those rights later receives property as trustee, for one or more persons.

Practice Guide: The recommended practice for establishing a trust is to execute documents of transfer along with the declaration of trust, as the transfer documents help to prove that the settlor intended to create the trust.[FN2]

A transaction failing as a gift may give rise, irrespective of such failure, to a trust[FN3] where it complies with all the essentials and requisites of a trust.[FN4]

In some instances, an express trust may be affirmatively created and declared by a court,[\[FN5\]](#) as, for example, where created by a divorce court to secure payment of alimony[\[FN6\]](#) or child support[\[FN7\]](#) awards.

Observation: A court cannot impose a trust where the parties have contemplated another relationship,[\[FN8\]](#) although a court may impose a trust when none exists to effectuate the parties' intent.[\[FN9\]](#)

[\[FN1\]](#) [Cook v. First Nat. Bank, 1930 OK 290, 145 Okla. 5, 291 P. 43 \(1930\)](#); Consideration is, as a rule, necessary to a binding promise or contract to create a trust or, in the future, to convey or transfer property in trust. [Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 \(C.C.A. 8th Cir. 1937\)](#).
- [Restatement Third, Trusts § 10](#).

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[\[FN2\]](#) [Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\)](#).

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[\[FN3\]](#) [Ginn's Adm'x v. Ginn's Adm'r, 236 Ky. 217, 32 S.W.2d 971 \(1930\)](#); [Harris Banking Co. v. Miller, 190 Mo. 640, 89 S.W. 629 \(1905\)](#).

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[\[FN4\]](#) §§ [34](#) to [59](#).

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[\[FN5\]](#) [In re Elrod, 42 B.R. 468 \(Bankr. E.D. Tenn. 1984\)](#).

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[\[FN6\]](#) [Am. Jur. 2d, Divorce and Separation § 759](#).

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[\[FN7\]](#) [Am. Jur. 2d, Divorce and Separation §§ 1017 to 1019](#).

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[\[FN8\]](#) [Hubbard v. Shankle, 138 S.W.3d 474 \(Tex. App. Fort Worth 2004\)](#), review denied, (Sept. 17, 2004).
- A trust will not be created where none in fact was contemplated. [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\)](#), cert. denied, [537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\)](#).

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[\[FN9\]](#) [Scott v. C.I.R., 226 F.3d 871 \(7th Cir. 2000\)](#).

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§ 19. Purposes of trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [11\(1\)](#) to (3)

Forms

Purpose of trust. [17C Am. Jur. Legal Forms 2d, Trusts § 251:577](#)

Model Codes and Restatements

[Restatement Third, Trusts § 27](#)

A trust, to be valid, must have a purpose, and in order to create a trust the words or acts of the person who allegedly created the trust must indicate its purpose with reasonable certainty.^[FN1] The purpose of a trust governs its administration and enforcement, and such purpose is determined by examining the language of the trust instrument and the surrounding circumstances.^[FN2]

In the absence of a statute to the contrary, a settlor may create a trust for any lawful purpose, and the trust may be created for the settlor's own benefit as well as the benefit of another.^[FN3] The material purposes of a trust are subject to the settlor's discretion, which is limited only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve.^[FN4] The Uniform Trust Code, which provides that a trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve, also adds that a trust and its terms must be for the benefit of its beneficiaries,^[FN5] and also provides that the requirements for a trust's creation, including the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settler.^[FN6] Accordingly, the terms of a trusts do not prevail over the requirement that a trust have a legal purpose.^[FN7]

^[FN1] § 40.

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^[FN2] [Hanson v. Minette, 461 N.W.2d 592 \(Iowa 1990\)](#).

- As to construction of trusts, generally, see §§ [24](#) to [33](#).

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[\[FN3\] Aycock Pontiac, Inc. v. Aycock, 335 Ark. 456, 983 S.W.2d 915 \(1998\).](#)

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[\[FN4\] In re Estate of Somers, 277 Kan. 761, 89 P.3d 898 \(2004\).](#)

- As to trusts contravening law or public policy, see [§ 20](#).

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[\[FN5\] Uniform Trust Code § 404.](#)

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[\[FN6\] Uniform Trust Code § 105](#), Comment.

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[\[FN7\] Uniform Trust Code § 105\(b\)\(3\).](#)

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§ 20. Trusts contravening law or public policy

[Validity and effect of provision in trust instrument conditioning gift on beneficiary's assumption or retention of family name, 38 A.L.R.2d 1343](#)

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [11\(1\)](#)

Model Codes and Restatements

Restatement Third, Trusts § 29

A trust must have a lawful subject matter.[FN1] Generally, where the object of a trust is to circumvent a statutory prohibition or defeat a public policy, the trust is void and of no effect,[FN2] and one who wishes to dispose of his or her property through the device of a trust must do so subject to considerations of policy, and a person cannot force the courts to sanction his or her scheme of disposition if it is inimical to the interests of the state.[FN3] It follows that criminality of purpose ordinarily voids a trust.[FN4] However, the illegal motives of a trustor, where his or her method is legal, do not generally affect the validity of a trust, although certain motives, such as evasion of taxes, may cause the court to resolve doubts against the trustor.[FN5] Furthermore, a trust executed by illegal means need not fail if the trust could have been executed by legal means without defeating the settlor's purpose.[FN6]

The view has been taken that public policy is not violated by a trust provision for loss of any benefit under a testamentary trust upon adoption of the beneficiary by a nonmember of the testator's immediate family.[FN7]

Caution: This view has been expressly rejected where a codicil, which added a condition to a will that if particular persons were named and appointed and acted as either the guardian of the person or the guardian of the estate of any beneficiaries of a trust for children, all funds and all property held in trust for the beneficiary would revert and become a part of a trust for a different beneficiary, was deemed void as against public policy, since it sought to forfeit the estates of minor children because of an action taken by the probate court in their best interest.[FN8]

[FN1] Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927).

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[FN2] Shelley v. Shelley, 223 Or. 328, 354 P.2d 282, 91 A.L.R.2d 250 (1960).

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[FN3] Perkins v. Hilton, 329 Mass. 291, 107 N.E.2d 822, 33 A.L.R.2d 1281 (1952); Graves v. First Nat. Bank in Grand Forks, 138 N.W.2d 584, 14 A.L.R.3d 1205 (N.D. 1965).

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[FN4] In re Moorehead's Estate, 289 Pa. 542, 137 A. 802, 52 A.L.R. 1251 (1927).

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[FN5] Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 (C.C.A. 8th Cir. 1937).

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[FN6] Donnkenny, Inc. v. Virginia Financial and Ins. Services, Inc., 739 F. Supp. 290 (W.D. Va. 1990).

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[FN7] National Bank of Commerce v. Greenberg, 195 Tenn. 217, 258 S.W.2d 765, 38 A.L.R.2d 1337 (1953).

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[FN8] Stewart v. RepublicBank, Dallas, N.A., 698 S.W.2d 786 (Tex. App. Fort Worth 1985), writ refused n.r.e. (Sept. 10, 1986).

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§ 21. Impossibility of performance

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [11\(1\)](#)

Model Codes and Restatements

[Restatement Third, Trusts § 30](#)

Present impossibility of performance of a trust,[\[FN1\]](#) or the impossibility of a particular mode of performance does not necessarily prevent a trust from arising,[\[FN2\]](#) or call for the termination of a trust,[\[FN3\]](#) at least where deviation from the terms of the trust, in order to accomplish the ultimate purpose of the trustor, under a decree or order of the court, is justified.[\[FN4\]](#)

Impossibility of performance works a failure of the trust, however, where the performance is material to the very existence of the trust[\[FN5\]](#) and where no justifiable deviation from the terms of the trust can make a modified performance possible.[\[FN6\]](#)

[\[FN1\]](#) [In re Stack's Will](#), 214 Wis. 98, 251 N.W. 470, 92 A.L.R. 150 (1933).

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[\[FN2\]](#) [Re John's Will](#), 30 Or 494, 47 P 341, recalled on other grounds [30 Or 532](#), [50 P 226](#).

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[\[FN3\]](#) [§ 88](#).

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[\[FN4\]](#) §§ [291](#) to [294](#).

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[\[FN5\] Wilce v. Van Anden, 248 Ill. 358, 94 N.E. 42 \(1911\).](#)

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[\[FN6\] §§ 291 et seq.](#)

- As to rule where a trust instrument shows intention that trust should be created in a certain manner, and in no other, see [§ 82](#).

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§ 22. Effect of provision for forfeiture by contesting beneficiary; "no contest" clauses

[Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary, 23 A.L.R.4th 369](#)

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [11\(1\)](#)

Forms

Forfeiture by contesting beneficiary. [17C Am. Jur. Legal Forms 2d, Trusts § 251:583](#)

A trust instrument may validly provide for forfeiture of the rights of any contesting beneficiary.[\[FN1\]](#) Further, it has been stated that a "no contest" clause in a declaration of trust is valid and must be given effect

according to the intent of the trustor, as that intent appears from the terms of the instrument itself and surrounding circumstances.[\[FN2\]](#)

Observation: Although a no contest clause in a trust is enforceable, it will be strictly construed, and no contest clauses in inter vivos trusts are not to be extended beyond what was plainly the settlor's intent.[\[FN3\]](#)

A forfeiture provision of a trust is to be enforced only where the trustor intended that the beneficiary's conduct should forfeit the beneficiary's interest under the trust agreement.[\[FN4\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Whether there has been a "contest" within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used. [West's Ann.Cal.Prob.Code § 21300\(a\)](#). [Fazzi v. Klein](#), 190 Cal. App. 4th 1280, 2010 WL 5077804 (4th Dist. 2010).

[END OF SUPPLEMENT]

[\[FN1\]](#) [Barry v. American Security & Trust Co.](#), 135 F.2d 470, 146 A.L.R. 1204 (App. D.C. 1943); [Rossi v. Davis](#), 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 (1939).

- As to the effect of a provision for forfeiture by a contesting beneficiary in the case of wills, generally, see [Am. Jur. 2d, Wills §§ 1569 et seq.](#)

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[\[FN2\]](#) [Poag v. Winston](#), 195 Cal. App. 3d 1161, 241 Cal. Rptr. 330 (2d Dist. 1987).

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[\[FN3\]](#) [Scharlin v. Superior Court](#), 9 Cal. App. 4th 162, 11 Cal. Rptr. 2d 448 (4th Dist. 1992).

- As to construction of trusts, generally, see [§ 28](#).

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[\[FN4\]](#) [Cox v. Fisher](#), 322 S.W.2d 910 (Mo. 1959).

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§ 23. Multiple trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 11(1)

Forms

Joint revocable trust agreement. [17B Am. Jur. Legal Forms 2d, Trusts § 251:65](#)

Division into shares—Separate trusts. [17C Am. Jur. Legal Forms 2d, Trusts § 251:273](#)

Consolidation of trust with subsequent trust. [17C Am. Jur. Legal Forms 2d, Trusts § 251:515](#)

Where a first trust is already in existence, there are two ways to create a valid second trust, as either all the beneficiaries of the initial trust can make a second trust of their equitable interest, or the trustee of the initial trust may consent to the creation of a second trust.[\[FN1\]](#) The Uniform Trust Code provides that after notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.[\[FN2\]](#)

Separate and several trusts, to be administered by the same trustee, may also be created by the same instrument.[\[FN3\]](#)

In line with the basic rule that to construe a trust, one must first determine the intention of those creating the trust,[\[FN4\]](#) in determining whether one or multiple trusts are created by an instrument, the particular words of the instrument creating such trust or trusts must be examined to determine the creator's purpose.[\[FN5\]](#) In this regard, where a trustor used such plural expressions as "trust estates," "trusts," "said estates," "trust funds," "several trust estates," and "respective trust estates," the trustor indicates that he or she has in mind not one, but several trust estates.[\[FN6\]](#) Provisions in a trust that the trustee keep accounts with all the beneficiaries separately may also indicate an intention on the part of the grantor to create separate trusts.[\[FN7\]](#)

[\[FN1\]](#) [Grutka v. Clifford, 445 N.E.2d 1015 \(Ind. Ct. App. 3d Dist. 1983\).](#)

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[\[FN2\]](#) [Uniform Trust Code § 417.](#)

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[\[FN3\]](#) [U.S. Trust Co. of New York v. Commissioner of Internal Revenue, 296 U.S. 481, 56 S. Ct. 329, 80 L. Ed. 340 \(1936\).](#)

- As to whether a trustee is under a duty to set up a single trust or several trusts, see [§ 448](#).

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[\[FN4\] § 35](#).

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[\[FN5\] Union Trust Co. of Butler v. Commissioner of Internal Revenue, 84 F.2d 386 \(C.C.A. 3d Cir. 1936\)](#).

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[\[FN6\] Union Trust Co. of Butler v. Commissioner of Internal Revenue, 84 F.2d 386 \(C.C.A. 3d Cir. 1936\)](#).

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[\[FN7\] Union Trust Co. of Butler v. Commissioner of Internal Revenue, 84 F.2d 386 \(C.C.A. 3d Cir. 1936\)](#).

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2. Effect of Reservation or Exercise of Powers by Settlor or Others

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§ 24. Reservation of powers by settlor, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [15](#)

Model Codes and Restatements

[Restatement Third, Trusts § 25](#)

A trust is valid even if the settlor retains extensive control of the trust property.[\[FN1\]](#) Moreover, a revocable living trust is valid even though the settlor reserves an extensive power of control over the administration of the corpus.[\[FN2\]](#) The grantor of an inter vivos trust may retain some rights, such as the right to receive trust income or the right to revoke the trust.[\[FN3\]](#) However, where the powers retained by the settlor amount, in cumulative effect, to ownership of the trust estate, with such control over the administrative functions of the trustee as to make of the trustee simply the settlor's representative, no valid trust is established.[\[FN4\]](#) Similarly, while a trust instrument may purport to name a beneficiary, if the settlor reserves a substantial interest or unbridled control over management of the operations that is not for the benefit of the purported beneficiary, the trust may be found to be illusory.[\[FN5\]](#) In such circumstances, it has been stated that the settlor remains the owner of the property and there is no beneficiary.[\[FN6\]](#)

CUMULATIVE SUPPLEMENT

Cases:

A "grantor trust" is a trust over which the settlor retains substantial control over trust property or its income, so that the settlor is taxed on the trust's income. [Lovell v. Levin, 116 Ohio St. 3d 200, 2007-Ohio-6054, 877 N.E.2d 667 \(2007\)](#), petition for cert. filed, [76 U.S.L.W. 3499 \(U.S. Feb. 19, 2008\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Oken v. Hammer, 791 P.2d 9 \(Colo. Ct. App. 1990\).](#)

- As to the effect of the settlor's naming him or herself trustee or beneficiary of the trust, generally, see [§ 50](#).

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[\[FN2\] Oken v. Hammer, 791 P.2d 9 \(Colo. Ct. App. 1990\).](#)

-

[\[FN3\] Matter of Estate of Campbell, 171 Misc. 2d 892, 655 N.Y.S.2d 913 \(Sur. Ct. 1997\).](#)

- As to reservation of power of revocation, see [§ 25](#).

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[\[FN4\] Cleveland Trust Co. v. White, 134 Ohio St. 1, 11 Ohio Op. 377, 15 N.E.2d 627, 118 A.L.R. 475 \(1938\).](#)

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[\[FN5\] Roberts v. South Oklahoma City Hosp. Trust, 1986 OK 52, 742 P.2d 1077 \(Okla. 1986\).](#)

- A trust was declared void as illusory where the trust was revocable, the trustee's role was merely custodial and he could not transfer any of the trust property without the settlor's permission, the settlor retained powers so extensive he had the same rights in the trust assets as he had before the trust was created, and the trust, which constituted the better part of his estate, was created in favor of his daughters from a former marriage to the exclusion of his wife. [Seifert v. Southern Nat. Bank of South Carolina, 305 S.C. 353, 409 S.E.2d 337 \(1991\).](#)

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[\[FN6\] § 52.](#)

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§ 25. Reservation of power of revocation

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [15](#), [57](#), [58](#)

Forms

Revocable trust agreement—General form. [17B Am. Jur. Legal Forms 2d, Trusts § 251:48](#)

Revocable trust agreements. [17B Am. Jur. Legal Forms 2d, Trusts §§ 251:49 to 251:64.2](#)

Reservation of power of revocation. [17C Am. Jur. Legal Forms 2d, Trusts §§ 251:503 to 251:507](#)

Revocation—Forms. [17C Am. Jur. Legal Forms 2d, Trusts § 251:599 to 251:607](#)

Model Codes and Restatements

[Restatement Third, Trusts § 25](#)

A settlor has the power to reserve the right to revoke the trust in whole or in part.^[FN1] A trust which reserves to the creator, or to some other person, designated powers of revocation is not for that reason rendered invalid^[FN2] or incomplete.^[FN3] In creating a trust, the settlor can reserve to him or herself or grant to another the power to revoke the agreement as to property interests of the various beneficiaries at such times as, and on the conditions, the settlor directs.^[FN4]

Caution: Where the settlor makes no reservation in the language to amend or revoke a trust, he or she may not unilaterally revoke the trust.[FN5]

Observation: A right of revocation is not a property right and has none of the attributes of property.[FN6]

[FN1] [Aycock Pontiac, Inc. v. Aycock, 335 Ark. 456, 983 S.W.2d 915 \(1998\).](#)

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[FN2] [Rollins v. Alvarez, 792 So. 2d 695 \(Fla. Dist. Ct. App. 5th Dist. 2001\); In re Wendland-Reiner Trust, 267 Neb. 696, 677 N.W.2d 117 \(2004\).](#)

- The retention by the settlor of the power to revoke a trust is insufficient, standing alone, to render the trust illusory or testamentary. [Johnson v. Farmers & Merchants Bank, 180 W. Va. 702, 379 S.E.2d 752 \(1989\).](#)

- As to the powers of trustees as to the administration of trusts, generally, see [§§ 316 et seq.](#)

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[FN3] [In re Estate of Flake, 2003 UT 17, 71 P.3d 589 \(Utah 2003\).](#)

-

[FN4] [Procter v. Woodhouse, 127 Vt. 148, 241 A.2d 785 \(1968\).](#)

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[FN5] [In re Guardianship of Lombardo, 86 Ohio St. 3d 600, 1999-Ohio-132, 716 N.E.2d 189 \(1999\).](#)

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[FN6] [Bassin v. Enoch-Pearl Co., 140 N.J. Eq. 428, 54 A.2d 824 \(Ct. Err. & App. 1947\); Central Trust Co. v. Watt, 139 Ohio St. 50, 22 Ohio Op. 18, 38 N.E.2d 185 \(1941\).](#)

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§ 26. Reservation of power of modification

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West's Key Number Digest, [Trusts](#) [15](#)

Forms

Reservation by trustor of power to amend trust. [17C Am. Jur. Legal Forms 2d, Trusts §§ 251:508 to 251:511](#)

Reservation to beneficiary of power to amend trust. [17C Am. Jur. Legal Forms 2d, Trusts § 251:522](#)

Model Codes and Restatements

[Restatement Third, Trusts § 25](#)

Trusts in which powers of modification or amendment have been reserved in the trustor are valid,[\[FN1\]](#) the retention by the settlor of the power to modify a trust being insufficient, standing alone, to render the trust illusory or testamentary.[\[FN2\]](#) The validity of trusts reserving powers of modification or amendment in the trustor and trustees,[\[FN3\]](#) in the beneficiaries,[\[FN4\]](#) or in others,[\[FN5\]](#) has also been recognized.

[\[FN1\] Rollins v. Alvarez, 792 So. 2d 695 \(Fla. Dist. Ct. App. 5th Dist. 2001\); In re Estate of Flake, 2003 UT 17, 71 P.3d 589 \(Utah 2003\).](#)

-

[\[FN2\] Johnson v. Farmers & Merchants Bank, 180 W. Va. 702, 379 S.E.2d 752 \(1989\).](#)

-

[\[FN3\] Richardson v. Stephenson, 193 Wis. 89, 213 N.W. 673, 52 A.L.R. 681 \(1927\).](#)

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[\[FN4\] State St. Trust Co. v. Crocker, 306 Mass. 257, 28 N.E.2d 5, 128 A.L.R. 1166 \(1940\)](#) (beneficiaries surviving at the time of the amendment).

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[\[FN5\] State St. Trust Co. v. Crocker, 306 Mass. 257, 28 N.E.2d 5, 128 A.L.R. 1166 \(1940\).](#)

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76 Am. Jur. 2d Trusts § 27

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§ 27. Reservation of life interest or other powers; multiple powers reserved

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [15](#)

Forms

Answer—Defense—Trustor retained power to dispose of trust property. [Am. Jur. Pleading and Practice Forms, Trusts § 29](#)

Model Codes and Restatements

[Restatement Third, Trusts § 25](#)

A grantor's reservation of all income for life does not invalidate a trust where there has been an actual transfer of properties to the trustees.^[FN1] In this regard, reservation of a life interest to a trustor is not inconsistent with a sufficient present divestiture by the trustor of his or her title to property to create a trust,^[FN2] although it has been said that the fact that all benefit to another is postponed until death is of weight as to the testamentary character of a disposition of property,^[FN3] thus requiring compliance with the statute of wills.^[FN4] The settlor may reserve to him or herself a beneficial interest in the proceeds from the property for his or her life and the power to revoke the trust in whole or in part at any time.^[FN5]

Many extensive rights, other than the power to revoke and life benefits, may be reserved by the settlor without defeating a trust;^[FN6] and thus, a settlor may reserve many powers of control, even of disposition and appropriation, of the property, without invalidating the trust or rendering it testamentary.^[FN7] Furthermore, the mere fact that the settlor makes him or herself the sole trustee, besides reserving a life interest and power of revocation, does not necessarily render the trust invalid or testamentary in character.^[FN8] An inter vivos trust will may also not be rendered testamentary or invalid by the fact that, in addition to a life interest and power of revocation, the settlor reserves a substantially unlimited right to withdraw or appropriate principal, insofar as the right to withdraw principal has not been viewed by some courts as being much different from a right to revoke in whole or in part.^[FN9] Further, a trust is not rendered testamentary or invalid by reason of the fact

that in addition to a life interest and power to revoke, the settlor reserves the right to sell the property and appropriate the proceeds.[FN10]

[FN1] [Potter v. Winter](#), 280 S.W.2d 27 (Mo. 1955).

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[FN2] [Cramer v. Hartford-Connecticut Trust Co.](#), 110 Conn. 22, 147 A. 139, 73 A.L.R. 201 (1929); [In re Shapley's Deed of Trust](#), 353 Pa. 499, 46 A.2d 227, 164 A.L.R. 877 (1946).

- As to the requirement for a valid trust that there be a present and unequivocal disposition of the trust property, see [§ 45](#).

-

[FN3] [Bryan v. Bigelow](#), 77 Conn. 604, 60 A. 266 (1905).

- Where the settlor of a trust reserves to him or herself a beneficial life estate, a power to revoke or modify in whole or in part, and power to control the trustee as to the details of the administration of the trust, the scheme becomes testamentary as to dispositions intended to take effect after the settlor's death. [In re Shapley's Deed of Trust](#), 353 Pa. 499, 46 A.2d 227, 164 A.L.R. 877 (1946).

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[FN4] [§ 60](#).

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[FN5] [Sutter v. Sutter](#), 345 Ark. 12, 43 S.W.3d 736 (2001).

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[FN6] [Merchants Nat. Bank of Aurora v. Weinold](#), 12 Ill. App. 2d 209, 138 N.E.2d 840 (2d Dist. 1956).

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[FN7] [Coon v. Stanley](#), 230 Mo. App. 524, 94 S.W.2d 96 (1936).

- A valid trust may be created even if the donor retains a life interest and almost complete dominion and control over the property. [Adams v. Fleck](#), 171 Ohio St. 451, 14 Ohio Op. 2d 313, 172 N.E.2d 126 (1961).

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[FN8] [Nickson v. Filtrol Corp.](#), 262 A.2d 267 (Del. Ch. 1970) (applying California law); [Farkas v. Williams](#), 5 Ill. 2d 417, 125 N.E.2d 600 (1955).

- For a discussion of the trustor or settlor as trustee, generally, see [§ 208](#).

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[FN9] [United Bldg. & Loan Ass'n v. Garrett](#), 64 F. Supp. 460 (W.D. Ark. 1946); [Leahy v. Old Colony Trust Co.](#), 326 Mass. 49, 93 N.E.2d 238, 18 A.L.R.2d 1006 (1950).

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[FN10] [Lane v. Palmer First Nat. Bank & Trust Co. of Sarasota](#), 213 So. 2d 301 (Fla. Dist. Ct. App. 2d Dist. 1968).

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Forms

[17C Am. Jur. Legal Forms 2d, Trusts §§ 251:564 to 251:576](#)

[24 Am. Jur. Pleading and Practice Forms, Trusts §§ 8, 29](#)

Model Codes and Restatements

[Uniform Trust Code §§ 107, 108, 403](#)

[Restatement Third, Trusts §§ 4, 21](#)

[Restatement Second, Trusts §§ 267 to 282](#)

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§ 28. Generally

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West's Key Number Digest, [Trusts](#) [112](#)

Forms

Provisions concerning construction of trust instrument. [17C Am. Jur. Legal Forms 2d, Trusts §§ 251:564 to 251:576](#)

Complaint, petition, or declaration—By charitable corporation—Seeking declaratory judgment—Whether gift made by will was absolute or in trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 8](#)

In general, the rules for construction of written instruments apply to the interpretation of trusts,[\[FN1\]](#) so that the meaning of a trust instrument is determined by the same rules that govern the interpretation of contracts,[\[FN2\]](#) deeds,[\[FN3\]](#) or wills.[\[FN4\]](#)

In construing a trust instrument, the courts are required to subordinate form to substance.[\[FN5\]](#)

CUMULATIVE SUPPLEMENT

Cases:

A trust is construed according to the law in effect at the time it is created. [Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 \(2008\)](#).

[END OF SUPPLEMENT]

[\[FN1\] In re Estate of McInerny, 289 Ill. App. 3d 589, 224 Ill. Dec. 723, 682 N.E.2d 284 \(1st Dist. 1997\).](#)

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[\[FN2\] Woods v. Wells Fargo Bank Wyoming, 2004 WY 61, 90 P.3d 724 \(Wyo. 2004\).](#)

- As to the construction of contracts, generally, see [Am. Jur. 2d, Contracts §§ 328 et seq.](#)

-

[\[FN3\] In re Work Family Trust, 260 Iowa 898, 151 N.W.2d 490 \(1967\).](#)

- As to construction of deeds, see [Am. Jur. 2d, Deeds §§ 192 et seq.](#)

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[\[FN4\] Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434 \(Mo. Ct. App. W.D. 2004\); In re Trust of Hirt, 2003 PA Super 287 \(PASUPER, 2003\).](#)

- As to construction and interpretation of wills, see [Am. Jur. 2d, Wills §§ 993 et seq.](#)

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[\[FN5\] Eckels v. Davis, 111 S.W.3d 687 \(Tex. App. Fort Worth 2003\),](#) review denied, (Oct. 10, 2003).

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§ 29. Creator's intent

West's Key Number Digest

The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator,^[FN1] and a court's primary duty in construing a trust is to give effect to the trustor's intent.^[FN2] A fundamental rule when construing trusts is that the intention of the settlor as expressed in a trust instrument shall prevail unless inconsistent with some positive rule of law.^[FN3] It is said that the cardinal rule of law in a trust case is that the intent of the settlor controls the interpretation of the instrument,^[FN4] and when the purpose of a trust is ascertained, that purpose will take precedence over all other canons of construction.^[FN5]

In interpreting a trust, a court's initial focus must be on the terms of the trust.^[FN6] Accordingly, courts look first and foremost to the language in the trust, and interpret that language to effectuate the intent of the settlors.^[FN7]

It is the grantor's intention which exists at the time of the execution of the trust instrument which controls, not one thereafter formulated and not expressed in the instrument.^[FN8] However, the intention of the settlor at the time of creation of a trust may be shown by facts occurring after that time.^[FN9]

Practice Guide: The determination of the ultimate fact of the intent of a trust settlor rests with the court.^[FN10]

In construing a trust document, the fact that the form of assets may change over time does not defeat the settlor's intent of disposing of the assets.^[FN11]

When words of recommendation must be followed to carry out the clear intention of the settlor of trust, such words are regarded as words of command or direction.^[FN12]

CUMULATIVE SUPPLEMENT

Cases:

When a trust instrument must be construed by a court, the court attempts to discern the settlor's intent in light of the facts and circumstances existing at the time the instrument was executed. [Paloutzian v. Taggart, 931 N.E.2d 921 \(Ind. Ct. App. 2010\)](#).

If the settlor's intent is clear from the plain language of the trust instrument and not against public policy, courts must give effect to that intent. [Lewis v. Clifton, 837 N.E.2d 1016 \(Ind. Ct. App. 2005\)](#).

The intent of one who creates a trust is to be determined by the language he chooses to convey his thoughts, the purpose he seeks to accomplish, and the situation of the several parties to or benefited by the trust. [First Charter Bank v. American Children's Home, 692 S.E.2d 457 \(N.C. Ct. App. 2010\)](#).

When a court reviews a trust, its primary duty is to ascertain, within the bounds of the law, the intent of the settlor. [Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 \(2008\)](#).

When determining the settlor's intent, an inter vivos trust speaks from the date of its creation, not the date upon which the assets are distributed. [Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 \(2008\)](#).

Courts ascertain the intent of the grantor by looking at the language used in a trust agreement. [Riverside Healthcare Ass'n, Inc. v. Forbes, 281 Va. 522, 709 S.E.2d 156 \(2011\)](#).

[END OF SUPPLEMENT]

^[FN1] [In re Wendland-Reiner Trust, 267 Neb. 696, 677 N.W.2d 117 \(2004\)](#); [Norwest Bank Minnesota North, N.A. v. Beckler, 663 N.W.2d 571 \(Minn. Ct. App. 2003\)](#), subsequent determination, [2003 WL 23854013](#)

[\(Minn. Dist. Ct. 2003\)](#), aff'd, [2004 WL 2093550 \(Minn. Ct. App. 2004\)](#).

- A basic tenet in the construction of trusts is to ascertain the intent of the settlor and to give effect to this intent. [Arellano v. Bisson, 847 So. 2d 998 \(Fla. Dist. Ct. App. 3d Dist. 2003\)](#).

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[FN2] [Huscher v. Wells Fargo Bank, 121 Cal. App. 4th 956, 18 Cal. Rptr. 3d 27 \(2d Dist. 2004\)](#).

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[FN3] [In re Medeiros Testamentary Trust and Life Ins. Trust, 105 Haw. 284, 96 P.3d 1098 \(2004\)](#); [Godley v. Valley View State Bank, 277 Kan. 736, 89 P.3d 595 \(2004\)](#); [Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\)](#).

- Unless contrary to settled principles of law, the intentions of a trust's settlors must control in actions involving the trust. [Carl H. Christensen Family Trust v. Christensen, 133 Idaho 866, 993 P.2d 1197 \(1999\)](#).

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[FN4] [Chavin v. PNC Bank, 816 A.2d 781 \(Del. 2003\)](#).

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[FN5] [Wisener v. Burns, 345 Ark. 84, 44 S.W.3d 289 \(2001\)](#); [Mercantile Trust Co., N.A. v. Hardie, 39 S.W.3d 907 \(Mo. Ct. App. S.D. 2001\)](#).

- All other rules of construction must be subordinate to determining the settlor's intent, their value being as aids in ascertaining that intent as precisely as possible. [Chavin v. PNC Bank, 816 A.2d 781 \(Del. 2003\)](#).

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[FN6] [In re Estate of King, 769 A.2d 771 \(D.C. 2001\)](#).

- The threshold inquiry in any trust case is to examine the terms of the trust document. [In re Estate of Berthot, 312 Mont. 366 \(Mont., 2002\)](#).

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[FN7] [Wachovia Bank of Georgia v. Namik, 265 Ga. App. 80, 593 S.E.2d 35 \(2003\)](#), cert. granted, (May 24, 2004); [In re Trust by Dumaine, 146 N.H. 679, 781 A.2d 999 \(2001\)](#).

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[FN8] [In re Gallet, 196 Misc. 2d 303, 765 N.Y.S.2d 157 \(Sur. Ct. 2003\)](#).

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[FN9] [Wisener v. Burns, 345 Ark. 84, 44 S.W.3d 289 \(2001\)](#).

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[FN10] [In re Trust by Dumaine, 146 N.H. 679, 781 A.2d 999 \(2001\)](#).

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[FN11] [Eckels v. Davis, 111 S.W.3d 687 \(Tex. App. Fort Worth 2003\)](#), review denied, (Oct. 10, 2003).

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[FN12] [Carnahan v. Johnson, 127 Ohio App. 3d 195, 711 N.E.2d 1093 \(12th Dist. Madison County 1998\)](#).

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§ 30. Construction of unambiguous trusts, generally

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[Admissibility of subsequent declarations of Settlor to aid interpretation of trust, 51 A.L.R.2d 820](#)

Model Codes and Restatements

[Restatement Third, Trusts § 21](#)

If the text of a trust instrument is plain and unambiguous, the intent of the settlor can be ascertained from the language of the trust document itself.^[FN1] So, in general, if the language of a trust instrument is clear and can be carried out as written, there is no room for construction.^[FN2] Thus, when the language of a trust instrument is free from ambiguity, a resort to parol evidence is prohibited.^[FN3] The express language of a trust generally guides the court in determining the intentions of the settlor.^[FN4] Accordingly, the settlor's intention is ordinarily to be gleaned from the four corners of the trust instrument itself,^[FN5] considering the language used and giving meaning to all provisions, whenever possible,^[FN6] and collateral evidence will be considered only when there is uncertainty about the testator's intentions from looking at the language of the instrument.^[FN7]

Practice Guide: If the court can give a certain or definite legal meaning or interpretation to the words of a trust instrument, it is unambiguous and the court may construe it as a matter of law.^[FN8] Accordingly, the interpretation of an unambiguous trust is a question of law for the court to decide.^[FN9]

CUMULATIVE SUPPLEMENT

Cases:

When the instrument is unambiguous, the settlor's intent can be determined from the trust's express language. [Pack v. Osborn](#), 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 (2008).

Courts construe trusts to determine the intent of the maker. [Keisling v. Landrum](#), 218 S.W.3d 737 (Tex. App. Fort Worth 2007), reh'g overruled, (Feb. 8, 2007) and review denied, (June 1, 2007).

[END OF SUPPLEMENT]

[FN1] [Godley v. Valley View State Bank](#), 277 Kan. 736, 89 P.3d 595 (2004); [Matter of Estate of Schmidt](#), 1997 ND 244, 572 N.W.2d 430 (N.D. 1997).

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[FN2] [Matter of Ralph E. Breeding Trust](#), 21 Kan. App. 2d 351, 899 P.2d 511 (1995).

- Where the language of a trust is unambiguous and expresses the intention of the maker, it is unnecessary to construe the instrument because it speaks for itself. [Eckels v. Davis](#), 111 S.W.3d 687 (Tex. App. Fort Worth 2003), review denied, (Oct. 10, 2003).

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[FN3] [In re Estate of Klarner](#), 98 P.3d 892 (Colo. Ct. App. 2003), cert. granted, 2004 WL 2211536 (Colo. 2004) and cert. granted, (Oct. 4, 2004); [In re Reid](#), 2002 OK CIV APP 49, 46 P.3d 188 (Div. 1 2002).

- In interpreting a trust, the court could not rely on an affidavit of the trust drafter, where the trust language was unambiguous. [L'Argent v. Barnett Bank, N.A.](#), 730 So. 2d 395 (Fla. Dist. Ct. App. 2d Dist. 1999).

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[FN4] [In re Trust of Brooke](#), 82 Ohio St. 3d 553, 1998-Ohio-185, 697 N.E.2d 191 (1998).

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[FN5] [Thinn v. Parks](#), 79 Ark. App. 20, 83 S.W.3d 430 (2002); [In re Estate of Somers](#), 277 Kan. 761, 89 P.3d 898 (2004); [Eckels v. Davis](#), 111 S.W.3d 687 (Tex. App. Fort Worth 2003), review denied, (Oct. 10, 2003).

- The nature and extent of the rights retained by the trustor are to be measured by the four corners of the instrument. [Crook v. Contreras](#), 95 Cal. App. 4th 1194, 116 Cal. Rptr. 2d 319 (6th Dist. 2002), review denied, (May 22, 2002).

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[FN6] [Thinn v. Parks](#), 79 Ark. App. 20, 83 S.W.3d 430 (2002).

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[FN7] [Thinn v. Parks](#), 79 Ark. App. 20, 83 S.W.3d 430 (2002).

- Long-settled rules of construction preclude an attempt to define a settlor's intention by looking first to extrinsic evidence. [Mercury Bay Boating Club Inc. v. San Diego Yacht Club](#), 76 N.Y.2d 256, 557 N.Y.S.2d 851, 557 N.E.2d 87 (1990).

- As to admissibility of evidence regarding trust matters, generally, see [§§ 635 et seq.](#)

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[FN8] [Wright v. Greenberg](#), 2 S.W.3d 666 (Tex. App. Houston 14th Dist. 1999).

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[FN9] [Mucci v. Stobbs](#), 281 Ill. App. 3d 22, 216 Ill. Dec. 882, 666 N.E.2d 50 (5th Dist. 1996); [In re Valma M. Hanson Revocable Trust No. 103-83-1](#), 779 N.E.2d 1218 (Ind. Ct. App. 2002), transfer denied, [792 N.E.2d 46 \(Ind. 2003\)](#).

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§ 31. Construction of ambiguous trusts, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [112](#), [119](#)

A.L.R. Library

[Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 A.L.R.2d 820](#)

Forms

Answer—Defense—Trustor retained power to dispose of trust property. [24 Am. Jur. Pleading and Practice Forms, Trusts § 29](#)

Model Codes and Restatements

[Restatement Third, Trusts § 21](#)

Where the express language of the trust does not reveal the grantor's intent, the court must ascertain that intent through the use of various presumptions, rules of construction, and a review of applicable statutes and case law.^[FN1] However, technical rules or canons of construction of a trust should be resorted to only if the language of the trust is ambiguous or conflicting, or the settlor's intent is for any reason uncertain.^[FN2] Rules

of construction for interpreting a trust are applied when the language of the trust is not clear, but if the language clearly expresses the settlor's intent, the rules do not apply.[FN3] The courts turn to parol or extrinsic evidence only if the trust instrument is ambiguous[FN4] and the settlor's intent cannot be ascertained.[FN5] When parol or extrinsic evidence is admitted to aid in construing a trust instrument, it may be used only to explain, not contradict the instrument.[FN6] It should be noted that a trust document is not ambiguous merely because the parties disagree over its meaning.[FN7]

When a trust beneficiary is described in terms applicable to more than one person or thing, parol evidence is admissible to prove which of the persons or things so described was intended.[FN8]

Definitions: Ambiguity in a written trust instrument exists when, in light of the circumstances surrounding the execution of the instrument, the written language is fairly susceptible of two or more constructions,[FN9] or where there is uncertainty as to the meaning of a term.[FN10] While a patent ambiguity is apparent on the face of the trust, a latent ambiguity is not evident until there is an attempt to apply the trust's provisions to the existing facts.[FN11]

Practice Guide: If trust language is not clear, construction of an ambiguous trust instrument is a question of law to be decided by the court.[FN12] However, it has been said that once a written instrument is determined to be ambiguous, the meaning of its terms generally is an issue of fact.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

When donative intent cannot be determined from within the four corners of a will or a trust, resort to extrinsic evidence may be proper. [Lazarus v. Sherman, 10 A.3d 456 \(R.I. 2011\)](#).

[END OF SUPPLEMENT]

[FN1] [Fifth Third Bank v. Harris, 2003 -Ohio- 7361 \(Ohio. Prob., 2003\)](#).

- The court may be aided in ascertaining the intent of the settlor of a trust by the use of presumptions and canons of construction. [In re Asserson, 184 Misc. 2d 480, 707 N.Y.S.2d 821 \(Sur. Ct. 2000\)](#).

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[FN2] [In re Trust of Hirt, 2003 PA Super 287 \(PASUPER, 2003\)](#).

- Ordinarily where a trust is silent on a particular question, in the sense that it contains no express answer to the question, then a construction of the trust is necessary. [Steburg v. Swanson, 198 Ill. App. 3d 636, 144 Ill. Dec. 848, 556 N.E.2d 315 \(3d Dist. 1990\)](#).

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[FN3] [In re Wendland-Reiner Trust, 267 Neb. 696, 677 N.W.2d 117 \(2004\)](#).

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[FN4] [Wachovia Bank of Georgia v. Namik, 265 Ga. App. 80, 593 S.E.2d 35 \(2003\)](#), cert. granted, (May 24, 2004); [Brown v. Ryan, 338 Ill. App. 3d 864, 273 Ill. Dec. 307, 788 N.E.2d 1183 \(1st Dist. 2003\)](#), appeal denied, [205 Ill. 2d 577, 281 Ill. Dec. 76, 803 N.E.2d 480 \(2003\)](#); [In re Trust by Dumaine, 146 N.H. 679, 781 A.2d 999 \(2001\)](#).

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[FN5] [Espevik v. Kaye, 277 Ill. App. 3d 689, 214 Ill. Dec. 360, 660 N.E.2d 1309 \(2d Dist. 1996\)](#).

- Where a trust instrument contains some expression of the trustor's intention, but as a result of a drafting error that expression is made ambiguous, the trial court may admit and consider extrinsic evidence, including the

drafter's testimony, to resolve the ambiguity and give effect to the trustor's intention as expressed in the trust instrument. [Ike v. Doolittle, 61 Cal. App. 4th 51, 70 Cal. Rptr. 2d 887 \(4th Dist. 1998\)](#).

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[FN6] [Bonin v. Alerion Bank, 840 So. 2d 15 \(La. Ct. App. 4th Cir. 2003\)](#), writ denied, [845 So. 2d 1092 \(La. 2003\)](#).

- Oral testimony is admissible only for the purpose of showing the meaning of the words used in a trust instrument when they are ambiguous, and not to show what the settlor intended, as distinguished from the settlor's expressed words. [Aycock Pontiac, Inc. v. Aycock, 335 Ark. 456, 983 S.W.2d 915 \(1998\)](#).

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[FN7] [Blue Ridge Bank and Trust Co. v. American Ass'n of Orthodontists Foundation, 106 S.W.3d 543 \(Mo. Ct. App. W.D. 2003\)](#).

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[FN8] [All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina, 358 S.C. 209, 595 S.E.2d 253 \(Ct. App. 2004\)](#).

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[FN9] [Ike v. Doolittle, 61 Cal. App. 4th 51, 70 Cal. Rptr. 2d 887 \(4th Dist. 1998\)](#); [Corr v. Corr, 2001 OK CIV APP 31, 21 P.3d 642 \(Div. 2 2000\)](#).

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[FN10] [Matter of Trusts Created by Ferguson, 929 P.2d 33 \(Colo. Ct. App. 1996\)](#).

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[FN11] [Carl H. Christensen Family Trust v. Christensen, 133 Idaho 866, 993 P.2d 1197 \(1999\)](#).

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[FN12] [Theodore Short Trust v. Fuller, 7 S.W.3d 482 \(Mo. Ct. App. S.D. 1999\)](#); [In re Estate of Stevenson, 2000 SD 24, 605 N.W.2d 818 \(S.D. 2000\)](#).

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[FN13] [Matter of Trusts Created by Ferguson, 929 P.2d 33 \(Colo. Ct. App. 1996\)](#).

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§ 32. Rule of liberal construction

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [112](#)

The law favors the liberal construction and interpretation of trusts.^[FN1] Trusts should be construed in favor of upholding the validity of the instruments creating them^[FN2] and to uphold the settlor's intent.^[FN3] In this regard, charitable trusts are regarded by the law with special favor.^[FN4]

Speaking of trusts generally, however, liberal construction does not mean that an instrument or a sentence or word contained in it will be given a forced or unnatural construction in order to sustain it as a trust.^[FN5] When interpreting a trust, a court must give effect to the intent of the settlor or testator.^[FN6] So, in construing a trust, the court is limited to establishing what the creator did say rather than what the creator meant to say,^[FN7] or, stated another way, a court must not read into a trust instrument provisions that do not expressly or impliedly appear from the plain meaning of its words.^[FN8] Accordingly, when interpreting a trust instrument, a court cannot rewrite the trust instrument, and the expressed intent must control,^[FN9] as to substitute the court's discretion for that of the trustee would undermine the intent of the settlor of the trust.^[FN10]

^[FN1] [Succession of Voorhies v. Voorhies, 853 So. 2d 655 \(La. Ct. App. 3d Cir. 2003\).](#)

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^[FN2] [Meyer v. Northern Indiana Bank and Trust Co., 490 N.E.2d 400 \(Ind. Ct. App. 3d Dist. 1986\).](#)

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^[FN3] [Blieden v. Greenspan, 742 S.W.2d 93 \(Tex. App. Beaumont 1987\)](#), judgment rev'd on other grounds, [751 S.W.2d 858 \(Tex. 1988\)](#).

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^[FN4] [Am. Jur. 2d, Charities § 118.](#)

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^[FN5] Re [Estate of Fair, 132 Cal 563, 60 P 442](#), different results reached on reh on other grounds [132 Cal 523, 64 P 1000](#); [Gillespie v. Smith, 29 Ill. 473, 1863 WL 3004 \(1863\)](#); [Cottman v. Grace, 112 N.Y. 299, 19 N.E. 839 \(1889\)](#).

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^[FN6] [In re Estate of Klarner, 98 P.3d 892 \(Colo. Ct. App. 2003\)](#), cert. granted, [2004 WL 2211536 \(Colo. 2004\)](#) and cert. granted, (Oct. 4, 2004); [In re Valma M. Hanson Revocable Trust No. 103-83-1, 779 N.E.2d 1218 \(Ind. Ct. App. 2002\)](#), transfer denied, [792 N.E.2d 46 \(Ind. 2003\)](#).

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^[FN7] [Whittaker v. Stables, 339 Ill. App. 3d 943, 274 Ill. Dec. 496, 791 N.E.2d 588 \(2d Dist. 2003\).](#)

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^[FN8] [Morrison v. Doyle, 570 N.W.2d 692 \(Minn. Ct. App. 1997\)](#), rev'd on other grounds, [582 N.W.2d 237 \(Minn. 1998\)](#).

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[FN9] [Spencer v. Spencer, 71 Conn.App. 475 \(Conn.App.,2002\)](#).

- A court may not rewrite a trust or will to provide by conjecture what a settlor might have intended if the settlor knew how events would occur. [In re Trust Created Under Agreement with Lane, 660 N.W.2d 421 \(Minn. Ct. App. 2003\)](#).

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[FN10] [In re Charnock, 158 N.C. App. 35, 579 S.E.2d 887 \(2003\)](#), cert. denied, [357 N.C. 506, 588 S.E.2d 473 \(2003\)](#) and decision aff'd, [358 N.C. 523, 597 S.E.2d 706 \(2004\)](#).

- Courts cannot rewrite a settlor's trust instrument or distort his or her language or the language of a statute in order to attain what is believed to be beneficial or wise, or even what it is believed that the settlor would or should have provided if he or she possessed a knowledge of all presently existing circumstances. [In re Trust of Hirt, 2003 PA Super 287, 832 A.2d 438 \(PASUPER,2003\)](#).

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§ 33. Rule that terms be given ordinary meanings

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [112](#)

Forms

Pronouns. [17C Am. Jur. Legal Forms 2d, Trusts § 251:569](#)

Trust provisions defining particular terms. [17C Am. Jur. Legal Forms 2d, Trusts §§ 251:570 to 251:576](#)

The meaning accorded to the language used in a trust is to be its usual and ordinary meaning.[FN1] In construing the intent of a trust grantor, the grantor is presumed to know and intend the legal effect of the language used, and the court must give the words used their usual, ordinary, and natural meaning, unless a contrary meaning appears in the instrument.[FN2] Stated another way, the words used in a trust instrument are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be ascertained.[FN3]

Words with a well-known technical meaning should be construed according to their technical meaning when determining the intent of an inter vivos trust grantor, unless a contrary meaning appears in the granting instrument.[FN4] On the other hand, when a term in a trust instrument is undefined, the courts usually look to the clear ordinary meaning which a non-law-trained person would attach to the term.[FN5]

When words of general meaning in a trust are preceded by and connected with words of narrower impact, the interpretation of the words of general meaning is confined to the species of things more specifically described.[FN6]

It has been held that words in a private instrument such as a trust are ordinarily, in the absence of a showing of contrary intent, given the same effect as by statute or case law.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

The words used in a trust are presumed to be used according to their common, ordinary meaning. [Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 \(2008\)](#).

Words of a trust should be given their primary, ordinary, and common meaning unless it plainly appears that they were used in some other sense. [Steinhof v. Murphy, 991 A.2d 1028 \(R.I. 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Brown v. Ryan, 338 Ill. App. 3d 864, 273 Ill. Dec. 307, 788 N.E.2d 1183 \(1st Dist. 2003\)](#), appeal denied, [205 Ill. 2d 577, 281 Ill. Dec. 76, 803 N.E.2d 480 \(2003\)](#); [In re Trust Known as Spencer Memorial Fund, 641 N.W.2d 771 \(Iowa 2002\)](#).

[FN2] [A.G. Edwards Trust Co. v. Miller, 59 S.W.3d 550 \(Mo. Ct. App. E.D. 2001\)](#).

[FN3] [Cate-Schweyen v. Cate, 303 Mont. 232, 15 P.3d 467 \(2000\)](#).

[FN4] [In re Nelson, 926 S.W.2d 707 \(Mo. Ct. App. S.D. 1996\)](#).

[FN5] [Eckes v. Richland County Social Services, 2001 ND 16, 621 N.W.2d 851 \(N.D. 2001\)](#).

[FN6] [In re Barnes Foundation, 453 Pa. Super. 243, 683 A.2d 894 \(1996\)](#).

[FN7] [Weir v. Ferreira, 59 Cal. App. 4th 1509, 70 Cal. Rptr. 2d 33 \(5th Dist. 1997\)](#).

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§ 34. Construing document as whole

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [112](#)

When construing a trust, a court must consider the trust instrument as a whole,[\[FN1\]](#) considering all parts in light of the entire instrument.[\[FN2\]](#) All provisions of a trust instrument must be construed together, with every word given effect, if possible.[\[FN3\]](#) A trust document must not be examined piecemeal, and the intention of the settlor must be determined without taking individual clauses out of context and considering them without reference to the whole instrument.[\[FN4\]](#) Clearly then, the intention of the settlor is not to be gleaned from any particular word or provision but from a sympathetic reading of the trust instrument as a whole,[\[FN5\]](#) and no single clause or word is to be given undue preference.[\[FN6\]](#) Further, a court should construe the trust instrument to give effect to all provisions in it, so that no provision is rendered meaningless, and all terms in a trust instrument must be harmonized to properly give effect to all parts of the trust instrument.[\[FN7\]](#) In examining the entire instrument, the court should give each word and phrase a meaning that, wherever possible, agrees with or accommodates the other.[\[FN8\]](#)

Under the doctrine of *expressio unius est exclusio alterius*, meaning the expression of one thing implies the exclusion of all not expressed, a court attaches significance to the differences in the provisions of a trust instrument.[\[FN9\]](#)

[\[FN1\]](#) [Godley v. Valley View State Bank, 277 Kan. 736, 89 P.3d 595 \(2004\)](#); [Duemeland v. Norback, 2003 ND 1, 655 N.W.2d 76 \(N.D.,2003\)](#).

- The intent of the settlor in a trust case must be determined by considering the language of the trust instrument, read as an entirety, in light of the circumstances surrounding its creation. [Chavin v. PNC Bank, 816 A.2d 781](#)

[\(Del. 2003\).](#)

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[\[FN2\] Carl H. Christensen Family Trust v. Christensen, 133 Idaho 866, 993 P.2d 1197 \(1999\).](#)

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[\[FN3\] Tremaine v. Tremaine, 235 Conn. 45, 663 A.2d 387 \(1995\)](#) (stating Ohio law).

- All of the language of a settlor must be given effect if at all possible. [Boston Safe Deposit and Trust Co. v. Goodwin, 59 Mass.App.Ct. 270 \(Mass.App.,2003\).](#)

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[\[FN4\] Indiana Dept. of State Revenue, Inheritance Tax Div. v. Estate of Nichols, 659 N.E.2d 694 \(Ind. Tax Ct. 1995\).](#)

- When interpreting trust language, the court does not read words in isolation and out of context. [Hillman v. Hillman, 433 Mass. 590, 744 N.E.2d 1078 \(2001\).](#)

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[\[FN5\] In re Asserson, 184 Misc. 2d 480, 707 N.Y.S.2d 821 \(Sur. Ct. 2000\).](#)

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[\[FN6\] A.G. Edwards Trust Co. v. Miller, 59 S.W.3d 550 \(Mo. Ct. App. E.D. 2001\).](#)

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[\[FN7\] Eckels v. Davis, 111 S.W.3d 687 \(Tex. App. Fort Worth 2003\)](#), review denied, (Oct. 10, 2003).

- Where provisions in a trust instrument appear to conflict, they should be read in such a fashion as to give effect to both and/or fulfill the intent of the settlor. [In re Trust of Hirt, 2003 PA Super 287, 832 A.2d 438 \(2003\)](#), appeal denied, [2004 WL 2237217 \(Pa. 2004\).](#)

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[\[FN8\] Wachovia Bank of North Carolina, N.A. v. Willis, 118 N.C. App. 144, 454 S.E.2d 293 \(1995\).](#)

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[\[FN9\] In re Ruth Easton Fund, 680 N.W.2d 541 \(Minn. Ct. App. 2004\).](#)

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§ 35. Consideration of circumstances surrounding execution of instrument

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [112](#), [118](#)

Model Codes and Restatements

[Restatement Third, Trusts § 4](#)

Where the settlor's intention in creating a trust cannot be divined clearly from the face of the document, the words used must be construed against the background of the surrounding circumstances at the time the trust instrument was executed.^[FN1] Where construction is necessary, a court must put itself in the situation of the settlor when the settlor made the trust instrument and, from a consideration of the language used in the entire instrument, determine the intention of the settlor.^[FN2] Accordingly, in interpreting a document such as a trust, it is proper for the court to consider the circumstances under which the document was made so that the court may be placed in the position of the trustor whose language it is interpreting, in order to determine whether the terms of the document are clear and definite or ambiguous in some respect.^[FN3] To ascertain the settlor's intent the court may look to the circumstances known to the settlor on execution of the trust.^[FN4] The expressed intent of the settlor is to be determined from a reading of the trust instrument as a whole in the light of the circumstances surrounding the settlor when the instrument was executed, including the condition of his or her estate, the settlor's relations to his or her family and beneficiaries, and their situation and condition.^[FN5]

Observation: Each case involving the construction of trust instruments of necessity is determined upon its peculiar facts and the particular instrument to be construed, all to the ultimate and primary end of effectuating the settlor's intention.^[FN6]

When there are two or more instruments relating to a trust, the instruments should be construed together to effectuate the settlor's intent.^[FN7] Accordingly, instruments, including trusts, executed at the same time, by the same party, for the same purpose, and in the course of the same transaction are one instrument and will be read and construed together as if one in form.^[FN8]

^[FN1] [In re Kline Revocable Trust U/A Dated September 9, 1971, 196 Misc. 2d 66, 763 N.Y.S.2d 721 \(Sur. Ct. 2003\).](#)

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^[FN2] [Godley v. Valley View State Bank, 277 Kan. 736, 89 P.3d 595 \(2004\).](#)

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^[FN3] [In re Estate of Powell, 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501 \(3d Dist. 2000\).](#)

- The court of appeals may always receive and consider evidence concerning the circumstances existing when the trust instrument was written that will enable the court to place itself in the settlor's position at the time and thus to determine the sense in which the words were used by the settlor. [Eckels v. Davis, 111 S.W.3d 687 \(Tex.](#)

[App. Fort Worth 2003](#)), review denied, (Oct. 10, 2003).

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[FN4] [Dassori v. Patterson, 440 Mass. 1039, 802 N.E.2d 553 \(2004\)](#).

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[FN5] [Spencer v. Spencer, 71 Conn. App. 475, 802 A.2d 215 \(2002\)](#).

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[FN6] [Theodore Short Trust v. Fuller, 7 S.W.3d 482 \(Mo. Ct. App. S.D. 1999\)](#).

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[FN7] [In re Wendland-Reiner Trust, 267 Neb. 696, 677 N.W.2d 117 \(2004\)](#); [Davenport v. Central Carolina Bank, 161 N.C. App. 666, 589 S.E.2d 367 \(2003\)](#).

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[FN8] [In re Estate of West, 252 Neb. 166, 560 N.W.2d 810 \(1997\)](#).

- Where the will and trust agreement form a part of the same estate plan, they must be construed together. [In re Estate of Blodgett, 2002 WL 1012855 \(Mo. Ct. App. E.D. 2002\)](#), reh'g and/or transfer denied, (July 29, 2002) and transferred to Mo. S. Ct., [95 S.W.3d 79 \(Mo. 2003\)](#).

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§ 36. Applicable law and effect thereof, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [2](#), [113](#)

Forms

Governing law. [17C Am. Jur. Legal Forms 2d, Trusts § 251:565](#)

In construing an inter vivos trust, the provisions of the trust are to be governed by the law existing at the time of its creation,[\[FN1\]](#) not the law and public policy in effect at the time the construed words will take effect,[\[FN2\]](#) absent a contrary intention within the instrument itself.[\[FN3\]](#)

Practice Guide: In determining what law was in force at the time a legal instrument such as a trust was executed, a court assumes that testators know and understand the meaning and effect of the terms used in a trust as defined under state law.[\[FN4\]](#)

There is a presumption that, if the beneficiaries in a class are to be identified over a period of time, the grantor intends that changes in the law subsequent to the execution of the trust be grafted onto the provisions in the trust.[\[FN5\]](#)

[\[FN1\] Ehrenclou v. MacDonald, 117 Cal. App. 4th 364, 12 Cal. Rptr. 3d 411 \(4th Dist. 2004\)](#), review denied, (July 21, 2004); [In re Klosinski, 192 Misc. 2d 714, 746 N.Y.S.2d 350 \(Sur. Ct. 2002\)](#).

- The language of an inter vivos trust should be construed according to the law in effect at the time the trust is executed. [In re Medeiros Testamentary Trust and Life Ins. Trust, 105 Haw. 284, 96 P.3d 1098 \(2004\)](#).

- Trust that specifically stated that it was intended to be "given effect under and in accordance with the present existing laws and statutes" of settlor's resident state had to be interpreted using law in effect in settlor's state at time trust was executed. [Matter of Duke, 305 N.J. Super. 408, 702 A.2d 1008 \(Ch. Div. 1995\)](#), aff'd, [305 N.J. Super. 407, 702 A.2d 1007 \(App. Div. 1997\)](#).

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[\[FN2\] Ehrenclou v. MacDonald, 117 Cal. App. 4th 364, 12 Cal. Rptr. 3d 411 \(4th Dist. 2004\)](#), review denied, (July 21, 2004).

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[\[FN3\] Society Nat. Bank v. Jacobson, 54 Ohio St. 3d 15, 560 N.E.2d 217 \(1990\)](#).

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[\[FN4\] Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434 \(Mo. Ct. App. W.D. 2004\)](#).

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[\[FN5\] McGehee v. Edwards, 268 Va. 15, 597 S.E.2d 99 \(2004\)](#).

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Trusts

Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

II. Express, Technical, or Direct Trusts; in General
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§ 37. Applicable law and effect thereof, generally—Conflict of laws

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The Uniform Trust Code provides that the meaning and effect of the terms of a trust are determined by the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.^[FN1] Accordingly, the Uniform Trust Code allows a settlor to select the law that will govern the meaning and effect of the terms of the trust.^[FN2] The jurisdiction selected need not have any other connection to the trust.^[FN3] The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime.^[FN4]

The Uniform Trust Code also provides that in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue determines the meaning and effect of the terms of a trust.^[FN5] Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries.^[FN6] Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.^[FN7]

Generally, at common law, a trust was created if it complied with the law of the state having the most significant contacts to the trust.^[FN8] The Uniform Trust Code extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts.^[FN9] Pursuant to the Uniform Trust Code,^[FN10] a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.^[FN11]

The Uniform Trust Code also prescribes rules relating to a trust's principal place of administration.^[FN12] Locating a trust's principal place of administration will ordinarily determine which court has primary, if not exclusive, jurisdiction over the trust.^[FN13]

Although a trust may provide that a particular state's law must control its interpretation, the status of a person who may be a beneficiary of a trust is determined by the laws of that person's domicile.^[FN14]

^[FN1] [Uniform Trust Code § 107\(1\)](#).

[\[FN2\] Uniform Trust Code § 107](#), Comment.

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[\[FN3\] Uniform Trust Code § 107](#), Comment.

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[\[FN4\] Uniform Trust Code § 107](#), Comment.

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[\[FN5\] Uniform Trust Code § 107\(2\)](#).

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[\[FN6\] Uniform Trust Code § 107](#), Comment.

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[\[FN7\] Uniform Trust Code § 107](#), Comment.

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[\[FN8\] Uniform Trust Code § 403](#), Comment.

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[\[FN9\] Uniform Trust Code § 403](#), Comment.

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[\[FN10\] Uniform Trust Code § 403](#).

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[\[FN11\] Uniform Trust Code § 403](#), Comment.

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[\[FN12\] Uniform Trust Code § 108](#).

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[\[FN13\] Uniform Trust Code § 108](#), Comment.

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[\[FN14\] In re Trusteeship of Trust Created Under Trust Agreement Dated Dec. 31, 1974, 674 N.W.2d 222 \(Minn. Ct. App. 2004\)](#), review denied, (Apr. 20, 2004) and cert. denied, [125 S. Ct. 345 \(U.S. 2004\)](#) and cert. denied, [125 S. Ct. 312 \(U.S. 2004\)](#).

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§ 38. Applicable law and effect thereof, generally—Conflict of laws regarding real property
[Restatement Second, Conflict of Law §§ 276 to 282](#)

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 2, [113](#)

Under the restatement pertaining to conflict of laws, an instrument creating a trust of an interest in land is ordinarily construed in accordance with the rules of construction of the state designated for this purpose in the instrument,[\[FN1\]](#) and in the absence of such a designation, the instrument is construed in accordance with the rules of construction that would be applied by the courts of the situs of the property.[\[FN2\]](#)

Comment: This rule[\[FN3\]](#) is concerned with questions of construction as distinguished from questions of legal effect and questions of interpretation.[\[FN4\]](#)

Where questions of the validity and effect of a trust of an interest of real property are concerned, the law of the situs of the property governs.[\[FN5\]](#) Where applicable, this principle applies to inter vivos trusts of land.[\[FN6\]](#) The restatement also provides that the validity of a trust of an interest in land is determined by the law that would be applied by the courts of the situs,[\[FN7\]](#) and this rule is applicable to trusts of interests in land whether created by will or inter vivos.[\[FN8\]](#)

In some jurisdictions the rule appears to be that the law of the state having the most significant contacts is to be applied in construing a trust of land, situs of the property being one of the factors examined in determining which jurisdiction had such contacts.[\[FN9\]](#) Other factors which have been considered in determining the state with the most significant contacts for this purpose have included the location of the trustees, as well as the location, as specified by the trust instrument, of successor trustees to be appointed, upon failure of the existing trustees to appoint a successor.[\[FN10\]](#)

[\[FN1\]](#) [Restatement Second, Conflict of Laws § 277\(1\)](#).

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[\[FN2\]](#) [Restatement Second, Conflict of Laws § 277\(2\)](#).

- As to jurisdiction and venue of courts over trust matters, generally, see [§§ 535 et seq.](#)
- As to conflict of laws regarding charitable trusts, see [Am. Jur. 2d, Charities §§ 123 et seq.](#)

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[\[FN3\]](#) [Restatement Second, Conflict of Laws § 277](#).

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[\[FN4\]](#) [Restatement Second, Conflict of Laws § 277](#), Comment a.

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[\[FN5\]](#) [Minella v. Phillips, 245 F.2d 687, 65 A.L.R.2d 994 \(5th Cir. 1957\)](#).

- Under Florida's conflict of law rule, providing that the laws of the situs of the real property govern, Bahamian law, not Florida law, applied in an action brought by the siblings of the decedent against the widow of the

decedent to impose a constructive trust for the siblings' benefit upon real property located in the Commonwealth of the Bahamas. [Beale v. Beale, 807 So. 2d 797 \(Fla. Dist. Ct. App. 1st Dist. 2002\)](#).

- As to what law governs charitable trusts, see [Am. Jur. 2d, Charities §§ 123 et seq.](#)

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[FN6] [Spindle v. Shreve, 111 U.S. 542, 4 S. Ct. 522, 28 L. Ed. 512 \(1884\)](#).

- Inasmuch as the matter before the bankruptcy court involved a trust administered under Iowa law, involving real property situated within Iowa, it appeared that Illinois courts would themselves apply Iowa law in their construction of the trust; accordingly, Iowa law would be applied to determine the debtor's beneficial interest in the testamentary trust involved. [In re Arney, 35 B.R. 668 \(Bankr. N.D. Ill. 1983\)](#).

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[FN7] [Restatement Second, Conflict of Laws § 278](#).

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[FN8] [Restatement Second, Conflict of Laws § 278](#), Comment a.

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[FN9] [Ford v. Newman, 64 Ill. App. 3d 528, 21 Ill. Dec. 283, 381 N.E.2d 392 \(4th Dist. 1978\)](#), judgment aff'd, [77 Ill. 2d 335, 33 Ill. Dec. 150, 396 N.E.2d 539 \(1979\)](#).

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[FN10] [Ford v. Newman, 64 Ill. App. 3d 528, 21 Ill. Dec. 283, 381 N.E.2d 392 \(4th Dist. 1978\)](#), judgment aff'd, [77 Ill. 2d 335, 33 Ill. Dec. 150, 396 N.E.2d 539 \(1979\)](#).

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§ 39. Applicable law and effect thereof, generally—Conflict of laws regarding personal property

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[Restatement Second, Conflict of Laws §§ 267 to 275](#)

Under the restatement pertaining to conflict of laws, a will or other instrument creating a trust of interests in movables is construed in accordance with the rules of construction of the state designated for this purpose in the instrument.[\[FN1\]](#) In the absence of such a designation, the instrument is construed: (1) as to matters pertaining to administration, in accordance with the rules of construction of the state whose local law governs the administration of the trust; and (2) as to matters not pertaining to administration, in accordance with the rules of construction of the state which the testator or settlor would probably have desired to be applicable.[\[FN2\]](#)

As to interests in personal property held in a living trust, a settlor may designate the local law to govern the validity of the trust, unless application of the designated law would be contrary to the public policy of the state of the testator's domicile at death.[\[FN3\]](#) However, the state whose law is designated to apply to a trust must have a substantial relation to the trust.[\[FN4\]](#) A state has a substantial relation to a trust, for choice of law purposes, when it is the state, if any, which the settlor designated as that in which the trust is to be administered, or that of the place of business or domicile of the trustee at the time of the creation of the trust, or that of the location of the trust assets at that time, or that of the domicile of the settlor, at that time, or that of the domicile of beneficiaries; there may be other contacts which will likewise suffice.[\[FN5\]](#) A similar view has been adopted by the restatement pertaining to conflicts of law with regard to trusts of movables created inter vivos, the stated rule being that an inter vivos trust of interests in movables is valid if valid under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that its application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship, or if there is no such effective designation, under the local law of the state with which, as to the matter at issue, the trust has its most significant relationship.[\[FN6\]](#) In the absence of an expression in the trust instrument of the settlor's intent as to what forum's law is applicable, courts have determined which forum's law is applicable based on which state has the most significant contacts with the trust.[\[FN7\]](#)

Where a trust of interests in movables is created by will, the restatement rule is that the validity of such trust is determined as to matters that affect the validity of the will as a testamentary disposition, by the law that would be applied by the courts of the state of the testator's domicile at death.[\[FN8\]](#) The validity of such trust is determined as to matters that affect only the validity of the trust provisions, except when the provision is invalid under the strong public policy of the state of the testator's domicile at death, by the local law of the state designated by the testator to govern the validity of the trust, provided that such state has a substantial relation to the trust.[\[FN9\]](#) If there is no such effective designation, the local law of the state of the testator's domicile at death governs the validity of the trust; however, the local law of the state where the trust is to be administered will be applied if application of this law is necessary to sustain the validity of the trust.[\[FN10\]](#) Further, the rule has been stated that a trust of movables created by will will be upheld if it is valid under either the local law of the state of the testator's domicile at death or the local law of the state where the trust is to be administered, provided that this would not be contrary to the strong public policy of the state of the testator's domicile at death.[\[FN11\]](#)

In some jurisdictions, the rule is that where the jurisdiction in which a testamentary trust of personalty is to be executed is different from that of the domicile of the testator, the validity of such trust is governed by the law of the testator's domicile,[\[FN12\]](#) at least in the absence of an indication that the testator intended some other law to be applied.[\[FN13\]](#) Similarly, in the case of trusts inter vivos in personal property, the view has sometimes been followed that the validity of such trusts is governed by the law of the settlor's domicile.[\[FN14\]](#) In other

cases, it has been denied that this factor controls.[\[FN15\]](#) Still other decisions indicate that the law of the domicile at the time of death does not control the trust.[\[FN16\]](#) Other decisions indicate that the law of the situs of the property controls.[\[FN17\]](#)

[\[FN1\] Restatement Second, Conflict of Laws, § 268\(1\).](#)

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[\[FN2\] Restatement Second, Conflict of Laws, § 268\(2\).](#)

- Laws of Illinois, as state in which trust was subject to administration, controlled construction of trust instrument executed in Nebraska, although grantor referenced courts of Nebraska in provisions regarding appointment and removal of trustees and court notification upon death of grantor, where grantor did not expressly designate that trust be subject and construed according to the laws of Nebraska, and, to extent Nebraska law could apply to construction of trust, it did not conflict with Illinois law. [Brown v. Ryan, 338 Ill. App. 3d 864, 273 Ill. Dec. 307, 788 N.E.2d 1183 \(1st Dist. 2003\)](#), appeal denied, [205 Ill. 2d 577, 281 Ill. Dec. 76, 803 N.E.2d 480 \(2003\)](#).

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[\[FN3\] Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 \(2003\).](#)

- The law of Kentucky where the settlor/trustee resided when he executed the trust, rather than Tennessee where he resided when he later executed a will, governed the effect of the will on the trust agreement, as the choice of law provision in the trust required the application of Kentucky law to the validity, interpretation, and administration of the agreement, and applying Kentucky law would not violate Tennessee's public policy. [Wright v. Rains, 106 S.W.3d 678 \(Tenn. Ct. App. 2003\)](#), appeal denied, (May 27, 2003).

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[\[FN4\] Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 \(2003\).](#)

- Wisconsin law, rather than Florida law, governed the issue of whether the settlor complied with the formalities necessary for the creation of a trust, although the settlor was a Florida resident at the time he created the trust, where the trust specified that it should be construed according to Wisconsin law, designated Wisconsin as the location of the trust situs, named Wisconsin residents as trustee and primary beneficiary, and identified Wisconsin as the place of its drafting and execution; the trust at issue had its most significant relationship with Wisconsin, not Florida. [Glaeske v. Shaw, 261 Wis. 2d 549, 2003 WI App 71, 661 N.W.2d 420 \(Ct. App. 2003\)](#), review dismissed, 260 Wis. 2d 756, 2003 WI 32, 661 N.W.2d 103 (2003).

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[\[FN5\] Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 \(2003\).](#)

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[\[FN6\] Restatement Second, Conflict of Laws, § 270.](#)

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[\[FN7\] Matter of Moore, 129 Misc. 2d 639, 493 N.Y.S.2d 924 \(Sup 1985\).](#)

- As to what law governs powers of appointment relating to personalty, generally, see [Am. Jur. 2d, Powers of Appointment and Alienation §§ 21 et seq.](#)

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[\[FN8\] Restatement Second, Conflict of Laws § 269.](#)

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[\[FN9\] Restatement Second, Conflict of Laws § 269.](#)

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[\[FN10\] Restatement Second, Conflict of Laws § 269.](#)

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[\[FN11\] Estate of Klinkner, 85 Cal. App. 3d 942, 151 Cal. Rptr. 20 \(2d Dist. 1978\).](#)

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[\[FN12\] Morgan Guaranty Trust Co. of New York v. Huntington, 149 Conn. 331, 179 A.2d 604 \(1962\); Boston Safe Deposit & Trust Co. v. Fleming, 361 Mass. 172, 279 N.E.2d 342 \(1972\).](#)

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[\[FN13\] Boston Safe Deposit & Trust Co. v. Fleming, 361 Mass. 172, 279 N.E.2d 342 \(1972\).](#)

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[\[FN14\] Jaiser v. Milligan, 120 F. Supp. 599 \(D. Neb. 1954\).](#)

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[\[FN15\] National Shawmut Bank of Boston v. Cumming, 325 Mass. 457, 91 N.E.2d 337 \(1950\).](#)

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[\[FN16\] National Shawmut Bank of Boston v. Cumming, 325 Mass. 457, 91 N.E.2d 337 \(1950\).](#)

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[\[FN17\] Jaiser v. Milligan, 120 F. Supp. 599 \(D. Neb. 1954\); National Shawmut Bank of Boston v. Cumming, 325 Mass. 457, 91 N.E.2d 337 \(1950\).](#)

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§ 40. Generally; purpose

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Forms

Checklist—Drafting complaint in action to determine existence of or to enforce express trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 7](#)

Although the language used in stating the requisite elements of a trust vary from state to state, it can generally be said that those requisite elements are:

- (1) a declaration creating the trust,[\[FN1\]](#) or the manifestation of an intention of the settlor to create a trust;[\[FN2\]](#)
- (2) a trust res;[\[FN3\]](#)
- (3) a trustee[\[FN4\]](#) with active duties;[\[FN5\]](#)
- (4) designated beneficiaries;[\[FN6\]](#)
- (5) a trust purpose;[\[FN7\]](#) and
- (6) if required, delivery of the trust property to the trustee.[\[FN8\]](#)

In a more simple statement, it has been said that the three circumstances that must occur to constitute a valid trust are sufficient words to raise a trust, a definite subject or trust res, and an ascertained object.[\[FN9\]](#)

If all the requirements to create a trust have not been completed, the trust is not established.[\[FN10\]](#) Likewise, if any one of the necessary elements is not described with certainty, no express trust is created.[\[FN11\]](#) Stated another way, any attempt to create an express trust that omits one or more of the formal requirements automatically fails.[\[FN12\]](#) This rule, however, is not a technical trap,[\[FN13\]](#) and trusts are to be construed in a manner so as to implement the intent of the settlor and the purposes of the trust.[\[FN14\]](#)

[\[FN1\]](#) [Eychaner v. Gross, 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\); Williams v. Wilson, 341 S.C. 136, 533 S.E.2d 593 \(Ct. App. 2000\)](#), aff'd in part, rev'd in part on other grounds, [349 S.C. 336, 563 S.E.2d 320 \(2002\)](#).

- As to express trusts, see [§ 17](#).

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[\[FN2\]](#) [California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church, 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 \(5th Dist. 2004\)](#), review filed, (Sept. 22, 2004); [Hayes v. Clark, 242 Ga. App. 411, 530 S.E.2d 38 \(2000\)](#); [Eychaner v. Gross, 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\)](#).

- As to intent and manifestation of an intent to create a trust, generally, see [§ 57](#), [58](#).

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[FN3] [California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church](#), 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 (5th Dist. 2004), review filed, (Sept. 22, 2004); [Eychaner v. Gross](#), 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 (2002); [In re Gillette](#), 195 Misc. 2d 89, 756 N.Y.S.2d 835 (Sur. Ct. 2003).

- As to trust property, see § § [41](#), [42](#).

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[FN4] [Hayes v. Clark](#), 242 Ga. App. 411, 530 S.E.2d 38 (2000); [Eychaner v. Gross](#), 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 (2002); [In re Gillette](#), 195 Misc. 2d 89, 756 N.Y.S.2d 835 (Sur. Ct. 2003).

- As to trustee, see § [51](#).

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[FN5] [Hayes v. Clark](#), 242 Ga. App. 411, 530 S.E.2d 38 (2000).

- A trust is created only if the trustee has duties to perform. [Uniform Trust Code § 401\(a\)\(4\)](#).

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[FN6] [California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church](#), 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 (5th Dist. 2004), review filed, (Sept. 22, 2004); [Eychaner v. Gross](#), 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 (2002); [In re Gillette](#), 195 Misc. 2d 89, 756 N.Y.S.2d 835 (Sur. Ct. 2003).

- As to beneficiaries, see §§ [52](#) to [56](#).

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[FN7] [California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church](#), 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 (5th Dist. 2004), review filed, (Sept. 22, 2004); [Eychaner v. Gross](#), 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 (2002).

- As to trust purposes, generally, see § [19](#).

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[FN8] [Eychaner v. Gross](#), 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 (2002); [In re Gillette](#), 195 Misc. 2d 89, 756 N.Y.S.2d 835 (Sur. Ct. 2003); [In re Estate of Richardson](#), 2002 OK CIV APP 69, 50 P.3d 584 (Div. 1 2002), cert. denied, (June 18, 2002).

- As to delivery of the trust property, see § § [45](#), [46](#).

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[FN9] [In re Davis](#), 13 B.R. 456 (Bankr. S.D. Ohio 1980); [In re Craft's Estate](#), 320 So. 2d 874 (Fla. Dist. Ct. App. 4th Dist. 1975); [Gold v. Price](#), 24 N.C. App. 660, 211 S.E.2d 803, 76 A.L.R.3d 1250 (1975).

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[FN10] [In re Gillette](#), 195 Misc. 2d 89, 756 N.Y.S.2d 835 (Sur. Ct. 2003).

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[FN11] [Eychaner v. Gross](#), 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 (2002).

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[FN12] [Meyer v. Northern Indiana Bank and Trust Co.](#), 490 N.E.2d 400 (Ind. Ct. App. 3d Dist. 1986).

- In order to create a valid trust, it is necessary that the formalities which vest title in the trustee be observed. [Carpenter v. U.S.](#), 4 Cl. Ct. 705 (1984).

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[FN13] [Meyer v. Northern Indiana Bank and Trust Co.](#), 490 N.E.2d 400 (Ind. Ct. App. 3d Dist. 1986).

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[FN14] § § [28](#), [29](#).

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§ 41. Subject matter of trust; trust "res"

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[Comment Note—Creation of express trust in property to be acquired in future, 3 A.L.R.3d 1416](#)

Forms

Inter vivos trust agreement—Securities as principal. [Am. Jur. Legal Forms 2d, Trusts § 251:43](#)

Answer—Defense—Property subject of trust not in existence at time of creation of trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 28](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 40 to 42](#)

Under common-law principles, a trust is created in property, and a trust therefore does not come into existence until the settlor identifies an ascertainable interest in property to be the trust res.[FN1] In other words, a basic requirement for the creation of a valid trust is the existence, at the time of the creation of the trust,[FN2] of trust property[FN3] or subject matter[FN4] —that is, the existence of a trust "res." [FN5]

A trust res can consist of any type of transferable property, including realty, personalty, and future, undivided or contingent interests, including an expectancy based upon an existing contract.[FN6] Similarly, intangible interests can be held in trust.[FN7] It follows that property which the settlor cannot transfer cannot be held in trust, and where a settlor has no legal authority to convey legal title to property, putting said property into an irrevocable trust is ultra vires and the ostensible trust created thereby is consequently void ab initio.[FN8] Further, a trust res cannot be a mere expectancy without right or interest,[FN9] nor can it be a mere power of appointment[FN10] or a mere interest in the performance of a contract,[FN11] although such an interest is in the nature of a property right.[FN12] A person cannot be held as the property of a trust.[FN13]

Observation: The property interest necessary to fund and create a trust need not be substantial.[FN14]

[FN1] [Begier v. I.R.S., 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 \(1990\).](#)

- As to trust property, generally, see [§§ 250 et seq.](#)

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[FN2] [DiLucia v. Clemens, 373 Pa. Super. 466, 541 A.2d 765 \(1988\).](#)

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[FN3] [California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church, 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 \(5th Dist. 2004\)](#), review filed, (Sept. 22, 2004); [Hayes v. Clark, 242 Ga. App. 411, 530 S.E.2d 38 \(2000\).](#)

- A trust cannot be created unless there is trust property. [Coffey v. Coffey, 286 N.J. Super. 42, 668 A.2d 76 \(App. Div. 1995\).](#)

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[FN4] [In re Holmes, 117 B.R. 848 \(Bankr. D. Md. 1990\).](#)

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[FN5] [Williams v. Wilson, 341 S.C. 136, 533 S.E.2d 593 \(Ct. App. 2000\)](#), aff'd in part, rev'd in part on other grounds, [349 S.C. 336, 563 S.E.2d 320 \(2002\).](#)

- As to trust property and estates and interests therein, generally, see [§§ 250 et seq.](#)

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[FN6] [Hoyle v. Dickinson, 155 Ariz. 277, 746 P.2d 18 \(Ct. App. Div. 2 1987\).](#)

- As to the effect of future benefits on the validity of a trust, see [§ 45.](#)

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[FN7] [Eychaner v. Gross, 321 Ill. App. 3d 759, 254 Ill. Dec. 557, 747 N.E.2d 969, 154 Ed. Law Rep. 601 \(1st Dist. 2001\)](#), judgment rev'd on other grounds, [202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\).](#)

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[FN8] [Jewish Community Ass'n of Casper v. Community First Nat. Bank, 6 P.3d 1264 \(Wyo. 2000\).](#)

- A personal injury cause of action is not transferable and cannot, thereby, be made the subject of a trust. [Vittands v. Sudduth, 49 Mass. App. Ct. 401, 730 N.E.2d 325 \(2000\).](#)

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[\[FN9\] Fisher v. Donovan, 57 Neb. 361, 77 N.W. 778 \(1899\).](#)

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[\[FN10\] Fisher v. Donovan, 57 Neb. 361, 77 N.W. 778 \(1899\).](#)

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[\[FN11\] In re Nires, 290 N.Y. 78, 48 N.E.2d 268, 145 A.L.R. 1368 \(1943\).](#)

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[\[FN12\] Latterman v. Guardian Life Ins. Co. of America, 280 N.Y. 102, 19 N.E.2d 978, 127 A.L.R. 450 \(1939\).](#)

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[\[FN13\] Vittands v. Sudduth, 49 Mass. App. Ct. 401, 730 N.E.2d 325 \(2000\).](#)

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[\[FN14\] Uniform Trust Code § 401](#), Comment.

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II. Express, Technical, or Direct Trusts; in General

C. Requisite Elements of Trust

1. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 42. Subject matter of trust; trust "res"—Requirement of definiteness or ascertainability

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [1](#)

Forms

Trust estate—Form drafting guide. [17C Am. Jur. Legal Forms 2d, Trusts § 251:241](#)

Description of trust estate. [17C Am. Jur. Legal Forms 2d, Trusts §§ 251:242 to 251:246](#)

A valid trust requires an ascertainable,[\[FN1\]](#) or clearly defined[\[FN2\]](#) trust res, or, stated another way, definite trust property.[\[FN3\]](#) Accordingly, in order to create a trust, the words or acts of the person who allegedly created the trust must indicate, with a reasonable certainty, the subject of the trust.[\[FN4\]](#) The trust res must be so sufficiently described or capable of identification that its title can pass to the trustee upon actual delivery of the trust corpus, or if the character of the property composing the corpus is such, there must be a legal assignment of the corpus to the trustee sufficient to convey present title.[\[FN5\]](#) If the corpus is retained by the grantor, as trustee, that retention must be under circumstances which unequivocally disclose an intent to hold it for the use of another.[\[FN6\]](#)

A testamentary trust will fail where the testator does not provide specific funds to maintain the trust.[\[FN7\]](#) Furthermore, where the subject matter of an alleged trust is not an earmarked or segregated fund, but merely a sum of money to be realized out of the testator's estate after his or her death, the subject matter is not sufficiently definite to fulfill the requirement that the res of the trust must be specifically designated.[\[FN8\]](#)

[\[FN1\]](#) [Begier v. I.R.S., 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 \(1990\).](#)

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[\[FN2\]](#) [In re Stefanoff, 97 B.R. 607 \(Bankr. N.D. Okla. 1989\).](#)

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[\[FN3\]](#) [Eychaner v. Gross, 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\).](#)

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[\[FN4\]](#) [Matter of Estate of Binder, 386 N.W.2d 910 \(N.D. 1986\).](#)

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[\[FN5\]](#) [Newton v. Wimsatt, 791 S.W.2d 823 \(Mo. Ct. App. S.D. 1990\).](#)

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[\[FN6\]](#) [Newton v. Wimsatt, 791 S.W.2d 823 \(Mo. Ct. App. S.D. 1990\).](#)

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[\[FN7\]](#) [Gold v. Price, 24 N.C. App. 660, 211 S.E.2d 803, 76 A.L.R.3d 1250 \(1975\).](#)

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[\[FN8\]](#) [Dawson v. Dawson's Adm'x, 272 S.W.2d 666 \(Ky. 1954\).](#)

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II. Express, Technical, or Direct Trusts; in General
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§ 43. Separation of legal title and equitable ownership

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [31](#)

A.L.R. Library

[Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621](#)

Model Codes and Restatements

[Restatement Third, Trusts § 42](#)

In order to create and sustain a trust, there must be a separation between the legal and equitable interests of the trust,[\[FN1\]](#) as there can exist no trust where the legal title and beneficial interest are both in the same person.[\[FN2\]](#) This is because where one person has both the legal title to the property and the entire beneficial interest, the person holds it free of trust.[\[FN3\]](#) In such case, there is no separation of the legal and beneficial interests, and there are no duties to assume or to provide.[\[FN4\]](#)

Caution: No trust is created when property is transferred to an individual for life with the remainder to another because the life tenant takes title outright, the only restriction being the duration of the estate.[\[FN5\]](#)

Where the settlor is the trustee, the equitable interest must be in another.[\[FN6\]](#) The suspension of beneficial ownership, since it involves cessation of the separation of equitable and legal interests, is repugnant to the requirement of a trust.[\[FN7\]](#) Where the holder of the legal and equitable interests of trust property are the same person, the result is a merger of the legal and equitable title, defeating the trust.[\[FN8\]](#) However, if possible, the existence of a legal estate separate from equitable interest will be implied,[\[FN9\]](#) and, in this regard, a court of equity may appoint a trustee where necessary to prevent failure of the trust.[\[FN10\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Purported trust to which taxpayer transferred his business lacked economic substance, and therefore would be disregarded for federal income tax purposes; taxpayer's relationship to property transferred did not differ in any material respect after transfer, trust did not have independent trustee who exercised meaningful control over its operations due to taxpayer's failure to observe formalities with respect to resignation and appointment of trustees and taxpayer's unfettered control of trust's assets and operations, trust was mere intermediary for passing economic benefit to taxpayer, and taxpayer was not in practice bound by any restrictions imposed by trust or law of trusts. [Edwards v. C.I.R., T.C. Memo. 2005-52, T.C.M. \(RIA\) P 2005-052 \(2005\)](#)

[END OF SUPPLEMENT]

[FN1] [Contella v. Contella, 559 So. 2d 1217 \(Fla. Dist. Ct. App. 5th Dist. 1990\)](#); [Brooks v. Ramsey County Community Human Services Dept., 405 N.W.2d 432 \(Minn. Ct. App. 1987\)](#).

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[FN2] [Austin v. City of Alexandria, 265 Va. 89, 574 S.E.2d 289 \(2003\)](#).

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[FN3] [Moody v. Pitts, 708 S.W.2d 930 \(Tex. App. Corpus Christi 1986\)](#).

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[FN4] [Moody v. Pitts, 708 S.W.2d 930 \(Tex. App. Corpus Christi 1986\)](#).

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[FN5] [Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 \(Iowa 2001\)](#).

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[FN6] [Bath Sav. Inst. v. Hathorn, 88 Me. 122, 33 A. 836 \(1895\)](#); [Milholland v. Whalen, 89 Md. 212, 43 A. 43 \(1899\)](#); [Welch v. Henshaw, 170 Mass. 409, 49 N.E. 659 \(1898\)](#).

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[FN7] [Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 \(C.C.A. 8th Cir. 1937\)](#).

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[FN8] [§ 90](#).

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[FN9] [Stanley v. Colt, 72 U.S. 119, 18 L. Ed. 502 \(1866\)](#).

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[FN10] [§ 217](#).

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§ 44. Consideration

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [13](#)

Forms

Answer—Defense—Absence of consideration. [24 Am. Jur. Pleading and Practice Forms, Trusts § 26](#)

Model Codes and Restatements

[Restatement Third, Trusts § 15](#)

Consideration is generally not necessary to the creation of a trust,[\[FN1\]](#) whether the trust is executed by a declaration[\[FN2\]](#) or by a transfer.[\[FN3\]](#) However, an executory trust requires a consideration to support it.[\[FN4\]](#)

Consideration to support enforcement in equity of an executory trust may consist in that which constitutes consideration for a contract generally.[\[FN5\]](#)

[\[FN1\] Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 \(1956\); Flynn v. Palmer, 270 Wis. 43, 70 N.W.2d 231, 51 A.L.R.2d 1000 \(1955\).](#)

- [An owner may create a trust of his or her property for the benefit of a third person without consideration. Matter of Estate of Binder, 386 N.W.2d 910 \(N.D. 1986\).](#)

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[\[FN2\] § 18.](#)

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[\[FN3\] § 18.](#)

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[FN4] [Mattsen v. U.S. Ensilage Harvester Co., 171 Minn. 237, 213 N.W. 893 \(1927\).](#)

- As to the distinction between "executed" and "executory" trusts, generally, see [§ 5](#).

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[FN5] [Ransdel v. Moore, 153 Ind. 393, 53 N.E. 767 \(1899\).](#)

- As to what constitutes sufficient consideration for contracts, generally, see [Am. Jur. 2d, Contracts §§ 114 et seq.](#)

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§ 45. Disposition of trust property; present and unequivocal disposition

West's Key Number Digest

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Another essential element for the creation of a valid express trust is that there be a definite,[FN1] present, and complete disposition of the trust property, even if enjoyment by the beneficiary is to take place in the future.[FN2] A trust res consisting of a present interest in property must be transferred to and vested in the trustee in order to create a trust.[FN3] That is, while a settlor may make him or herself a trustee, and thus retain the legal title in whole or in part,[FN4] or may make him or herself a beneficiary of the trust, and thus retain equitable ownership in whole or in part,[FN5] a trust is not perfectly created unless the legal interest is actually vested in the trustee.[FN6]

The required present and unequivocal disposition of the property in trust must constitute an actual carrying out and execution of the settlor's intent to create a trust,[FN7] and it does not suffice to create a present trust that the settlor merely intends or manifests an intent to create a trust in the future,[FN8] or conditionally

directs[[FN9](#)] or, without valuable consideration, promises[[FN10](#)] a disposition of property in trust in the future. Even so, a trust may be presently created—with full validity and effect—notwithstanding a futurity of benefits under the terms of the trust.[[FN11](#)]

[[FN1](#)] [Pitt v. U.S., 319 F.2d 564 \(8th Cir. 1963\)](#).

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[[FN2](#)] [Pitt v. U.S., 319 F.2d 564 \(8th Cir. 1963\)](#); [Matter of Estate of Stokes, 1987 OK 119, 747 P.2d 300 \(Okla. 1987\)](#).

- An express trust requires the transfer of lawful and definite property made by a person capable of making the transfer. [Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\)](#).

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[[FN3](#)] [Crews v. Overbey, 645 S.W.2d 388 \(Tenn. 1983\)](#).

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[[FN4](#)] [§ 208](#).

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[[FN5](#)] [§ 240](#).

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[[FN6](#)] [Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co., 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219 \(1920\)](#).

- As to the separation of legal and equitable ownership as a prerequisite to the creation of a trust, generally, see [§ 43](#).

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[[FN7](#)] [Mutual Ben. Life Ins. Co. v. Ellis, 125 F.2d 127, 138 A.L.R. 1478 \(C.C.A. 2d Cir. 1942\)](#); [Cook v. First Nat. Bank, 1930 OK 290, 145 Okla. 5, 291 P. 43 \(1930\)](#).

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[[FN8](#)] [New England Trust Co. v. Sanger, 337 Mass. 342, 149 N.E.2d 598 \(1958\)](#); [Edgar v. Fitzpatrick, 377 S.W.2d 314 \(Mo. 1964\)](#).

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[[FN9](#)] [In re Tinsley's Will, 187 Iowa 23, 174 N.W. 4, 11 A.L.R. 826 \(1919\)](#).

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[[FN10](#)] [§ 44](#).

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[[FN11](#)] [Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 \(C.C.A. 8th Cir. 1937\)](#); [Ketcham v. Miller, 37 S.W.2d 635 \(Mo. 1931\)](#).

- As to the effect of various perpetuities rules upon the law of trusts, generally, see Am. Jur. 2d, Perpetuities and Restraints on Alienation.

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§ 46. Disposition of trust property; present and unequivocal disposition—Transfer of title and possession of property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [31](#)

Forms

Transfers of Personal Property—Forms. [17A Am. Jur. Legal Forms 2d, Trusts §§ 251:18 to 251:32](#)

Conveyances of Real Property—Forms. [17A Am. Jur. Legal Forms 2d, Trusts §§ 251:33 to 251:38](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 10, 16](#)

Transfer of title to a trustee for the benefit of the trust of an identifiable res is the event that brings a trust into existence.[\[FN1\]](#) and before property can be said to be held in trust by a trustee, the trustee must have legal title.[\[FN2\]](#) Thus, in order to create a valid trust, there must be an actual conveyance or transfer of property,[\[FN3\]](#) as the trust must be funded by an assignment of property from the settlor to the trustee.[\[FN4\]](#) Accordingly, in order to create an enforceable trust, it is necessary that the donor or creator should part with his or her interest in the property to the trustee by an actual conveyance or transfer, and, where the creator has legal title, that such title should pass to the trustee.[\[FN5\]](#) With respect to an inter vivos trust, a settlor must convey the legal title to the trust res to the trustee so that the trustee may hold the property for the benefit of the cestui que trust.[\[FN6\]](#) However, an owner may create a trust of his or her property for the benefit of a third person without a change of possession of such property.[\[FN7\]](#) That is, it is not required that the physical control of real

property be relinquished in order to transfer an interest in it in trust to a third party,[FN8] and the actual transfer or delivery of the trust res is not a requisite to a declaration of trust.[FN9]

Observation: Once the settlor has created a trust he or she is no longer the owner of the trust property and has only such ability to deal with it as is expressly reserved to him or her in the trust instrument.[FN10]

No trust can arise while the grantor retains both the full equitable interest and legal title in the trust property, and therefore, when real property is placed into a trust, a change in the title of that property must be effected.[FN11] For a transfer of real property to a trust to be real, valid, and nonillusory, the party transferring the property must effectuate a completed inter vivos transfer by a conveyance that both divests him or her of all ownership in the property, and also, at the time of the conveyance, is made with the proper donative intent.[FN12]

If the owner of property declares him or herself trustee of the property, a trust may be created without a transfer of title to the property.[FN13] Accordingly, where the settlor and the trustee are the same person, no transfer of legal title is required, since the trustee already holds legal title.[FN14] However, the important question in such cases is whether an equitable interest has been divested to the beneficiary by the settlor.[FN15] If such a transfer of an equitable interest is made, the separation of equitable and legal interests required to support a trust is present, and the settlor-trustee holds legal title to the trust property subject to the trust.[FN16] Clearly the settlor-trustee's words or acts must denote that he or she is merely the legal title holder of the trust res and the equitable interest must lie with another.[FN17]

A declaration by the trustors that they hold property in trust for another is sufficient to transfer real property to a trust, and there is no requirement that the settlor/trustee execute a separate writing conveying the property to the trust.[FN18]

Observation: Where the present transfer of legal title to property is required, it is because common sense and logic dictate that the requirements of a valid trust cannot be fulfilled without it. Before property can be said to be held in trust by a trustee, the trustee must have legal title. Without legal title the trustee holds nothing in trust. Furthermore, the backbone of trust law is the concept of separate ownership of equitable and legal interests. Ordinarily, transfer of legal title to the trust property to a trustee accomplishes the separation of legal and equitable interests.[FN19]

A trust agreement may precede the transfer of title, as well as occur at the time of the transfer.[FN20]

CUMULATIVE SUPPLEMENT

Cases:

For a trust to exist under Ohio law, legal title of res must immediately pass to trustee. [In re Kuchta, 434 B.R. 837 \(Bankr. N.D. Ohio 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Brevard County v. Ramsey, 658 So. 2d 1190 \(Fla. Dist. Ct. App. 5th Dist. 1995\)](#).

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[FN2] [Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\)](#).

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[FN3] [Brevard County v. Ramsey, 658 So. 2d 1190 \(Fla. Dist. Ct. App. 5th Dist. 1995\)](#); [McCormick v. Brevig, 1999 MT 86, 294 Mont. 144, 980 P.2d 603 \(1999\)](#).

- When the settlor does not declare him or herself trustee of the res, a gift in trust fails absent delivery. [Papale-](#)

[Keefe v. Altomare, 38 Mass. App. Ct. 308, 647 N.E.2d 722 \(1995\).](#)

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[\[FN4\] Hieber v. Uptown Nat. Bank of Chicago, 199 Ill. App. 3d 542, 145 Ill. Dec. 638, 557 N.E.2d 408, 13 U.C.C. Rep. Serv. 2d 438 \(1st Dist. 1990\).](#)

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[\[FN5\] Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 \(2003\)](#) (stating North Carolina law).

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[\[FN6\] Hatch v. Lallo, 2002-Ohio-1376, 2002 WL 462862](#) (Ohio Ct. App. 9th Dist. Summit County 2002).

- A trustor's holographic instrument creating an inter vivos trust was insufficient to serve as an instrument of conveyance, for purposes of the requirement that there must be a transfer of property in order to create an inter vivos trust. [Cate-Schweyen v. Cate, 303 Mont. 232, 15 P.3d 467 \(2000\).](#)

- A trust instrument and the attached documents unambiguously effected the settlor's intent to transfer titled assets to an inter vivos trust, and thus, the trust included such titled assets, even if the settlor did not formally transfer title of those assets to the trust, considering that one attached document stated that the settlor "does hereby sell, transfer, and convey unto" the settlor as trustee the titled assets, indicating a present intent to do so, and another attached document listed particularly the titled assets and identified the date of the trust's execution as the date of transfer of those assets to the trust. [Samuel v. King, 335 Or. 443, 186 Or. App. 684, 64 P.3d 1206 \(2003\), review denied, 335 Or. 443, 70 P.3d 893 \(2003\).](#)

- An assignment of assets executed by a settlor in conjunction with an inter vivos trust was sufficient to transfer furniture and appliances to the trust, although she retained possession of the items, as possession was not inconsistent with an intent to pass legal title to the trustees. [In re Estate of Washburn, 158 N.C. App. 457, 581 S.E.2d 148, 50 U.C.C. Rep. Serv. 2d 1190 \(2003\).](#)

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[\[FN7\] Matter of Estate of Binder, 386 N.W.2d 910 \(N.D. 1986\).](#)

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[\[FN8\] Golleher v. Horton, 148 Ariz. 537, 715 P.2d 1225 \(Ct. App. Div. 1 1985\).](#)

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[\[FN9\] § 24.](#)

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[\[FN10\] Banks v. Means, 2002 UT 65, 52 P.3d 1190 \(Utah 2002\).](#)

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[\[FN11\] Austin v. City of Alexandria, 265 Va. 89, 574 S.E.2d 289 \(2003\).](#)

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[\[FN12\] Pezza v. Pezza, 690 A.2d 345 \(R.I. 1997\).](#)

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[\[FN13\] Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 \(2001\); Brevard County v. Ramsey, 658 So. 2d 1190 \(Fla. Dist. Ct. App. 5th Dist. 1995\); Samuel v. King, 335 Or. 443, 186 Or. App. 684, 64 P.3d 1206 \(2003\), review denied, 335 Or. 443, 70 P.3d 893 \(2003\).](#)

- A valid trust may be created by a declaration of the settlor/owner that real estate or life insurance is held in trust, even without a transfer of the deed or reference to whether the named beneficiary of the policy has changed. [Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\).](#)

- When trust property includes stock, the settlor may make him or herself trustee of the shares for another by oral or written declaration of the trust, without delivery of any document to the beneficiary or change on the corporation stock records. [Hatch v. Lallo, 2002-Ohio-1376, 2002 WL 462862](#) (Ohio Ct. App. 9th Dist. Summit County 2002).

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[\[FN14\] Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\); Hatch v. Lallo, 2002-Ohio-1376, 2002 WL 462862 \(Ohio Ct. App. 9th Dist. Summit County 2002\).](#)

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[\[FN15\] Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\).](#)

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[\[FN16\] Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\).](#)

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[\[FN17\] Hatch v. Lallo, 2002-Ohio-1376, 2002 WL 462862 \(Ohio Ct. App. 9th Dist. Summit County 2002\).](#)

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[\[FN18\] In re Estate of Powell, 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501 \(3d Dist. 2000\).](#)

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[\[FN19\] Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\).](#)

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[\[FN20\] Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 \(2003\)](#) (stating North Carolina law).

- The property interest funding a trust need not be transferred contemporaneously with the signing of the trust instrument. [Uniform Trust Code § 401](#), Comment.

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Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

II. Express, Technical, or Direct Trusts; in General

C. Requisite Elements of Trust

1. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 47. Disposition of trust property; present and unequivocal disposition—Delivery and acceptance of instruments

West's Key Number Digest

Forms

Acceptance of trust by trustee. [17C Am. Jur. Legal Forms 2d, Trusts § 251:366](#)

Acceptance by trustee. [17C Am. Jur. Legal Forms 2d, Trusts § 251:580](#)

Reply—Delivery and acceptance not necessary to creation of trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 30](#)

Model Codes and Restatements

[Restatement Third, Trusts § 16](#)

While a change of actual physical possession of the trust res is ordinarily not required in order to create a valid trust,[\[FN1\]](#) delivery of the trust instrument to the trustee is required.[\[FN2\]](#) This delivery requirement, however, does not mean that the trust instrument must be physically handed to the trustee in order to create a valid trust.[\[FN3\]](#) Rather, "delivery" in this context means the manifestation of intention that the instrument in question shall have operative effect.[\[FN4\]](#) It relates to expression of the idea that the document has to cause a change in legal relations at once.[\[FN5\]](#) Thus, there may be sufficient delivery when the instrument is given to a third party for delivery to the trustee.[\[FN6\]](#)

It has been stated that the actual transfer, or delivery, of the instrument of trust is not a requisite to a declaration of trust.[\[FN7\]](#) The effectiveness of a trust does not depend upon the settlor making a delivery to anyone of the trust when the settlor declares that he or she will hold the property in trust.[\[FN8\]](#) Further, manual delivery is unnecessary where the trustee has accepted in writing the terms and provisions of the document.[\[FN9\]](#)

Practice Guide: When it comes to trust agreements, there is a legal presumption in favor of delivery.[\[FN10\]](#) However, the presumption of delivery arising when a deed is in the possession of the grantee did not apply to a deed conveying property to a land trust that was never delivered to the trustee, but was in the possession of a beneficiary of the trust at the time of the grantor's death.[\[FN11\]](#)

Acceptance by a trustee of the trust is ordinarily not necessary to its existence and validity,[\[FN12\]](#) since if such person declines the trust, a court will appoint a trustee to fill the office that the person declines.[\[FN13\]](#) However, where a donor intends to employ a gift as a particular mode of creating a trust, rather than merely to declare a trust without receiving any consideration, delivery, acceptance, and other formal requisites of a gift are as essential as in any other case of a technical gift.[\[FN14\]](#) Similarly, where a trustor intends to create a trust by a technical conveyance or transfer to the trustee, delivery, acceptance, and other formal requisites are as fully applicable as in other cases of conveyance or transfer.[\[FN15\]](#)

[\[FN1\]](#) § 45.

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[\[FN2\]](#) *Carpenter v. U.S.*, 4 Cl. Ct. 705 (1984).

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[\[FN3\] Carpenter v. U.S., 4 Cl. Ct. 705 \(1984\).](#)

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[\[FN4\] Carpenter v. U.S., 4 Cl. Ct. 705 \(1984\).](#)

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[\[FN5\] Carpenter v. U.S., 4 Cl. Ct. 705 \(1984\).](#)

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[\[FN6\] Carpenter v. U.S., 4 Cl. Ct. 705 \(1984\).](#)

- As to intent to create a trust as a requisite element of trust, see [§§ 57 et seq.](#)

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[\[FN7\] § 18.](#)

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[\[FN8\] Matter of Catanio, 306 N.J. Super. 439, 703 A.2d 988 \(App. Div. 1997\).](#)

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[\[FN9\] Whittaker v. Stables, 339 Ill. App. 3d 943, 274 Ill. Dec. 496, 791 N.E.2d 588 \(2d Dist. 2003\).](#)

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[\[FN10\] Whittaker v. Stables, 339 Ill. App. 3d 943, 274 Ill. Dec. 496, 791 N.E.2d 588 \(2d Dist. 2003\).](#)

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[\[FN11\] In re Estate of Wittmond, 314 Ill. App. 3d 720, 247 Ill. Dec. 604, 732 N.E.2d 659 \(4th Dist. 2000\).](#)

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[\[FN12\] First Nat. Bank v. Cash, 220 Ala. 319, 125 So. 28 \(1929\); Ladies Benev. Soc. v. Orrell, 195 N.C. 405, 142 S.E. 493 \(1928\).](#)

- Under Louisiana statutory provision, an inter vivos trust is created upon execution of the trust instrument without regard to the trustee's acceptance. [Francois v. Tufts, 491 So. 2d 673 \(La. Ct. App. 4th Cir. 1986\)](#), writ denied, [497 So. 2d 308 \(La. 1986\)](#).

- As to acceptance by one of a trust as a requirement for charging such person with the office of trustee, see [§ 220](#).

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[\[FN13\] § 217.](#)

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[\[FN14\] Union Trust Co. v. Hawkins, 121 Ohio St. 159, 6 Ohio L. Abs. 371, 6 Ohio L. Abs. 503, 7 Ohio L. Abs. 381, 167 N.E. 389, 73 A.L.R. 190 \(1929\).](#)

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[\[FN15\] Hinton's Ex'r v. Hinton's Committee, 256 Ky. 345, 76 S.W.2d 8 \(1934\); Van Studdiford v. Randolph, 49 S.W.2d 250 \(Mo. Ct. App. 1932\).](#)

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§ 48. Notice of trust, and acceptance by, beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [19.1](#), [20](#), [38](#), [39](#)

Forms

Acceptance of trust by beneficiary. [17C Am. Jur. Legal Forms 2d, Trusts § 251:622](#)

Model Codes and Restatements

[Restatement Third, Trusts § 14](#)

There is no principle of general application that knowledge or consent of the beneficiary at the time a trust is created is necessary to the validity of a declaration of trust.^[FN1] Nor is an acceptance of or assent to the trust by the beneficiary necessary to the creation and validity of the trust.^[FN2]

^[FN1] [Bongaards v. Millen, 55 Mass. App. Ct. 51, 768 N.E.2d 1107 \(2002\)](#), review granted, [437 Mass. 1110, 776 N.E.2d 453 \(2002\)](#) and aff'd on other grounds, [440 Mass. 10, 793 N.E.2d 335 \(2003\)](#).

- As to the existence of a valid, definitely ascertainable beneficiary or beneficiaries as required for the creation of a trust, generally, see §§ [52](#) to [55](#).

- As to beneficiaries, generally, see [§§ 240 et seq.](#)

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^[FN2] [Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 \(C.C.A. 8th Cir. 1937\)](#).

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§ 49. Trustor or settlor

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [121.1](#), [122](#)

Forms

Answer—Defense—Trustor incompetent to make trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 27](#)

Model Codes and Restatements

[Restatement Third, Trusts § 11](#)

A valid trust requires a trustor or settlor.^[FN1] The settlor must be competent^[FN2] or, stated variously, the settlor must have the capacity to create a trust.^[FN3] That is, a valid trust can be created only where the trustor or settlor has the legal competence to make a contract and to make a disposition of the legal title to the property.^[FN4] Unless the grantor is free from disability to establish a trust, the attempt is void or voidable.^[FN5]

A person lacking capacity to make an ordinary transfer of property has no capacity to create an inter vivos trust.^[FN6]

Practice Guide: Mental capacity of a maker of a trust is presumed and the burden rests on the contestants to prove incapacity by a preponderance of the evidence.^[FN7]

Additionally, for a settlor to have the power to create a trust, he or she must own a transferable property interest or have a power of disposition over such property interest, or the settlor must have the means of contracting with an owner or holder of such a power.[\[FN8\]](#)

CUMULATIVE SUPPLEMENT

Cases:

With regard to the mental capacity necessary to execute a trust, mental incapacity is not always permanent and a person may have lucid moments or intervals when that person possesses the necessary capacity to convey property. [Kibbee v. First Interstate Bank, 2010 WY 143, 242 P.3d 973 \(Wyo. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\] *McLemore v. McLemore*, 675 So. 2d 202 \(Fla. Dist. Ct. App. 1st Dist. 1996\)](#).

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[\[FN2\] *Hoyle v. Dickinson*, 155 Ariz. 277, 746 P.2d 18 \(Ct. App. Div. 2 1987\); *Matter of Estate of Stokes*, 1987 OK 119, 747 P.2d 300 \(Okla. 1987\)](#).

- If an individual is not legally competent, a trust established by a legal guardian, including a parent, using the individual's assets can be treated as having been established by the individual, since the individual could not establish the trust without the help of a third party. [Williams for and on Behalf of Squier v. Kansas Dept. of Social and Rehabilitation Services](#), 258 Kan. 161, 899 P.2d 452 (1995).

- The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. [Uniform Trust Code § 601](#).

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[\[FN3\] Uniform Trust Code § 402\(a\)\(1\)](#).

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[\[FN4\] *Reid v. Barry*, 93 Fla. 849, 112 So. 846 \(1927\); *Kinney v. Robinson*, 30 Haw. 246, 1927 WL 3288 \(1927\); *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 \(1927\)](#).

- In order to have the mental capacity required to execute a trust and life insurance contract which funds the trust, the settlor must have the mental capacity to understand or comprehend the subject of the contract, its nature, and its probable consequences. [Macaulay v. Wachovia Bank of South Carolina, N.A.](#), 351 S.C. 287, 569 S.E.2d 371 (Ct. App. 2002).

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[\[FN5\] *Lourdes College of Sylvania, Ohio v. Bishop*, 94 Ohio Misc. 2d 51, 703 N.E.2d 362 \(C.P. 1997\)](#).

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[\[FN6\] *Hilbert v. Benson*, 917 P.2d 1152 \(Wyo. 1996\)](#).

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[\[FN7\] *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 \(1984\)](#).

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[\[FN8\] *Jewish Community Ass'n of Casper v. Community First Nat. Bank*, 6 P.3d 1264 \(Wyo. 2000\)](#).

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§ 50. Trustor or settlor—Settlor as trustee or beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [121.1](#), [122](#)

Forms

Trusts for benefit of trustor. [17B Am. Jur. Legal Forms 2d, Trusts §§ 251:87 to 251:97](#)

Complaint, petition, or declaration—For declaratory judgment—To establish existence of testamentary trust—All trustees as the sole beneficiaries of the trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 10](#)

It is permissible for the settlor to act also as the trustee.^[FN1] A trust instrument creates a valid trust, even though the same individual is both the settlor and trustee, where the instrument names several of the settlor's relatives as beneficiaries, and there is no indication that the settlor reserves a substantial interest or unbridled control over the management of the trust assets that is not for the benefit of the purported beneficiaries.^[FN2] Furthermore, a trust is not invalidated merely because the trustor names him or herself as a beneficiary during his or her life.^[FN3] However, no valid trust is established where the powers retained by the settlor amount, in cumulative effect, to ownership of the trust estate, with such control over the administrative functions of the trustee as to make of the settlor, in effect, the settlor's representative, or where, despite naming a beneficiary, the settlor reserves a substantial interest or unbridled control over management of the operations that is not for the benefit of the purported beneficiary.^[FN4]

[\[FN1\] Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 \(2001\).](#)

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[\[FN2\] Argo v. Moncus, 721 So. 2d 218 \(Ala. Civ. App. 1998\).](#)

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[\[FN3\] Estate of Overmire v. American Nat. Red Cross, 58 Wash. App. 531, 794 P.2d 518 \(Div. 2 1990\).](#)

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[\[FN4\] § 24.](#)

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§ 51. Trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [121.1](#), [123](#)

A.L.R. Library

[Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 31 to 39](#)

The rule has been followed that for a valid trust, there must be a trustee,[\[FN1\]](#) although occupancy of the position by a designated person is not essential.[\[FN2\]](#) The mere designation of a party as "trustee" does not create a trust.[\[FN3\]](#) Furthermore, it has been stated that a valid trust is created notwithstanding the failure to designate a trustee.[\[FN4\]](#) In this regard, a trust will not fail for the want of a trustee,[\[FN5\]](#) insofar as a court of equity will appoint a trustee where necessary or take measures to execute the trust or otherwise effect its accomplishment.[\[FN6\]](#) The trustee must be one who holds trust property and who is subject to the equitable duties to deal with it for the benefit of another.[\[FN7\]](#) A trust in which there is no legally binding obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of property.[\[FN8\]](#) Furthermore, if the trustee is not given affirmative powers and duties, the trust is "passive" or "dry," with the legal title vested not in the trustee named, but in the beneficiaries;[\[FN9\]](#) such a trust is invalid.[\[FN10\]](#)

The trustee must be competent,[\[FN11\]](#) but the fact that the person nominated as trustee may be incompetent or disqualified, or may refuse to accept the trust or to continue in office, does not affect the validity of the trust, since the court in such case will appoint a trustee.[\[FN12\]](#)

Observation: The settlor and trustee may be the same person.[\[FN13\]](#) However, one cannot at the same instant be both the sole trustee and the sole beneficiary of the same trust,[\[FN14\]](#) although a settlor can designate him or herself as both sole trustee and one of the trust's beneficiaries.[\[FN15\]](#)

[\[FN1\] Yardley v. Yardley, 137 Ill. App. 3d 747, 92 Ill. Dec. 142, 484 N.E.2d 873 \(2d Dist. 1985\); Kopsombut-Myint Buddhist Center v. State Bd. of Equalization, 728 S.W.2d 327 \(Tenn. Ct. App. 1986\).](#)

- For there to be a valid inter vivos trust, there must be a trustee. [Newton v. Wimsatt, 791 S.W.2d 823 \(Mo. Ct. App. S.D. 1990\).](#)

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[\[FN2\] In re Crawford's Estate, 148 Iowa 60, 126 N.W. 774 \(1910\) \(naming of trustee without legal existence\); Dunn v. Second Nat. Bank, 131 Tex. 198, 113 S.W.2d 165, 115 A.L.R. 730 \(Comm'n App. 1938\).](#)

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[\[FN3\] § 65.](#)

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[\[FN4\] In re Bisbee, 157 Ariz. 31, 754 P.2d 1135 \(1988\).](#)

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[\[FN5\] In re V-I-D, Inc., 198 F.2d 392 \(7th Cir. 1952\); In re Hill's Will, 261 Wis. 290, 52 N.W.2d 867 \(1952\).](#)

- The death of original trustees, without any provision in the instrument creating the trust for the appointment of their successors, will not terminate or destroy a trust. [Mast v. Blackburn, 248 N.C. 231, 102 S.E.2d 812 \(1958\).](#)

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[\[FN6\] § 217.](#)

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[\[FN7\] Cabaniss v. Cabaniss, 464 A.2d 87 \(D.C. 1983\); Kopsombut-Myint Buddhist Center v. State Bd. of Equalization, 728 S.W.2d 327 \(Tenn. Ct. App. 1986\).](#)

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[\[FN8\] McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\).](#)

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[\[FN9\] § 6.](#)

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[\[FN10\] § 40.](#)

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[\[FN11\] Hoyle v. Dickinson, 155 Ariz. 277, 746 P.2d 18 \(Ct. App. Div. 2 1987\); Matter of Estate of Stokes, 1987 OK 119, 747 P.2d 300 \(Okla. 1987\).](#)

- As to qualifications of trustees, generally, see [§§ 207 et seq.](#)

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[\[FN12\] § 217.](#)

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[\[FN13\] § 49.](#)

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[\[FN14\] Uniform Trust Code § 402\(a\)\(5\).](#)

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[\[FN15\] Markham v. Fay, 74 F.3d 1347 \(1st Cir. 1996\)](#) (stating Massachusetts law).

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§ 52. Beneficiary

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West's Key Number Digest, [Trusts](#) [121.1](#), [124](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 43 to 48](#)

Among the essential elements for the creation of a valid express trust is a person for whose benefit the trust property is held[[FN1](#)] —that is, a designated,[[FN2](#)] certain and identifiable[[FN3](#)] beneficiary or beneficiaries[[FN4](#)] to whom the trustee owes equitable duties to deal with the trust property for his or her benefit.[[FN5](#)]

For a trust to be valid, it is also required that the nature and quantity of the beneficiary's interests be specified.[[FN6](#)] Furthermore, the beneficiary must be vested with enforceable rights.[[FN7](#)]

A person who has the capacity to take and hold the legal title to property has the capacity to be the beneficiary of a trust of such property.[[FN8](#)]

A trust cannot be established for a beneficiary who the settlor knows to be dead.[[FN9](#)]

Caution: Although a trust instrument may purport to name a beneficiary, if the settlor reserves a substantial interest or unbridled control over management of the operations that is not for the benefit of the purported beneficiary, the settlor remains the owner of the property, and in such circumstances there is no beneficiary.[[FN10](#)] Consequently, the trust may be found to be illusory.[[FN11](#)]

Observation: In order for there to be a finding of the existence of a valid trust, the trustee and the beneficiary must be separate and distinct entities.[[FN12](#)]

[[FN1](#)] [In re Holmes, 117 B.R. 848 \(Bankr. D. Md. 1990\).](#)

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[[FN2](#)] [Williams v. Wilson, 341 S.C. 136, 533 S.E.2d 593 \(Ct. App. 2000\),](#) aff'd in part, rev'd in part on other grounds, [349 S.C. 336, 563 S.E.2d 320 \(2002\).](#)

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[[FN3](#)] [§ 53.](#)

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[[FN4](#)] [In re Shervin, 112 B.R. 724 \(Bankr. E.D. Pa. 1990\);](#) [Newton v. Wimsatt, 791 S.W.2d 823 \(Mo. Ct. App. S.D. 1990\).](#)

- Deeds conveying a cemetery to named "trustees" and their successors and a will bequeathing \$25,000 to an unincorporated cemetery association did not identify a beneficiary, and thus, such documents did not create a trust. [McAnally v. Friends of WCC, Inc., 113 S.W.3d 875 \(Tex. App. Dallas 2003\).](#)

- As to beneficiaries, generally, see [§§ 240 et seq.](#)

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[[FN5](#)] [Cabaniss v. Cabaniss, 464 A.2d 87 \(D.C. 1983\);](#) [Kopsombut-Myint Buddhist Center v. State Bd. of Equalization, 728 S.W.2d 327 \(Tenn. Ct. App. 1986\).](#)

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[[FN6](#)] [Yardley v. Yardley, 137 Ill. App. 3d 747, 92 Ill. Dec. 142, 484 N.E.2d 873 \(2d Dist. 1985\).](#)

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[[FN7](#)] [Brooks v. Ramsey County Community Human Services Dept., 405 N.W.2d 432 \(Minn. Ct. App. 1987\).](#)

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[[FN8](#)] [DPS Trust v. Sherman, 2002 -Ohio- 3846 \(Ohio.App.11.Dist.Lake.Co., 2002\).](#)

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[[FN9](#)] [In re Estate of Stratton, 165 Vt. 7, 674 A.2d 1281 \(1996\).](#)

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[\[FN10\] Roberts v. South Oklahoma City Hosp. Trust, 1986 OK 52, 742 P.2d 1077 \(Okla. 1986\).](#)

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[\[FN11\] § 49.](#)

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[\[FN12\] Jones v. Shrigley, 150 Neb. 137, 33 N.W.2d 510 \(1948\).](#)

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§ 53. Beneficiary—Requirement of definiteness, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [121.1](#), [124](#)

Forms

Petition—By testamentary trustee—To determine trust beneficiaries. [24 Am. Jur. Pleading and Practice Forms, Trusts § 184](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 44, 47](#)

As a rule, in order for a trust to be valid, the beneficiary or beneficiaries must be sufficiently identifiable,^[FN1] definite,^[FN2] or ascertainable^[FN3] so that the trust may be enforced, and a trust will fail whenever the designation of the beneficiaries named in the trust instrument is too vague and indefinite.^[FN4] In this regard, a trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust^[FN5] or definitely ascertainable within the period of the rule against perpetuities.^[FN6] Furthermore, it is essential to the creation and existence of a trust that a beneficiary be designated with sufficient clarity and certainty to be capable of identification, although not necessarily by name.^[FN7] Additionally, in some jurisdictions it has been specifically provided by statute that a beneficiary must be designated in the instrument creating the trust in a manner sufficient to objectively ascertain the identity of the beneficiary, and that the beneficiary must be in being and ascertainable on the date of the settlor's death.^[FN8]

A beneficiary designation is sufficient for a private trust if the identity of the beneficiary can be ascertained objectively, solely from the standards stated in the instrument.^[FN9] A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.^[FN10]

The Uniform Trust Code authorizes two types of trusts without ascertainable beneficiaries, those being trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose.^[FN11] Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select.^[FN12] The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot.^[FN13]

^[FN1] [Hoyle v. Dickinson, 155 Ariz. 277, 746 P.2d 18 \(Ct. App. Div. 2 1987\).](#)

- The designation of trust beneficiaries must clearly identify the particular entity, person, or class, the members of which can enforce the trust. [McLemore v. McLemore, 675 So. 2d 202 \(Fla. Dist. Ct. App. 1st Dist. 1996\).](#)

^[FN2] [Uniform Trust Code § 402\(a\)\(3\).](#)

^[FN3] [Eychaner v. Gross, 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\).](#)

- To create a trust, the beneficiary must be identified with certainty. [Hubbard v. Shankle, 138 S.W.3d 474 \(Tex. App. Fort Worth 2004\)](#), review denied, (Sept. 17, 2004).

^[FN4] [Salem Church of United Brethren in Christ in Baltimore County v. Numsen, 191 Md. 43, 59 A.2d 757, 4 A.L.R.2d 117 \(1948\).](#)

- Uncertainty in the designation of the beneficiary does not thereby pass title of the trust property to the trustee. [Keller v. Rogstad, 112 Idaho 484, 733 P.2d 705 \(1987\).](#)

- A trust instrument is ambiguous if its provisions, when taken together, evoke a question as to who the beneficiaries are. [Lehr v. Collier, 909 S.W.2d 717 \(Mo. Ct. App. S.D. 1995\).](#)

- As to who may be beneficiaries, and as to the designation of beneficiaries, generally, see [§§ 240 et seq.](#)

^[FN5] [First Nat. Bank in Ord v. Schroeder, 222 Neb. 330, 383 N.W.2d 755 \(1986\).](#)

^[FN6] [Donnkenny, Inc. v. Virginia Financial and Ins. Services, Inc., 739 F. Supp. 290 \(W.D. Va. 1990\); First Nat. Bank in Ord v. Schroeder, 222 Neb. 330, 383 N.W.2d 755 \(1986\).](#)

- As to the rule against perpetuities, generally, see [Am. Jur. 2d, Perpetuities and Restraints on Alienation §§ 5 et seq.](#)

^[FN7] [First Nat. Bank in Ord v. Schroeder, 222 Neb. 330, 383 N.W.2d 755 \(1986\).](#)

[\[FN8\] Succession of Stoneman, 490 So. 2d 333 \(La. Ct. App. 1st Cir. 1986\).](#)

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[\[FN9\] Succession of Fellman, 698 So. 2d 477 \(La. Ct. App. 4th Cir. 1997\), writ denied, 704 So. 2d 1193 \(La. 1997\) and writ denied, 704 So. 2d 1193 \(La. 1997\).](#)

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[\[FN10\] Uniform Trust Code § 402\(b\).](#)

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[\[FN11\] Uniform Trust Code § 409.](#)

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[\[FN12\] Uniform Trust Code § 409, Comment.](#)

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[\[FN13\] Uniform Trust Code § 409, Comment.](#)

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Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

II. Express, Technical, or Direct Trusts; in General
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2. Parties to Trust

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§ 54. Beneficiary—Application of definiteness requirement to respective interests of beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [121.1](#), [124](#)

A.L.R. Library

Validity and construction of trust instrument which fails to designate respective interest of beneficiaries, 87 A.L.R.3d 925

The requisite of reasonable certainty is applicable to the designation of the nature and quantity of the respective interests of beneficiaries in the trust property and income.[FN1] However, the view has been taken that a trust instrument is not uncertain even where the respective interests of the beneficiaries are not stated,[FN2] the presumption in such case being that their interests are equal.[FN3] Where the beneficiaries of a private trust are definite, the trust instrument's failure to designate the beneficiaries' respective interests generally does not invalidate the trust.[FN4] Similarly, discretionary multibeneficiary trusts—those giving the trustee discretion to apportion the income as he or she sees fit among the various beneficiaries—are also ordinarily valid.[FN5]

Private multibeneficiary trusts under which the beneficiaries' respective interests are unstated, in that they make no reference to the division of income among the beneficiaries, have been construed as requiring equal payments to the beneficiaries.[FN6] Sometimes this is predicated on a rule of law requiring such equality in the absence of trust language permitting unequal treatment.[FN7] In other cases, it is based on a presumption that the beneficiaries' interests are equal.[FN8] Where the trustee is vested with discretion to apportion the income among the beneficiaries, the trustee's exercise of his or her discretion is subject to review for abuse.[FN9] However, with regard to such trusts there is authority to the effect that the trustee is not required to divide the income equally among the respective beneficiaries,[FN10] as in fact, the trustee cannot exercise his or her discretion in his or her own favor if the trustee is also a beneficiary, at least without court approval.[FN11] However, if the trustee fails to act, the court will either divide the income equally among the beneficiaries[FN12] or will divide it among them according to the statute of distributions.[FN13]

[FN1] Wagner v. Clauson, 399 Ill. 403, 78 N.E.2d 203, 3 A.L.R.2d 672 (1948); Coyne v. Supreme Conclave of Improved Order of Heptasophs, 106 Md. 54, 66 A. 704 (1907).

[FN2] Loring v. Palmer, 118 U.S. 321, 6 S. Ct. 1073, 30 L. Ed. 211 (1886); Kinney v. Robinson, 30 Haw. 246, 1927 WL 3288 (1927).

[FN3] § 643.

[FN4] Loring v. Palmer, 118 U.S. 321, 6 S. Ct. 1073, 30 L. Ed. 211 (1886).

- Where a deceased provided in a trust instrument that the sum in trust was to be divided as subsequently directed in the trustor's will upon his death among a class of eight people specifically named in the trust instrument, and where the trustor never provided in the will for the apportionment of the interest among the class members, the trust instrument was valid because it clearly named the beneficiaries, as the trust property would be divided equally among the members of the class living when the deceased died. Schroeder v. Herbert C. Coe Trust, 437 N.W.2d 178 (S.D. 1989).

[FN5] Armington v. Meyer, 103 R.I. 211, 236 A.2d 450 (1967); Rice v. Morris, 541 S.W.2d 627 (Tex. Civ. App. Corpus Christi 1976), writ dismissed by agreement, (Nov. 2, 1977).

[FN6] Johnson v. Thornton, 264 S.C. 252, 214 S.E.2d 124, 87 A.L.R.3d 918 (1975).

[FN7] Johnson v. Thornton, 264 S.C. 252, 214 S.E.2d 124, 87 A.L.R.3d 918 (1975).

[\[FN8\] Loring v. Palmer, 118 U.S. 321, 6 S. Ct. 1073, 30 L. Ed. 211 \(1886\).](#)

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[\[FN9\] In re Work Family Trust, 260 Iowa 898, 151 N.W.2d 490 \(1967\).](#)

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[\[FN10\] City of Portsmouth v. Shackford, 46 N.H. 423, 1866 WL 4758 \(1866\).](#)

- A trust providing that the income go for the education of the descendants of the trustor for a period of 25 years from the date of the admission of the last will and testament for probate was valid, notwithstanding nothing in the testator's plan mandated equality in distributions or defined the term "education." [Matter of Estate of Anderson, 541 So. 2d 423 \(Miss. 1989\).](#)

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[\[FN11\] Armington v. Meyer, 103 R.I. 211, 236 A.2d 450 \(1967\).](#)

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[\[FN12\] In re Work Family Trust, 260 Iowa 898, 151 N.W.2d 490 \(1967\); In re Missett's Will, 136 N.Y.S.2d 923 \(Sur. Ct. 1954\).](#)

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[\[FN13\] City of Portsmouth v. Shackford, 46 N.H. 423, 1866 WL 4758 \(1866\).](#)

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AMJUR TRUSTS § 54

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76 Am. Jur. 2d Trusts § 55

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§ 55. Beneficiary—Application of definiteness requirement to unborn beneficiaries

West's Key Number Digest

Ordinarily, it is not necessary to the creation of a trust that the cestui que trust be in existence at the time of its creation,[[FN1](#)] and in such instances, where the remaindermen are uncertain and unascertained, the title abides in the trustee until they have been ascertained.[[FN2](#)] A present trust may be created where the beneficiary is an unborn child,[[FN3](#)] and generally, the fact that beneficiaries of a trust may come into existence precludes its termination before the time set for its termination by the terms of the trust.[[FN4](#)]

[[FN1](#)] [Senfour Inv. Co. v. King County](#), 66 Wash. 2d 67, 401 P.2d 319 (1965).

[[FN2](#)] [Lincoln Joint Stock Land Bank of Lincoln, Neb. v. Mitchell](#), 239 Iowa 995, 33 N.W.2d 388 (1948).

[[FN3](#)] [Morsman v. Commissioner of Internal Revenue](#), 90 F.2d 18, 113 A.L.R. 441 (C.C.A. 8th Cir. 1937).

[[FN4](#)] [§ 72](#).

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76 Am. Jur. 2d Trusts § 56

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§ 56. Beneficiary—Application of definiteness requirement to classes of beneficiaries

Forms

Answer—Defense—Adopted children not contemplated by trustor. [24 Am. Jur. Pleading and Practice Forms, Trusts § 185](#)

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [121.1](#), [124](#)

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[Adopted child as within class named in deed or inter vivos trust instrument, 37 A.L.R.5th 237](#)

Forms

Complaint, petition, or declaration—For declaratory judgment—Whether phrase "my children" includes adopted children. [24 Am. Jur. Pleading and Practice Forms, Trusts § 182](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 45, 46](#)

Designation of beneficiaries as a class may satisfy the requirement for the creation and existence of trusts that the designation of the beneficiaries be clear and certain.[\[FN1\]](#) In this regard, class trusts are exceptions to the requirements under some statutes that a beneficiary must be in being and ascertainable on the date of the creation of a trust; under such a law, a class trust has been allowed if one member of the class was in being at the time of the settlor's death.[\[FN2\]](#) Furthermore, a class of persons has been said to be definite within the meaning of the rule that the members of a definite class of persons can be the beneficiaries of a trust, if the identity of all the individuals comprising its membership is ascertainable.[\[FN3\]](#)

Observation: Where a trustee in the trust instrument states that distribution of his or her estate is to be made among any person or persons from the following class, and thereafter lists the persons making up such class, the beneficiaries are sufficiently definite for purposes of establishing a valid trust. In this regard, no problem exists with identity of beneficiaries for each member of the class is clearly identified by name. Rather, identity problems arise only when the language of the trust is so nebulous in naming beneficiaries that the beneficiaries are unascertainable, and the trust, as a result, violates statutory restraint on the alienation of the property.[\[FN4\]](#)

The class must be capable of reasonable delimitation[\[FN5\]](#) as, for example, a designation as beneficiaries "brothers and sisters," "children," "issue," or "nephews and nieces."[\[FN6\]](#)

A designation of the beneficiaries by the term "heirs" or "heirs at law" is sufficiently certain, construing such term to mean those who would take under the statute of descent and distribution,[\[FN7\]](#) and unless the trust instrument discloses a plain purpose to the contrary, the words "relatives" or "relations" may be similarly construed.[\[FN8\]](#) A trust for "friends" is, however, void for uncertainty.[\[FN9\]](#)

An exception to the general rule that the law in force when a trust was executed governs the determination of whether an adopted child is included within the meaning of a described class of the trust's beneficiaries is when the maker of the instrument establishing the trust clearly expresses a different intent.[\[FN10\]](#)

Under the Uniform Trust Code a power in a trustee to select a beneficiary from an indefinite class is valid.[\[FN11\]](#) If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.[\[FN12\]](#)

[\[FN1\] Clark v. Campbell, 82 N.H. 281, 133 A. 166, 45 A.L.R. 1433 \(1926\).](#)

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[\[FN2\] Judy Trust for David Quinn v. U.S., 833 F.2d 563 \(5th Cir. 1987\).](#)

- As to whether beneficiaries take as a class or as individuals, generally, see [§ 242](#).

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[\[FN3\] Schroeder v. Herbert C. Coe Trust, 437 N.W.2d 178 \(S.D. 1989\).](#)

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[\[FN4\] Schroeder v. Herbert C. Coe Trust, 437 N.W.2d 178 \(S.D. 1989\).](#)

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[\[FN5\] Clark v. Campbell, 82 N.H. 281, 133 A. 166, 45 A.L.R. 1433 \(1926\).](#)

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[\[FN6\] Clark v. Campbell, 82 N.H. 281, 133 A. 166, 45 A.L.R. 1433 \(1926\); In re Dewey's Estate, 45 Utah 98, 143 P. 124 \(1914\).](#)

- Terms such as child, children, grandchild, heirs of body, issue, or heirs appearing in a trust has been held to exclude an adopted child, absent a contrary intention within the instrument itself. [Fifth Third Bank v. Crosley, 79 Ohio Misc. 2d 10, 669 N.E.2d 904 \(C.P. 1996\)](#), judgment aff'd, [1997 WL 770159](#) (Ohio Ct. App. 1st Dist. Hamilton County 1997).

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[\[FN7\] Cotton v. Cotton, 166 Tenn. 420, 61 S.W.2d 655, 88 A.L.R. 622 \(1933\).](#)

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[\[FN8\] In re Lawrence's Estate, 104 N.H. 457, 189 A.2d 491, 5 A.L.R.3d 709 \(1963\).](#)

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[\[FN9\] Clark v. Campbell, 82 N.H. 281, 133 A. 166, 45 A.L.R. 1433 \(1926\).](#)

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[\[FN10\] Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434 \(Mo. Ct. App. W.D. 2004\).](#)

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[\[FN11\] Uniform Trust Code § 402\(c\).](#)

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[\[FN12\] Uniform Trust Code § 402\(c\).](#)

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§ 57. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [1](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 4, 13](#)

One of the main factors needed to establish a trust is a showing of an intent to create a trust,[\[FN1\]](#) or, stated otherwise, a trust is created only if the settlor indicates an intention to create the trust.[\[FN2\]](#) In fact, the question whether the parties in their dealings have created a trust is one of fact to be determined largely by ascertaining the intent of the parties.[\[FN3\]](#) The intent to create the trust must be clear[\[FN4\]](#) and unequivocal.[\[FN5\]](#) Furthermore, the settlor's intent must be to create a presently enforceable trust.[\[FN6\]](#)

Observation: Despite the general requirement that there be an intent by the settlor to create a trust in order for an express trust to be valid, it has sometimes been said to be immaterial that the parties, at the time of entering into the agreement, did not know that they were creating a trust[\[FN7\]](#) if, in fact, what they did had the legal effect of creating a trust.[\[FN8\]](#) Thus, an express trust may arise even though the parties in their own minds did not intend to create a trust.[\[FN9\]](#) In this regard, the view has been followed that an objective rather than a subjective test is applied concerning the creation of a trust, and it is the manifestation of intention which controls and not the actual intention where such differs from the manifestation of intention.[\[FN10\]](#)

[\[FN1\]](#) [Deida v. Murphy, 271 Ill. App. 3d 296, 207 Ill. Dec. 616, 647 N.E.2d 1109 \(5th Dist. 1995\).](#)

[\[FN2\]](#) [Uniform Trust Code § 402\(a\)\(2\).](#)

- Ordinarily, an express trust does not arise unless the owner of property has shown an unequivocal intention to

create a trust. [Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429 \(Tex. App. Houston 14th Dist. 2000\)](#).

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[FN3] [California-Nevada Annual Conference of United Methodist Church v. St. Luke's United Methodist Church, 121 Cal. App. 4th 754, 17 Cal. Rptr. 3d 442 \(5th Dist. 2004\)](#), review filed, (Sept. 22, 2004).

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[FN4] [Hoyle v. Dickinson, 155 Ariz. 277, 746 P.2d 18 \(Ct. App. Div. 2 1987\)](#); [Succession of Stoneman, 490 So. 2d 333 \(La. Ct. App. 1st Cir. 1986\)](#).

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[FN5] [Smith v. Williams, 698 F.2d 611 \(3d Cir. 1983\)](#); [Hoyle v. Dickinson, 155 Ariz. 277, 746 P.2d 18 \(Ct. App. Div. 2 1987\)](#); [Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church, 507 Pa. 255, 489 A.2d 1317 \(1985\)](#).

- For the creation of a voluntary trust in relation to real property it is necessary that an instrument indicate with reasonable certainty the trustor's intent to create the trust. [In re Marriage of Malquist, 234 Mont. 419, 763 P.2d 1116 \(1988\)](#).

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[FN6] [Sundquist v. Sundquist, 639 P.2d 181 \(Utah 1981\)](#).

- As to a present and unequivocal disposition of property as a prerequisite to the creation of a trust, generally, see [§ 45](#).

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[FN7] [Fulweiler v. Spruance, 43 Del. Ch. 196, 222 A.2d 555 \(1966\)](#); [Cravero v. Holleger, 566 A.2d 8 \(Del. Ch. 1989\)](#).

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[FN8] [Fulweiler v. Spruance, 43 Del. Ch. 196, 222 A.2d 555 \(1966\)](#).

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[FN9] [McGhee v. Bank of America, 60 Cal. App. 3d 442, 131 Cal. Rptr. 482 \(1st Dist. 1976\)](#).

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[FN10] [McGhee v. Bank of America, 60 Cal. App. 3d 442, 131 Cal. Rptr. 482 \(1st Dist. 1976\)](#).

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§ 58. Manifestation of intent

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Forms

Complaint, petition, or declaration—By charitable corporation—Seeking declaratory judgment—Whether gift made by will was absolute or in trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 8](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 4, 13](#)

To create an express trust there must be not only an intent to create an express trust[[FN1](#)] but also a proper[[FN2](#)] manifestation of such intent.[[FN3](#)] In this regard, no particular form of words or conduct is necessary for a manifestation of the intention to create a trust,[[FN4](#)] as such manifestation may be written or spoken words or conduct indicating that the settlor intended to create a trust,[[FN5](#)] and all that is required is that a manifest intention be found that another person shall have the benefit of the property in question.[[FN6](#)] It should be noted that words of trusteeship are not necessarily conclusive.[[FN7](#)]

Caution: The intention to create a trust must be shown by more than an expression of intent to establish a moral obligation. The problem is one of construction, but ordinarily words of desire, hope, or recommendation that a devisee or legatee use the property given him or her for the benefit of another does not create a trust. The direction must be imperative.[[FN8](#)]

It is not enough that the settlor secretly intends to create a trust, and no trust will arise unless there is an outward expression of the settlor's intention at the time of the trust's purported creation.[[FN9](#)] Rather, the manifestation of intent must be definite and particular[[FN10](#)]—it must be made with reasonable certainty.[[FN11](#)]

Definition: In determining whether an expressed intention to create a trust is indicated with reasonable certainty, as required for the establishment of a trust, it has been said that "reasonable certainty" means that the external manifestation which serves as the basis of the trust is sufficiently clear to indicate, by a reasonable construction in light of all the facts surrounding the external manifestation, the necessary elements of the trust. The external manifestation must also permit reasonable inferences as to the specifics necessary to implement and administer the trust.[[FN12](#)]

A manifestation of intent to create a trust inter vivos at some time subsequent to the time of manifestation does not create a trust.[\[FN13\]](#)

Practice guide: Among the extrinsic circumstances and evidentiary factors pertinent to a determination of a settlor's intention to create a trust are:

- (1) the imperative, as distinguished from precatory,[\[FN14\]](#) nature of the words used by the settlor to create a trust;
- (2) the definiteness of the trust property;
- (3) the certainty of the identity of the trust beneficiary;[\[FN15\]](#)
- (4) the relationship between and financial positions of the parties;
- (5) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; and
- (6) whether the results reached in construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce.[\[FN16\]](#)

[\[FN1\] § 57.](#)

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[\[FN2\] DeMello v. Home Escrow, Inc., 4 Haw. App. 41, 659 P.2d 759 \(1983\).](#)

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[\[FN3\] Stern v. J. Nichols Produce Co., Inc., 486 A.2d 84 \(D.C. 1984\); DeMello v. Home Escrow, Inc., 4 Haw. App. 41, 659 P.2d 759 \(1983\).](#)

- Although life insurance proceeds are appropriate trust property, the settlor must manifest the intention to create a trust from the proceeds of the policy. [Hubbard v. Shankle, 138 S.W.3d 474 \(Tex. App. Fort Worth 2004\)](#), review denied, (Sept. 17, 2004).

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[\[FN4\] Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 \(1997\); Conference of African Union First Colored Methodist Protestant Church v. Shell, 659 A.2d 77 \(Pa. Commw. Ct. 1995\).](#)

- As to use of express or particular words or phrases to create trust, see [§ 65](#).

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[\[FN5\] Conference of African Union First Colored Methodist Protestant Church v. Shell, 659 A.2d 77 \(Pa. Commw. Ct. 1995\).](#)

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[\[FN6\] Odum v. Henry, 254 Ga. 739, 334 S.E.2d 304 \(1985\).](#)

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[\[FN7\] Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 \(1997\).](#)

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[\[FN8\] Walton v. City of Red Bluff, 2 Cal. App. 4th 117, 3 Cal. Rptr. 2d 275 \(3d Dist. 1991\).](#)

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[\[FN9\] Eychaner v. Gross, 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\).](#)

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[\[FN10\] DeMello v. Home Escrow, Inc., 4 Haw. App. 41, 659 P.2d 759 \(1983\).](#)

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[\[FN11\] Matter of Estate of Binder, 386 N.W.2d 910 \(N.D. 1986\).](#)

- A voluntary trust can only be created by words or acts of the trustors which indicate with reasonable certainty an intention on the part of the trustor to create a trust. [Morin v. Mapston, 217 Mont. 403, 705 P.2d 118 \(1985\).](#)

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[\[FN12\] Matter of Estate of Binder, 386 N.W.2d 910 \(N.D. 1986\).](#)

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[\[FN13\] Tierce v. Macedonia United Methodist Church of Northport, 519 So. 2d 451 \(Ala. 1987\).](#)

- As to a present and unequivocal disposition of property as a prerequisite to the creation of a trust, generally, see [§ 45](#).

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[\[FN14\]](#) As to inferences of intent to create a trust from precatory words, generally, see [§ 79](#).

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[\[FN15\] Cabaniss v. Cabaniss, 464 A.2d 87 \(D.C. 1983\).](#)

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[\[FN16\] In re Estate of Tuthill, 754 A.2d 272 \(D.C. 2000\).](#)

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§ 59. Manifestation of intent—Manifestation of intent by inference

West's Key Number Digest

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[Implication of gift in inter vivos trust instrument, 11 A.L.R.2d 681](#)

Ordinarily an intention to create a trust may be manifested by inference from those things which a trustor has said or done, from the nature of a transaction, or from the circumstances surrounding creation of the purported trust.^[FN1] That is, when the language of the parties fails to clearly indicate their intention to create an express trust, such intention may be ascertained by other objective manifestations of intent, such as the facts and circumstances surrounding the transactions and the relationship of the parties.^[FN2] The intent to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties, although the inference of an intent to create a trust must come from clear, explicit, definite, unequivocal, and unambiguous language or conduct.^[FN3] It has been observed that an inference of intent to create a trust must result from circumstances which show beyond reasonable doubt that a trust was intended to be created.^[FN4]

^[FN1] [Shumway v. Shumway, 141 Kan. 835, 44 P.2d 247 \(1935\); Lambrecht v. Lee, 264 Mich. 56, 249 N.W. 490 \(1933\); Platt v. Huegel, 326 Mo. 776, 32 S.W.2d 605 \(1930\).](#)

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^[FN2] [Eckell v. Borbidge, 114 B.R. 63 \(E.D. Pa. 1990\).](#)

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^[FN3] [In re Fairfield Pagosa, Inc., 97 F.3d 247 \(8th Cir. 1996\)](#) (stating Colorado law).

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^[FN4] [Sindlinger v. Department of Financial Institutions of Indiana, 210 Ind. 83, 199 N.E. 715, 105 A.L.R. 501 \(1936\).](#)

- Where there is no language in the applicable instrument from which an intent to create a new trust at the time of its execution could be inferred, and the only expression of intent is to extend the life of an existing trust, the requirement of an intent to create a trust is not met. [Starling v. Taylor, 1 N.C. App. 287, 161 S.E.2d 204 \(1968\).](#)

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4. Necessity of Writing; Conformance to Statutes of Wills and Frauds

a. In General

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§ 60. Generally

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West's Key Number Digest, [Trusts](#) [17\(1\)](#) to [29](#)

Forms

Complaint, petition, or declaration—Allegation—Creation of express trust—By declaration. [24 Am. Jur. Pleading and Practice Forms, Trusts § 19](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 17, 20 to 24](#)

A valid, enforceable trust can be created orally, without a writing, in the absence of specific statutory provisions to the contrary,[\[FN1\]](#) such as provisions of a statute like the Statute of Frauds or Statute of Wills.[\[FN2\]](#) In some jurisdictions, however, no oral trusts are allowed and a writing is required.[\[FN3\]](#) Thus, for example, the rule has been stated as being that an express trust cannot be proved by parol evidence, but must be manifested and proved by some writing,[\[FN4\]](#) signed by the party declaring the trust;[\[FN5\]](#) or that an express trust can never be implied or arise by operation of law and can be proved only by some instrument in writing,[\[FN6\]](#) signed by the party enabled by law to declare the trust.[\[FN7\]](#)

A valid testamentary trust can be created only where the purported will attempting to create it is within the statute of wills.[\[FN8\]](#) In addition, where the owner of property purports to create a trust inter vivos but no interest passes to the beneficiary before the death of the settlor, the intended trust is testamentary in character and is invalid unless there is compliance with the statute relating to wills.[\[FN9\]](#) However, the creation of a revocable trust is not a testamentary act and need not conform to the requirements of the common-law statute of wills.[\[FN10\]](#)

[FN1] [Cabaniss v. Cabaniss, 464 A.2d 87 \(D.C. 1983\).](#)

- An express trust may be created orally or in writing. [In re Marcus Trusts, 2 A.D.3d 640, 769 N.Y.S.2d 56 \(App. Div. 2d Dep't 2003\).](#)

- Except as required by a statute other than the Uniform Trust Code, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence. [Uniform Trust Code § 407.](#)

- As to intent to create a trust as a basic requirement for creation of a valid trust, see [§§ 57 et seq.](#)

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[FN2] [Huff v. Byers, 209 Ky. 375, 272 S.W. 897 \(1925\).](#)

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[FN3] [Welch v. Cooper, 11 Ark. App. 263, 670 S.W.2d 454 \(1984\); Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 \(1987\).](#)

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[FN4] [Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 \(1987\).](#)

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[FN5] [§ 63.](#)

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[FN6] [Welch v. Cooper, 11 Ark. App. 263, 670 S.W.2d 454 \(1984\).](#)

- An "express trust" shall be created or declared in writing. [Hayes v. Clark, 242 Ga. App. 411, 530 S.E.2d 38 \(2000\).](#)

- As to trusts by operation of law, generally, see [§§ 128 et seq.](#)

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[FN7] [§ 63.](#)

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[FN8] [Atwood v. Rhode Island Hospital Trust Co., 275 F. 513, 24 A.L.R. 156 \(C.C.A. 1st Cir. 1921\); Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 A. 139, 73 A.L.R. 201 \(1929\).](#)

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[FN9] [Warner v. Burlington Federal Sav. & Loan Ass'n, 114 Vt. 463, 49 A.2d 93, 168 A.L.R. 1265 \(1946\).](#)

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[FN10] [Bezzini v. Department of Social Services, 49 Conn. App. 432, 715 A.2d 791 \(1998\).](#)

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AMJUR TRUSTS § 60

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Trusts

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II. Express, Technical, or Direct Trusts; in General

C. Requisite Elements of Trust

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§ 61. Trusts in real property, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [17\(3\)](#), [20](#)

Forms

Answer—Defense—Claim based on oral trust in real property barred by statute of frauds. [24 Am. Jur. Pleading and Practice Forms, Trusts § 25](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 20, 22](#)

Generally a trust involving real estate must be in writing,^[FN1] and an oral trust in real property is ordinarily void or unenforceable.^[FN2] It has been said that an express trust must pass statute of frauds muster, and some memorandum manifesting and proving the trust must exist to create an express trust.^[FN3]

Observation: Most states have enacted statutory provisions like section 7 of the English Statute of Frauds, specifically requiring a writing for the inter vivos creation of enforceable trusts of interests in land. In some of the remaining states, statutory provisions requiring a writing for certain contracts or conveyances affecting land have been held applicable to the creation of trusts of interests in land; some state-court decisions have treated section 7 of the Statute of Frauds as part of the common law.^[FN4]

Judicial decisions in several jurisdictions that have no express counterpart of section 7 of the English Statute of Frauds allow enforceable inter vivos trusts of land to be declared or created by transfer without need of a writing.^[FN5] Under the common law an express parol trust in land was valid and provable without a writing.^[FN6] In some jurisdictions an express parol trust in land is within the statute of frauds.^[FN7]

Despite the conclusions of some courts that oral trusts in real property may validly be created, the view has also been followed in some instances that while an oral trust in land is not invalid, it is nonetheless unenforceable.^[FN8]

Although real property absolutely conveyed generally cannot be shown to be subject to an express trust created by parol agreement, exceptions to this rule have been recognized where injustice, sufficient to raise an equitable trust, would otherwise result.^[FN9] Further, the doctrine of equitable estoppel may be employed to enforce an oral trust in land where the beneficiary has irrevocably changed his or her position in reliance upon

the trust.[FN10] However, except in cases of fraud, mistake, or undue influence, a parol trust, to arise by reason of a contract or agreement of the parties thereto, will not be set up or grafted in favor of a grantor upon a written deed conveying to the grantee absolute title, and giving a clear indication on the face of the instrument that such title was intended to pass.[FN11]

The statute of frauds does not require that delivery of a deed or conveyance of property be made subsequent to a declaration of trust in order for the trust to be effective.[FN12]

[FN1] [In re Estates of Gates](#), 876 So. 2d 1059 (Miss. Ct. App. 2004); [Matter of Catanio](#), 306 N.J. Super. 439, 703 A.2d 988 (App. Div. 1997).

- Under Colorado law, trust conveying title to real estate, unless created by act or operation of law, must be in writing and signed by grantor. [In re Fairfield Pagosa, Inc.](#), 97 F.3d 247 (8th Cir. 1996).

- As to who must sign the writing, generally, see [§ 63](#).

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[FN2] [In re Estate of Pearce](#), 481 So. 2d 69 (Fla. Dist. Ct. App. 4th Dist. 1985).

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[FN3] [Tartaglia v. Hodges](#), 129 N.M. 497, 2000-NMCA-080, 10 P.3d 176 (Ct. App. 2000).

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[FN4] [Restatement Third, Trusts § 20](#), Comment a.

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[FN5] [Restatement Third, Trusts § 20](#), Comment a.

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[FN6] [Rogers v. Greer](#), 70 Ariz. 264, 219 P.2d 760 (1950).

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[FN7] [Hall v. World Sav. and Loan Ass'n](#), 189 Ariz. 495, 943 P.2d 855 (Ct. App. Div. 1 1997).

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[FN8] [Perkins v. Hilton](#), 329 Mass. 291, 107 N.E.2d 822, 33 A.L.R.2d 1281 (1952) (stating that oral express trust in land is not mere nullity, but is unenforceable because of the lack of writing); [Simpson v. Henry N. Clark Co.](#), 316 Mass. 118, 55 N.E.2d 10, 154 A.L.R. 380 (1944).

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[FN9] [Schmaling v. Schmaling](#), 48 Conn. App. 1, 707 A.2d 339 (1998).

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[FN10] [Byrne v. Laura](#), 52 Cal. App. 4th 1054, 60 Cal. Rptr. 2d 908 (1st Dist. 1997).

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[FN11] [Burton v. Burton](#), 123 N.C. App. 153, 472 S.E.2d 339 (1996).

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[FN12] [Tretola v. Tretola](#), 61 Mass. App. Ct. 518, 811 N.E.2d 1037 (2004), review denied, [442 Mass. 1109, 815 N.E.2d 1085 \(2004\)](#).

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Trusts

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- II. Express, Technical, or Direct Trusts; in General
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§ 62. Trusts in personal property, generally

West's Key Number Digest

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Model Codes and Restatements

[Restatement Third, Trusts §§ 20, 24](#)

While statutory provisions have sometimes required express trusts in personalty to be created by a writing in order to be valid,[\[FN1\]](#) statutes of frauds in some jurisdictions have not contained any provision expressly requiring trusts in personal property to be in writing.[\[FN2\]](#) Accordingly, an express trust may be oral, but only if real property is not involved.[\[FN3\]](#) A valid trust in personalty may be created by deed, may rest entirely in parol, or may be partially in writing and partially in parol,[\[FN4\]](#) provided the words employed are sufficient to create a trust.[\[FN5\]](#) A trust in a real-estate mortgage is a trust in personalty and within the rule authorizing the creation of such trusts orally.[\[FN6\]](#)

Observation: In a few states, statutes require a writing for the creation of enforceable inter vivos trusts of personal property.[\[FN7\]](#)

If the corpus of a purported trust estate consists both of real and personal property, an express oral trust is ineffective to impose a trust on either.[\[FN8\]](#)

It has been said that a parol trust cannot be found in the absence of an agreement.[\[FN9\]](#)

Practice Guide: An express parol trust in personal property will be enforced if it is validly established.[\[FN10\]](#) A clear oral declaration that a trust is being created is needed for an express oral trust of personal property.[\[FN11\]](#)

[FN1] [Smith v. Peacock](#), 114 Ga. 691, 40 S.E. 757 (1902).

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[FN2] [In re Trbovich's Estate](#), 488 Pa. 583, 413 A.2d 379 (1980).

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[FN3] [In re Estates of Gates](#), 876 So. 2d 1059 (Miss. Ct. App. 2004).

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[FN4] [In re Craft's Estate](#), 320 So. 2d 874 (Fla. Dist. Ct. App. 4th Dist. 1975).

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[FN5] [In re Estate of Pearce](#), 481 So. 2d 69 (Fla. Dist. Ct. App. 4th Dist. 1985); [In re Craft's Estate](#), 320 So. 2d 874 (Fla. Dist. Ct. App. 4th Dist. 1975).

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[FN6] [Tapia v. Demartini](#), 77 Cal. 383, 19 P. 641 (1888); [Warren v. Lincoln](#), 58 S.D. 196, 235 N.W. 597 (1931).

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[FN7] [Restatement Third, Trusts § 20](#), Comment a.

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[FN8] [In re Estates of Gates](#), 876 So. 2d 1059 (Miss. Ct. App. 2004).

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[FN9] [Hoheimer v. Hoheimer](#), 30 S.W.3d 176 (Ky. 2000).

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[FN10] [In re Family and Indus. Medical Facilities, Inc.](#), 25 B.R. 443 (Bankr. E.D. Pa. 1982); [In re Trbovich's Estate](#), 488 Pa. 583, 413 A.2d 379 (1980).

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[FN11] [In re Estates of Gates](#), 876 So. 2d 1059 (Miss. Ct. App. 2004).

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§ 63. Signing and execution

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Model Codes and Restatements

[Restatement Third, Trusts §§ 22, 23](#)

Where a writing is required for the creation of a valid trust,[\[FN1\]](#) it has been said that, to be enforceable against objections, a trust in real property must be created by a writing signed by the settlor or his or her agent,[\[FN2\]](#) that is, by the party creating or declaring the trust, or by the party's attorney.[\[FN3\]](#) Alternately, the rule has been stated as being that the writing must be signed, or subscribed, by the party declaring,[\[FN4\]](#) or who is by law enabled to declare,[\[FN5\]](#) the trust.

It is not required that the settlor sign a formal trust instrument in order to create a valid trust.[\[FN6\]](#) Further, insofar as the subscribing may be by the grantor, where the trust is created by a conveyance declaring the trust,[\[FN7\]](#) in such case it is not requisite to the trust that the grantee sign the conveyance,[\[FN8\]](#) nor are witnesses required.[\[FN9\]](#) The subscribing may be by the trustee where the trust is created by the trustee's declaration when the trustee takes or while he or she holds legal title.[\[FN10\]](#)

A trust does not require the formalities of witnesses, attestation, and notarization which safeguard a testator's wishes for the disposition of his or her estate.[\[FN11\]](#)

Observation: When a trust is not required to be in writing, a grantor's failure to sign a trust document does not invalidate the trust, where all the essential elements of a trust, including a designated beneficiary, designated trustee, clearly identifiable res, and delivery of the res by the grantor to the trustee with the intent of vesting legal title in the trustee, are present.[\[FN12\]](#)

A mark made by the settlor of a trust, who could not write, was sufficient to meet the requirements for the execution of trust documents, where the settlor's name was typewritten on the trust instrument, according to the notary public, the settlor told him that she had signed the trust instrument, and a witness testified that the settlor made her mark on the document.[\[FN13\]](#)

[\[FN1\]](#) § 61.

[\[FN2\]](#) [Sundquist v. Sundquist, 639 P.2d 181 \(Utah 1981\).](#)

- A draft trust agreement involving real property prepared by an attorney did not create an express written trust, as the draft agreement was not signed, and was prepared over a month after the purported settlors' deaths. [In re Estates of Gates, 876 So. 2d 1059 \(Miss. Ct. App. 2004\).](#)

[FN3] [In re Carriage House, Inc., 120 B.R. 754 \(Bankr. D. Vt. 1990\)](#), opinion aff'd, [146 B.R. 352 \(D. Vt. 1992\)](#).
- As to declarations of trust as creating trusts, generally, see [§ 18](#).

[FN4] [Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 \(1987\)](#).

[FN5] [Welch v. Cooper, 11 Ark. App. 263, 670 S.W.2d 454 \(1984\)](#).

[FN6] [§ 64](#).

[FN7] [Holmes v. Holmes, 65 Wash. 572, 118 P. 733 \(1911\)](#).

[FN8] [Zubler v. Porter, 98 N.J.L. 444, 120 A. 194, 27 A.L.R. 822 \(N.J. Ct. Err. & App. 1923\)](#); [Flynn v. Palmer, 270 Wis. 43, 70 N.W.2d 231, 51 A.L.R.2d 1000 \(1955\)](#).

[FN9] [Brevard County v. Ramsey, 658 So. 2d 1190 \(Fla. Dist. Ct. App. 5th Dist. 1995\)](#).

[FN10] [Cashion v. Bank of Arizona, 30 Ariz. 172, 245 P. 360 \(1926\)](#); [Holmes v. Holmes, 65 Wash. 572, 118 P. 733 \(1911\)](#).

[FN11] [In re Estate of Richardson, 2002 OK CIV APP 69, 50 P.3d 584 \(Div. 1 2002\)](#), cert. denied, (June 18, 2002).

[FN12] [In re Marcus Trusts, 2 A.D.3d 640, 769 N.Y.S.2d 56 \(App. Div. 2d Dep't 2003\)](#).

[FN13] [Smith v. Wharton, 349 Ark. 351 \(Ark.,2002\)](#).

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§ 64. Sufficiency of particular forms or types of writings

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West's Key Number Digest, [Trusts](#) [21\(1\)](#), [25\(1\)](#)

Model Codes and Restatements

[Restatement Third, Trusts § 22](#)

A "formal" document is not required to create a trust.[\[FN1\]](#) Under this rule, a trust may be created by a will, deed, or other instrument,[\[FN2\]](#) by an instrument inoperative for some reason as a will,[\[FN3\]](#) or by correspondence.[\[FN4\]](#) Further, a trust need not be created in a single instrument.[\[FN5\]](#)

Comment: A writing not intended specifically by the parties to be used as an actual memorandum of trust may, nevertheless, be sufficient to satisfy the statute of frauds.[\[FN6\]](#)

The trust need not be declared in the deed or conveyance to the trustee,[\[FN7\]](#) but it can be proved by a writing extrinsic[\[FN8\]](#) and subsequent thereto.[\[FN9\]](#) Under some statutes, however, declarations or creations of trust in relation to real estate must be executed in the same manner as deeds of conveyance.[\[FN10\]](#) Furthermore, a bequest or devise in trust which is subject to the testator's extrinsic or future directions is void, unless the directions are in writing and in conformity with the statute of wills.[\[FN11\]](#)

The view taken in any particular jurisdiction with respect to pleadings, depositions, testimony, or statements in court as constituting a sufficient writing within the statute of frauds[\[FN12\]](#) applies in the case of a trust required to be established or proved in writing by such statute.[\[FN13\]](#)

A trust of real estate will comply with the statute of frauds if it sets forth with reasonable definiteness the trust's property, its beneficiaries, and its purpose.[\[FN14\]](#)

The statute of frauds is no obstacle to the enforcement of an oral trust where, in the course of litigation, the trust is confessed by the trustee, and in such a case it is not necessary either to find fraud or to resort to a finding that the defendant is a trustee ex maleficio.[\[FN15\]](#)

The satisfaction of writing requirements necessary to render a properly created trust valid cannot affect the invalidity of a trust that has not been properly created in the first instance.[\[FN16\]](#)

[\[FN1\] Matter of Trust Estate of Daoang, 87 Haw. 200, 953 P.2d 959 \(Ct. App. 1998\); Orentreich v. Prudential Ins. Co. of America, 275 A.D.2d 685, 713 N.Y.S.2d 330 \(1st Dep't 2000\).](#)

- The settlor need not sign a formal trust instrument to create an inter vivos trust. [Sundquist v. Sundquist, 639 P.2d 181 \(Utah 1981\).](#)

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[\[FN2\] Cohen v. Newton Sav. Bank, 320 Mass. 90, 67 N.E.2d 748, 168 A.L.R. 1321 \(1946\).](#)

- As to particular modes for creation of a trust, see [§§ 17 et seq.](#)

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[\[FN3\] Byers v. McAuley, 149 U.S. 608, 13 S. Ct. 906, 37 L. Ed. 867 \(1893\); Ransdel v. Moore, 153 Ind. 393, 53 N.E. 767 \(1899\).](#)

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[\[FN4\] Cohen v. Newton Sav. Bank, 320 Mass. 90, 67 N.E.2d 748, 168 A.L.R. 1321 \(1946\).](#)

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[\[FN5\] In re Marriage of Barneson, 69 Cal. App. 4th 583, 81 Cal. Rptr. 2d 726 \(1st Dist. 1999\).](#)

- A deed and a trust agreement may be construed together as parts of one transaction and as establishing the trust. [Holdener v. Fieser, 971 S.W.2d 946 \(Mo. Ct. App. E.D. 1998\).](#)

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[\[FN6\] Restatement Third, Trusts § 22, Comment d.](#)

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[\[FN7\] Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co., 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219 \(1920\); Zubler v. Porter, 98 N.J.L. 444, 120 A. 194, 27 A.L.R. 822 \(N.J. Ct. Err. & App. 1923\).](#)

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[\[FN8\] Ketcham v. Miller, 37 S.W.2d 635 \(Mo. 1931\); Carter v. Gibson, 29 Neb. 324, 45 N.W. 634 \(1890\).](#)

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[\[FN9\] Cashion v. Bank of Arizona, 30 Ariz. 172, 245 P. 360 \(1926\); McArthur v. Gordon, 126 N.Y. 597, 27 N.E. 1033 \(1891\).](#)

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[\[FN10\] § 62.](#)

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[\[FN11\] Atwood v. Rhode Island Hospital Trust Co., 275 F. 513, 24 A.L.R. 156 \(C.C.A. 1st Cir. 1921\); Heidenheimer v. Bauman, 84 Tex. 174, 19 S.W. 382 \(1892\).](#)

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[\[FN12\] Am. Jur. 2d, Statute of Frauds §§ 226, 511.](#)

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[\[FN13\] Cashion v. Bank of Arizona, 30 Ariz. 172, 245 P. 360 \(1926\).](#)

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[\[FN14\] Hall v. World Sav. and Loan Ass'n, 189 Ariz. 495, 943 P.2d 855 \(Ct. App. Div. 1 1997\).](#)

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[\[FN15\] Metzger v. Metzger, 338 Pa. 564, 14 A.2d 285, 129 A.L.R. 683 \(1940\).](#)

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[\[FN16\] In re Trust of Jameison, 2000 MT 190, 300 Mont. 418, 8 P.3d 83 \(2000\).](#)

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§ 65. Use of express or particular words or phrases

West's Key Number Digest

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No particular words are necessary to create a trust^[FN1] if there exists reasonable certainty as to the intended property, object, and beneficiary.^[FN2] Further, the purpose and intention, rather than the use of any particular term, determines whether a valid trust has been established.^[FN3] An express trust may be created without the use of technical words. All that is necessary are words or circumstances which unequivocally show an intention that the legal estate is vested in one person, to be held in some manner or for some purpose on behalf of another.^[FN4]

Any statement that shows the ownership or control of property is vested in one person for the benefit of another is sufficient to create a trust, and it is not necessary that the words "trust" or "trustee" be used.^[FN5] Furthermore, even where present, the mere use of the words "in trust" by the parties is not sufficient alone to create a trust,^[FN6] nor does the mere designation of a party as "trustee" create a trust.^[FN7] Absent indications to the contrary, a conveyance using the words "for the use of" or "for the benefit of" demonstrates the intent to create a trust.^[FN8]

The absence of trust language does not preclude the formation of a trust.^[FN9] However, a declaration of trust should make reasonably certain the subject matter, the beneficiaries, their interests, and the manner of performance,^[FN10] and that the nature, subject matters, and objects of the trust must be manifested with reasonable certainty by the instrument.^[FN11] Furthermore, the view has been followed that to create a trust by a written instrument, the beneficiary, the res, and the trust purpose must be identified, but that it is not absolutely necessary that legal title be granted to the trustee in specific terms.^[FN12]

^[FN1] [Albrecht v. Brais](#), 324 Ill. App. 3d 188, 257 Ill. Dec. 738, 754 N.E.2d 396 (3d Dist. 2001); [In re Marcus Trusts](#), 2 A.D.3d 640, 769 N.Y.S.2d 56 (App. Div. 2d Dep't 2003); [Hubbard v. Shankle](#), 138 S.W.3d 474 (Tex. App. Fort Worth 2004), review denied, (Sept. 17, 2004).

^[FN2] [Hubbard v. Shankle](#), 138 S.W.3d 474 (Tex. App. Fort Worth 2004), review denied, (Sept. 17, 2004).

- Language or conduct creating a trust must be clear and unambiguous, and a statement will be sufficient evidence of a trust if the beneficiary, trust property, and the trust's purpose are set forth therein. [Rebidas v.](#)

[Murasko, 450 Pa. Super. 546, 677 A.2d 331 \(1996\).](#)

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[\[FN3\] From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\).](#)

- Imperfections not affecting the manifestation of a settlor's intent, such as informality or even obscurity of language, will not defeat the formation of a valid trust. [In re Kline Revocable Trust U/A Dated September 9, 1971, 196 Misc. 2d 66, 763 N.Y.S.2d 721 \(Sur. Ct. 2003\).](#)

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[\[FN4\] In re Dameron, 155 F.3d 718 \(4th Cir. 1998\)](#) (stating Virginia law).

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[\[FN5\] Beaubien v. Cambridge Consol., Ltd., 652 So. 2d 936 \(Fla. Dist. Ct. App. 5th Dist. 1995\).](#)

- When the settlor does not use the word "trust," in order for a trust to exist the settlor must have manifested intent to create a trust. [Eychaner v. Gross, 321 Ill. App. 3d 759, 254 Ill. Dec. 557, 747 N.E.2d 969, 154 Ed. Law Rep. 601 \(1st Dist. 2001\), judgment rev'd on other grounds, 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\).](#)

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[\[FN6\] McGhee v. Bank of America, 60 Cal. App. 3d 442, 131 Cal. Rptr. 482 \(1st Dist. 1976\).](#)

- Merely labeling an agreement an "escrow" or a "trust" does not determine the real character of the transaction to be accomplished, as its true purpose must be determined from the relations of the parties and their respective rights and duties. [Albrecht v. Brais, 324 Ill. App. 3d 188, 257 Ill. Dec. 738, 754 N.E.2d 396 \(3d Dist. 2001\).](#)

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[\[FN7\] Gammarino v. Hamilton Cty. Bd. of Revision, 84 Ohio St. 3d 155, 1998-Ohio-715, 702 N.E.2d 415 \(1998\); Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264 \(Tex. App. Houston 14th Dist. 1995\).](#)

- The use of the word "trustee" in a deed is merely descriptive and of no legal effect; to create a trust, the beneficiary must be identified with certainty. [McAnally v. Friends of WCC, Inc., 113 S.W.3d 875 \(Tex. App. Dallas 2003\).](#)

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[\[FN8\] Brotman v. East Lake Creek Ranch, L.L.P., 31 P.3d 886, 157 Ed. Law Rep. 336 \(Colo. 2001\).](#)

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[\[FN9\] District 22 United Mine Workers of America v. Utah, 229 F.3d 982 \(10th Cir. 2000\), as amended on denial of reh'g, \(Nov. 6, 2000\).](#)

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[\[FN10\] Wagner v. Clauson, 399 Ill. 403, 78 N.E.2d 203, 3 A.L.R.2d 672 \(1948\).](#)

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[\[FN11\] Jones v. Ellis, 551 So. 2d 396 \(Ala. 1989\).](#)

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[\[FN12\] Perfect Union Lodge No. 10, A.F. and A.M., of San Antonio v. Interfirst Bank of San Antonio, N.A., 748 S.W.2d 218 \(Tex. 1988\).](#)

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§ 66. Inference of trust from precatory words

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While it is sometimes stated as a general rule that mere precatory words will not create an express trust,[[FN1](#)] a trust may be inferred, under some circumstances, from precatory words.[[FN2](#)] There must be compliance in the creation of a trust by precatory words with requisites pertaining to the creation of a trust generally, such as manifestation of intention to create a trust, and clarity and certainty in the terms, subject matter or object, and beneficiaries.[[FN3](#)] Furthermore, the application of the statute of frauds and the parol evidence rule to trusts created by inference of precatory words is the same as in other cases.[[FN4](#)]

Definition: Words of request, recommendation, suggestion, or expectation are known as "precatory words." [[FN5](#)]

It was the rule of earlier English cases that mere precatory expressions were to be deemed or presumed to be, in meaning, words of command or direction, and to raise a trust, unless it appeared from the context to be within the power of the legatee or transferee to whom such expressions are addressed to defeat the disposition of the property indicated by the precatory words.[[FN6](#)] While the early English rule—that precatory words create a trust unless it appears to the contrary in the context—has been followed in a few American jurisdictions,[[FN7](#)] the modern rule is that precatory words are presumably indicative of no more than a request or an expectation.[[FN8](#)] The real question in determining whether a trust has been created by precatory words is whether the wish, desire, or recommendation expressed by the trustor was meant to govern the conduct of the one to whom it was addressed, or whether it was merely an indication of that which the trustor thinks would be a reasonable exercise of the discretion of such person, leaving it, however, to the person to exercise his or her own discretion.[[FN9](#)] Words expressive of a wish or desire, if so definite as to amount and subject matter as to be capable of execution by a court may and will, if in conformity with the intention of the testator, create a trust.[[FN10](#)] The fact that the trustee is given discretion in the performance of duties is not solely determinative.[[FN11](#)] If the discretion as to duties is merely as to the manner, time, or choice of persons from a

class, and the trustee may under no circumstances keep the property for him or herself, it will be presumed that the precatory words were intended as words of binding obligation.[FN12] Whether a trust will be found from the use of any precatory word or phrase, whether that be "desire," "wish," "hope," "recommend," "in confidence," or "rely," cannot be concluded merely from the particular word or phrase used.[FN13]

Where precatory words create only a presumption that a mere moral obligation is imposed, such presumption will be overcome by only clear evidence of an intent to create a binding legal obligation.[FN14] It has been said to be a sound, but not inflexible, rule that no trust arises by force of any precatory words unless there is certainty in the object and in the subject matter.[FN15] Of course, no trust will be implied from the use of precatory words, where a testator expressly declares that such is not his or her intention.[FN16]

[FN1] [Pittman v. Thomas](#), 307 N.C. 485, 299 S.E.2d 207 (1983).

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[FN2] [Colton v. Colton](#), 127 U.S. 300, 8 S. Ct. 1164, 32 L. Ed. 138 (1888).

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[FN3] [Bryan v. Milby](#), 6 Del. Ch. 208, 24 A. 333 (1891); [Mills v. Newberry](#), 112 Ill. 123, 1 N.E. 156 (1885); [Williams v. Worthington](#), 49 Md. 572, 1878 WL 6817 (1878).

- As to the requisites for creation of an express trust generally, see [§§ 40 et seq.](#)

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[FN4] [Gosnell v. Leibman](#), 162 Md. 542, 160 A. 277 (1932).

- Generally, as to application of the statute of frauds and the parol evidence rule, see, respectively, [§§ 62 et seq.](#) and [§§ 636 et seq.](#)

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[FN5] [In re Bernheim's Estate](#), 82 Mont. 198, 266 P. 378, 57 A.L.R. 1169 (1928).

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[FN6] [Williams v. Williams' Committee](#), 253 Ky. 30, 68 S.W.2d 395 (1933).

- One possible basis for the rule as found in the earlier English cases was the misleading generalization that a request coming from one with power to command has all the force of a command, being virtually a command clothed in the language of courtesy. [In re Marti's Estate](#), 132 Cal. 666, 64 P. 1071 (1901).

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[FN7] [Ryder v. Myers](#), 113 N.J. Eq. 360, 167 A. 22 (Ch. 1933), aff'd, 115 N.J. Eq. 169, 169 A. 691 (Ct. Err. & App. 1934).

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[FN8] [Bosworth v. Kilbourn](#), 304 Ky. 628, 201 S.W.2d 904 (1947).

- Prima facie, a mere request, or an expression of hope or confidence or expectation, does not import a command. [In re Beauchamp's Estate](#), 256 Cal. App. 2d 563, 64 Cal. Rptr. 340 (2d Dist. 1967).

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[FN9] [Floyd v. Smith](#), 59 Fla. 485, 51 So. 537 (1910).

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[FN10] [In re Falvey's Will](#), 15 A.D.2d 415, 224 N.Y.S.2d 899, 5 A.L.R.3d 458 (4th Dep't 1962), order aff'd, 12 N.Y.2d 759, 234 N.Y.S.2d 713, 186 N.E.2d 563 (1962).

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[FN11] [In re Falvey's Will](#), 15 A.D.2d 415, 224 N.Y.S.2d 899, 5 A.L.R.3d 458 (4th Dep't 1962), order aff'd, 12 N.Y.2d 759, 234 N.Y.S.2d 713, 186 N.E.2d 563 (1962).

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[FN12] [In re Falvey's Will](#), 15 A.D.2d 415, 224 N.Y.S.2d 899, 5 A.L.R.3d 458 (4th Dep't 1962), order aff'd, [12 N.Y.2d 759](#), 234 N.Y.S.2d 713, 186 N.E.2d 563 (1962).

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[FN13] [Matter of Estate of Bolinger](#), 284 Mont. 114, 943 P.2d 981 (1997).

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[FN14] [Sexton v. West View Land Co.](#), 288 S.W.2d 352 (Ky. 1956).

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[FN15] [Maught v. Getzendanner](#), 65 Md. 527, 5 A. 471 (1886).

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[FN16] [Cooke v. King](#), 154 Or. 621, 62 P.2d 20 (1936).

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[24 Am. Jur. Pleading and Practice Forms, Trusts §§ 13, 14, 17, 34 to 36](#)

Model Codes and Restatements

[Uniform Trust Code §§ 411, 415, 416, 602](#)

[Restatement Third, Trusts § 62, 63, 66](#)

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§ 67. Generally

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Forms

Complaint, petition, or declaration—By trustee—For modification of terms of trust—To permit trustee to do acts not authorized by terms of trust. [24 Am. Jur. Pleading and Practice Forms, Trusts §§ 13, 14](#)

Petition or application—To modify trust terms. [24 Am. Jur. Pleading and Practice Forms, Trusts § 17](#)

Order—To show cause why terms of trust should not be modified. [24 Am. Jur. Pleading and Practice Forms, Trusts § 34](#)

Order—Modifying terms of trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 35](#)

Order—Modifying terms of trust—Another form. [24 Am. Jur. Pleading and Practice Forms, Trusts § 36](#)

Model Codes and Restatements

[Restatement Third, Trusts § 62, 63, 66](#)

Generally speaking, once established, a trust may be modified without the beneficiaries' consent, but only if the power to do so is reserved.[\[FN1\]](#) and if no such right has been reserved, then the beneficiaries' consent is required before the trust may be modified.[\[FN2\]](#) Under the Uniform Trust Code, an irrevocable trust may be modified upon consent of the settlor and all beneficiaries, even if the modification is inconsistent with a material purpose of the trust.[\[FN3\]](#) An irrevocable trust may be modified upon consent of all of the beneficiaries if a court concludes that modification is not inconsistent with a material purpose of the trust.[\[FN4\]](#) Agreements between trustees and less than all beneficiaries are ineffective, at least absent court approval,[\[FN5\]](#) to modify the terms of a trust.[\[FN6\]](#) However, modification or amendment of a trust is ordinarily possible by parties in interest and against parties without vested interest.[\[FN7\]](#) Further, in some jurisdictions the rule is followed that one or more of the beneficiaries, with the consent of the settlor, can compel a modification of a trust, but only if the interest of the beneficiaries who do not consent suffer no prejudice by virtue of that action.[\[FN8\]](#) The Uniform Trust Code also provides for the amendment of revocable trusts.[\[FN9\]](#)

A trust can be modified if provisions are ambiguous or if a slavish adherence to the terms of the trust would defeat the primary purpose of the trust; however, the common law of trusts does not permit the creation of a new agreement under the guise of a modification or reformation.[\[FN10\]](#) In any event a court has no authority to modify trust provisions if there is not a compelling reason for the modification.[\[FN11\]](#) Further, trusts will not be modified on technical objections merely because the interested parties' welfare will be served thereby.[\[FN12\]](#)

Observation: Evidence of tax consequences is generally proper for a trial court to consider when determining whether to modify a trust based on an unanticipated change of circumstances.[\[FN13\]](#)

The law does not require that a settlor expressly recite that he or she is amending a trust agreement in order to make an amendment effective.[\[FN14\]](#)

Observation: A trust can be irrevocable but still subject to amendment so long as the amendment does not accomplish the result of a revocation.[\[FN15\]](#) Further, there is authority for the view that an irrevocable trust may be amended without the consent of the beneficiary when the settlor surrenders privileges or rights in favor of the beneficiary.[\[FN16\]](#)

A trust may be split into multiple trusts if all persons interested in the trust consent to the split and the split is not directly contrary to the primary purpose of the trust.[FN17]

A trustee's noncooperation with a settlor's attempt to amend a trust, by failing to sign the amendment, should not be allowed to destroy a settlor's modification to his or her estate plan, particularly when the settlor has died, and where neither undue influence nor the settlor's mental capacity is an issue, and this principle applies whether the trustee refuses to sign because of financial overreaching, or simply delays signature until after the settlor's death because of comments about the proposed amendment.[FN18]

In some instances, in the administration of a trust, courts may depart from the terms of the trust,[FN19] as, for example, where such departure is necessary to effectuate the trustor's ultimate purpose in creating the trust.[FN20]

CUMULATIVE SUPPLEMENT

Cases:

Proposed modification of irrevocable trust that would have increased the distribution amount to a first generation beneficiary was inconsistent with the material purpose to preserve sufficient income and principal to find the distributions to beneficiaries after first generation beneficiary's death; basic support of first generation beneficiary was not material purpose of the trust, as beneficiary suggested. West's [K.S.A. 58a-411\(b\)](#). [In re Trust D Created Under Last Will and Testament of Darby](#), 234 P.3d 793 (Kan. 2010).

[END OF SUPPLEMENT]

[FN1] [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church](#), 370 Md. 152, 803 A.2d 548 (2002), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 (2003); [Bongaards v. Millen](#), 440 Mass. 10, 793 N.E.2d 335 (2003).

- A settlor cannot modify a trust if, by the terms of the trust, the settler did not reserve a power of modification. [In re Estate of Flake](#), 2003 UT 17, 71 P.3d 589 (Utah 2003).

- As to reserved power of amendment or alteration, see [§ 91](#).

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[FN2] [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church](#), 370 Md. 152, 803 A.2d 548 (2002), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 (2003).

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[FN3] [Uniform Trust Code § 411\(a\)](#).

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[FN4] [Uniform Trust Code § 411\(b\)](#).

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[FN5] As to reformation or modification of trusts by courts' administering such trusts, see §§ [335- 337](#).

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[FN6] [Hoffa v. Fitzsimmons](#), 673 F.2d 1345 (D.C. Cir. 1982).

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[FN7] [In re Boyle's Trust](#), 271 Wis. 323, 73 N.W.2d 425 (1955).

-

[FN8] [Disher v. Fulgoni](#), 161 Ill. App. 3d 1, 112 Ill. Dec. 949, 514 N.E.2d 767 (1st Dist. 1987).

- Modification of a trust must generally protect the interests of all beneficiaries, including contingent or

remainder beneficiaries. [Friedman v. Teplis, 268 Ga. 721, 492 S.E.2d 885 \(1997\)](#).

- When there is a lack of consent of all interested parties as to the continuation of a trust, ordinarily a court of equity has the power to do what is necessary to be done to preserve a trust from destruction, and in the exercise of that power may, under certain unusual circumstances, modify the terms of the trust to that end, but such court has not the power to defeat and destroy the trust. [Horne v. Timber Hill Holdings, 163 N.C. App. 582, 594 S.E.2d 207 \(2004\)](#).

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[\[FN9\] Uniform Trust Code § 602.](#)

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[\[FN10\] Estate of Sigourney, 93 Cal. App. 4th 593, 113 Cal. Rptr. 2d 274 \(6th Dist. 2001\).](#)

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[\[FN11\] In re Ruth Easton Fund, 680 N.W.2d 541 \(Minn. Ct. App. 2004\).](#)

-
[\[FN12\] Horne v. Timber Hill Holdings, 163 N.C. App. 582, 594 S.E.2d 207 \(2004\).](#)

-
[\[FN13\] Friedman v. Teplis, 268 Ga. 721, 492 S.E.2d 885 \(1997\).](#)

- To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect. [Uniform Trust Code § 416.](#)

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[\[FN14\] In re Wendland-Reiner Trust, 267 Neb. 696, 677 N.W.2d 117 \(2004\).](#)

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[\[FN15\] First Interstate Bank of Washington v. Lindberg, 49 Wash. App. 788, 746 P.2d 333 \(Div. 2 1987\).](#)

-
[\[FN16\] Bieley v. Bieley, 398 So. 2d 932 \(Fla. Dist. Ct. App. 3d Dist. 1981\).](#)

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[\[FN17\] Matter of Siegel, 174 Misc. 2d 698, 665 N.Y.S.2d 813 \(Sur. Ct. 1997\).](#)

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[\[FN18\] Godley v. Valley View State Bank, 277 Kan. 736, 89 P.3d 595 \(2004\).](#)

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[\[FN19\] §§ 335- 337.](#)

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[\[FN20\] § 335.](#)

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§ 68. Modification or amendment under terms of trust

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Forms

Amendment—With trustee's approval. [17C Am. Jur. Legal Forms 2d, Trusts § 251:510](#)

Amendment of trust—Forms. [17C Am. Jur. Legal Forms 2d, Trusts § 251:587 to 251:598](#)

Model Codes and Restatements

[Restatement Third, Trusts § 63](#)

The general rule is that a settlor cannot modify a trust unless the right to modify has been reserved to the settlor under the terms of the trust.^[FN1] When a settlor has reserved the power to modify the trust and specifies a particular method of modification or particular circumstances by which the trust can be modified, the trust can be modified only in that manner.^[FN2] Accordingly, a trustor may bind him or herself to a specific method of modification or amendment of the trust by including that specific method in the trust agreement,^[FN3] and when instructions in a trust instrument are clear and unambiguous, the intent of the grantor regarding future modifications, at the time the trust is created, governs and subsequent modifications to the trust are effective only if made in the manner expressed in the trust instrument.^[FN4] Trust provisions requiring a trustor to notify the trustee regarding a trust amendment and delaying an amendment's effectiveness are enforceable, and the trustors are bound to follow those provisions in order to make effective amendments to the trust.^[FN5]

Caution: Provisions in a trust agreement requiring a settlor to provide written notice of amendments to the trustee are for the benefit of the trustee, and thus, compliance may be waived by the trustee.^[FN6]

When a settlor has reserved the power of modification of a trust but has not specified any method of modification, the settlor can employ any method that sufficiently manifests the intention to modify the trust.^[FN7] When a revocable trust does not expressly provide an exclusive method for modification or amendment, it may be modified by a writing, other than a will, signed by the settlor and delivered to the trustee during the settlor's lifetime.^[FN8]

Practice Guide: A trust agreement is typically and properly amended by a separate written instrument, signed, dated, and acknowledged by the settlor, which, by its terms, revokes a clearly defined section of the original trust and sets forth new language to be substituted therefor.[\[FN9\]](#)

Any powers that a settlor has to amend a trust dies with him or her.[\[FN10\]](#) Further, when there are multiple trustors but the trust instrument specifically provides that the trust becomes irrevocable and not subject to amendment or modification on the death of any trustor, a surviving trustor lacks the power to amend or modify the trust instrument.[\[FN11\]](#) Likewise, the power to amend a revocable trust is not exercisable after the death of one of the two settlors, where the trust provides that any amendments will be made during the "life of settlors," and signed by the "settlors," and there is no specific reserved power granting the surviving settlor the power to amend.[\[FN12\]](#)

When the grantor or settlor of a trust reserves the right and power to amend a trust, those rights and powers are not transferable in the absence of the grantor's express direction.[\[FN13\]](#)

A grantor must be free from disability to modify a trust, and the exercise of the reserved power is void when the grantor is under a disability.[\[FN14\]](#) The settlor of a trust may be rendered incompetent under the terms of the trust itself to amend the trust, such as where the trust provides that the settlor is rendered incompetent to amend the trust if he or she is admitted as a permanent or chronic care resident or patient to a skilled nursing or residential care facility.[\[FN15\]](#) The power to modify a trust may not be exercised by a representative when the principal is incompetent or deceased.[\[FN16\]](#) However, a court had to the power to amend, modify, or revoke a trust through a conservator after the settlor became incompetent, where the trust did not specify that it became irrevocable upon the incapacity of the settlor.[\[FN17\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Guardianship and Conservatorship Act did not authorize the conservator and court, when acting for the benefit of protected person's estate and financial affairs as trustee to living trusts, to effectively amend the successor-trustee clauses in the trusts by authorizing a successor trustee other than the one designated in the clauses; when acting in her capacity as a trustee, protected person had no pre-conservatorship power to amend the successor clauses, and, because the Act's trust amendment authority was limited to powers the protected person could have exercised before the conservatorship, the statute conferred no authority to effectively amend the successor-trustee clauses after the conservatorship. [SDCL § 29A-5-420\(3\)](#). [In re Conservatorship of Didier, 2010 SD 56, 784 N.W.2d 486 \(S.D. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\]](#) [In re Herbst, 206 Ariz. 214, 76 P.3d 888 \(Ct. App. Div. 1 2003\)](#).

[\[FN2\]](#) [In re Herbst, 206 Ariz. 214, 76 P.3d 888 \(Ct. App. Div. 1 2003\)](#); [Whittaker v. Stables, 339 Ill. App. 3d 943, 274 Ill. Dec. 496, 791 N.E.2d 588 \(2d Dist. 2003\)](#); [Banks v. Means, 2002 UT 65, 52 P.3d 1190 \(Utah 2002\)](#).

- Where a trust instrument explicitly provides for a power and method of modification, that power must be exercised in strict conformity to its terms. [Kirschbaum v. Wennett, 60 Mass. App. Ct. 807, 806 N.E.2d 440 \(2004\)](#).

[\[FN3\]](#) [Conservatorship of Irvine, 40 Cal. App. 4th 1334, 47 Cal. Rptr. 2d 587 \(4th Dist. 1995\)](#).

[\[FN4\] In re Estate of Mueller, 933 S.W.2d 903 \(Mo. Ct. App. E.D. 1996\).](#)

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[\[FN5\] Conservatorship of Irvine, 40 Cal. App. 4th 1334, 47 Cal. Rptr. 2d 587 \(4th Dist. 1995\).](#)

- Provisions in a trust instrument that require the consent of a third party or a specific waiting period before the modification is effective are designed to protect settlors from the possible undue influence of people who would like to benefit from the trust assets. [Lombardo v. Huysentruyt, 91 Cal. App. 4th 656, 110 Cal. Rptr. 2d 691 \(1st Dist. 2001\)](#), as modified on denial of reh'g, (Sept. 12, 2001).

- Where a settlor reserves an inter vivos right to revoke or amend a trust, and conditions the effect of an amendment on the delivery of a written notice of change to the trustee, delivery of a notice of amendment, whether by will or otherwise, after the death of the settlor is ineffective to alter the terms of the trust. [In re Reid, 2002 OK CIV APP 49, 46 P.3d 188 \(Div. 1 2002\).](#)

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[\[FN6\] In re Wendland-Reiner Trust, 267 Neb. 696, 677 N.W.2d 117 \(2004\).](#)

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[\[FN7\] In re Herbst, 206 Ariz. 214, 76 P.3d 888 \(Ct. App. Div. 1 2003\); In re Estate of Flake, 2003 UT 17, 71 P.3d 589 \(Utah 2003\).](#)

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[\[FN8\] Lombardo v. Huysentruyt, 91 Cal. App. 4th 656, 110 Cal. Rptr. 2d 691 \(1st Dist. 2001\)](#), as modified on denial of reh'g, (Sept. 12, 2001).

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[\[FN9\] Estate of Pozarny, 177 Misc. 2d 752, 677 N.Y.S.2d 714 \(Sur. Ct. 1998\).](#)

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[\[FN10\] Griffin v. Cogliano, 2002 Mass.APPDIV 55, 2002 WL 500343 \(Mass.APPDIV,2002\).](#)

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[\[FN11\] Crook v. Contreras, 95 Cal. App. 4th 1194, 116 Cal. Rptr. 2d 319 \(6th Dist. 2002\)](#), review denied, (May 22, 2002).

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[\[FN12\] L'Argent v. Barnett Bank, N.A., 730 So. 2d 395 \(Fla. Dist. Ct. App. 2d Dist. 1999\).](#)

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[\[FN13\] Muller v. Bank of America, N.A., 28 Kan. App. 2d 136, 12 P.3d 899 \(2000\).](#)

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[\[FN14\] Lourdes College of Sylvania, Ohio v. Bishop, 94 Ohio Misc. 2d 51, 703 N.E.2d 362 \(C.P. 1997\).](#)

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[\[FN15\] Manning v. Glens Falls Nat. Bank and Trust Co., 265 A.D.2d 743, 697 N.Y.S.2d 203 \(3d Dep't 1999\).](#)

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[\[FN16\] Lourdes College of Sylvania, Ohio v. Bishop, 94 Ohio Misc. 2d 51, 703 N.E.2d 362 \(C.P. 1997\).](#)

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[\[FN17\] In re Guardianship and Conservatorship of Garcia, 262 Neb. 205, 631 N.W.2d 464 \(2001\).](#)

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§ 69. Reformation of trust

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Model Codes and Restatements

[Restatement Third, Trusts § 62](#)

Reformation of a trust is an equitable remedy^[FN1] designed to correct a defective or erroneous instrument so that it reflects the true agreement of the party or parties.^[FN2] A court will permit the reformation of a trust only in extreme cases, and this power is to be exercised with great caution.^[FN3] Reformation is generally available to correct mistakes in inter vivos instruments so that the written instrument accurately expresses the settlor's actual intent.^[FN4] The purpose of trust reformation for a mistake is to assure that the intent of the trustor is carried out; thus, a mistake must be material and the party seeking reformation must establish that the trust as written does not reflect the trustor's intent or that the trustor would have used different terms but for the mistake.^[FN5] In deciding whether to reform a trust, a court may consider the surrounding circumstances at the time the instrument was executed, to the extent they may aid in determining the settlor's intention in using certain language.^[FN6] In determining whether to reform a trust, extrinsic circumstances and evidentiary factors pertinent to the settlor's intent must be carefully examined; however, these determinations are fact driven and each piece of evidence presented to the court is only a factor in determining the overall intent of the settlor.^[FN7]

Practice Guide: A party seeking to reform a trust has the burden of both proving the settlor's intent by clear and convincing evidence, and also establishing that the settlor's actual intent has been displaced by an error.^[FN8]

Comment: Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition

of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required.[\[FN9\]](#)

[\[FN1\] Schroeder v. Gebhart, 825 So. 2d 442 \(Fla. Dist. Ct. App. 5th Dist. 2002\)](#), review denied, [845 So. 2d 892 \(Fla. 2003\)](#); [Shoemaker v. Estate of Freeman, 1998 OK 17, 967 P.2d 871 \(Okla. 1998\)](#).

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[\[FN2\] Schroeder v. Gebhart, 825 So. 2d 442 \(Fla. Dist. Ct. App. 5th Dist. 2002\)](#), review denied, [845 So. 2d 892 \(Fla. 2003\)](#).

- A trust instrument may be reformed to conform with the settlor's intent. [Dassori v. Patterson, 440 Mass. 1039, 802 N.E.2d 553 \(2004\)](#).

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[\[FN3\] In re Estate of McInerny, 289 Ill. App. 3d 589, 224 Ill. Dec. 723, 682 N.E.2d 284 \(1st Dist. 1997\)](#).

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[\[FN4\] In re Rubin, 4 Misc. 3d 634, 781 N.Y.S.2d 421 \(Sur. Ct. 2004\)](#).

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[\[FN5\] Shoemaker v. Estate of Freeman, 1998 OK 17, 967 P.2d 871 \(Okla. 1998\)](#).

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[\[FN6\] In re Estate of McInerny, 289 Ill. App. 3d 589, 224 Ill. Dec. 723, 682 N.E.2d 284 \(1st Dist. 1997\)](#).

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[\[FN7\] In re Estate of Tuthill, 754 A.2d 272 \(D.C. 2000\)](#).

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[\[FN8\] In re Estate of Tuthill, 754 A.2d 272 \(D.C. 2000\)](#).

- Reformation of trust agreements in probate actions requires clear and convincing proof. [Pivnick v. Beck, 326 N.J. Super. 474, 741 A.2d 655 \(App. Div. 1999\)](#), aff'd, [165 N.J. 670, 762 A.2d 653 \(2000\)](#).

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[\[FN9\] Uniform Trust Code § 415](#), Comment.

- As to construction of ambiguous trusts, generally, see [§ 37](#).

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Trusts

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II. Express, Technical, or Direct Trusts; in General D. Modification, Amendment, or Reformation of Trusts

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§ 70. Reformation of trust—Grounds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [57](#)

A trust instrument may be reformed where it fails to conform to the settlor's intent because of a scrivener's error.^[FN1] The common law equitable power of a trial court to modify or reform a trust extends to situations where the trust instrument contains some expression of the trustor's intention, but a drafting error renders that expression ambiguous.^[FN2] The existence of a mistake in the drafting of a trust instrument must be established by full, clear, and decisive evidence.^[FN3] The Uniform Trust Code provides that a court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.^[FN4]

A unilateral mistake is a sufficient ground for reforming a trust which was created without any consideration, although the burden is nonetheless on the party seeking reformation to establish the mistake by clear and convincing evidence.^[FN5]

A trust with testamentary aspects may be reformed after the death of the settlor for a unilateral drafting mistake so long as the reformation is not contrary to the interest of the settlor.^[FN6]

Practice Guide: Where a drafting error in a trust creates a potential for adverse federal estate tax consequences, a court may reform the trust to conform to the settlor's clear intention.^[FN7]

A court can allow the reformation of a trust when an unforeseen exigency arises which may place the beneficiary in a "pinching want," making it necessary for the court to place itself in the position of the settlor and carry out his or her intention as if the settlor had anticipated the changed circumstances.^[FN8] When a court grants relief from the directives of a trust due to unanticipated circumstances, this constitutes a grant of additional authority to the trustee by the court, rather than a determination that such authority was conferred by the governing instrument.^[FN9] It should be noted that a court will not reform a trust so as to include provisions that allegedly will "further" the settlor's intent, when there is no claim that the additional provisions are necessary to "effectuate" the settlor's intent.^[FN10] Further, reformation may not be used to change the terms of a trust to effectuate what the settlor would have done had the settlor foreseen the change of circumstances that has occurred.^[FN11]

CUMULATIVE SUPPLEMENT

Cases:

Even if a will or other instrument creating a donative testamentary or inter vivos trust is unambiguous, the terms of the trust may be reformed by the court to conform the text to the intention of the settlor if the following

are established by clear and convincing evidence: (1) that a mistake of fact or law, whether in expression or inducement, affected the specific terms of the document, and (2) what the settlor's intention was. [Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 895 N.E.2d 1191 \(Ind. 2008\)](#).

Qualified personal residence trusts (QPRTs) executed by two settlors who were husband and wife, entitling settlors to live in the trust property for a ten-year income term after which the property was to be held in trust for beneficiaries, could be reformed to reflect settlor's intent to reduce their estate and gift tax liabilities by eliminating terms of each trust that included the other settlor as a beneficiary, since evidence showed that inclusion of terms was a mistake; mistake was shown by affidavit from the attorney who drafted the trusts acknowledging mistake, settlors' affidavits demonstrating their intent in executing the trusts, settlors' assent to the proposed reformations, beneficiaries' agreements to facts presented in trustees' complaints, and beneficiaries' assents to the relief sought as modified by the guardian ad litem. [Bindman v. Parker, 459 Mass. 1004, 943 N.E.2d 942 \(2011\)](#).

[END OF SUPPLEMENT]

[FN1] [Schroeder v. Gebhart, 825 So. 2d 442 \(Fla. Dist. Ct. App. 5th Dist. 2002\)](#), review denied, [845 So. 2d 892 \(Fla. 2003\)](#); [Colt v. Colt, 438 Mass. 1001, 777 N.E.2d 1235 \(2002\)](#).

- Reformation under the Kansas Uniform Trust Code is available when the terms of a trust fail to reflect the donor's original particularized intention; the mistaken terms are then reformed to reflect this specific intent. [In re Harris Testamentary Trust, 275 Kan. 946, 69 P.3d 1109 \(2003\)](#).

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[FN2] [Ike v. Doolittle, 61 Cal. App. 4th 51, 70 Cal. Rptr. 2d 887 \(4th Dist. 1998\)](#).

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[FN3] [In re Estate of Tuthill, 754 A.2d 272 \(D.C. 2000\)](#); [Putnam v. Putnam, 425 Mass. 770, 682 N.E.2d 1351 \(1997\)](#).

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[FN4] [Uniform Trust Code § 415](#).

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[FN5] [Shoemaker v. Estate of Freeman, 1998 OK 17, 967 P.2d 871 \(Okla. 1998\)](#).

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[FN6] [In re Estate of Huls, 732 So. 2d 1206 \(Fla. Dist. Ct. App. 2d Dist. 1999\)](#).

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[FN7] [Fleet Bank, N.A. v. Fleet Bank, N.A., 429 Mass. 1003, 706 N.E.2d 627 \(1999\)](#).

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[FN8] [In re Estate of McInerny, 289 Ill. App. 3d 589, 224 Ill. Dec. 723, 682 N.E.2d 284 \(1st Dist. 1997\)](#).

- When unanticipated circumstances cause compliance with the directives of a trust to defeat or substantially impair the accomplishment of the creator's intent, relief may be available. [Matter of Siegel, 174 Misc. 2d 698, 665 N.Y.S.2d 813 \(Sur. Ct. 1997\)](#).

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[FN9] [Matter of Siegel, 174 Misc. 2d 698, 665 N.Y.S.2d 813 \(Sur. Ct. 1997\)](#).

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[FN10] [Walker v. Walker, 433 Mass. 581, 744 N.E.2d 60 \(2001\)](#).

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[\[FN11\] In re Rubin, 4 Misc. 3d 634, 781 N.Y.S.2d 421 \(Sur. Ct. 2004\).](#)

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Forms

[17B, 17C Am. Jur. Legal Forms 2d, Trusts §§ 251:47 to 251:68, 251:72, 251:188, 251:227, 251:503 to 251:507, 251:254 to 251:264, 251:266, 251:268, 251:601, 251:602, 251:604, 251:609 to 251:613, 251:616](#)

[24 Am. Jur. Pleading and Practice Forms, Trusts §§ 16, 294, 297 to 306, 310](#)

Model Codes and Restatements

[Uniform Trust Code §§ 410 to 412, 414, 602](#)

[Restatement Third, Trusts §§ 61, 63, 65, 66, 69](#)

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II. Express, Technical, or Direct Trusts; in General
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§ 71. Generally

West's Key Number Digest

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Forms

Duration of trust—General form. [17C Am. Jur. Legal Forms 2d, Trusts § 251:254](#)

Duration of trust—Other forms. [17C Am. Jur. Legal Forms 2d, Trusts §§ 251:255 to 251:262](#)

Renewal of trust. [17C Am. Jur. Legal Forms 2d, Trusts § 251:616](#)

Answer—Defense—Trust term extended by agreement of beneficiaries. [24 Am. Jur. Pleading and Practice Forms, Trusts § 306](#)

Model Codes and Restatements

[Restatement Third, Trusts § 61](#)

The length of time which a trust lasts depends upon its purpose.[\[FN1\]](#) In the absence of specific provisions for termination, a trust will continue as long as may be necessary to accomplish the purpose for which it was created.[\[FN2\]](#) In other words, in the absence of a reservation of a power of revocation at the time of the creation of a trust, in which case the trust becomes irrevocable,[\[FN3\]](#) the trust terminates when its purpose has been fully accomplished[\[FN4\]](#) or upon the reaching of a date fixed in the trust instrument.[\[FN5\]](#) Further, it has been stated that an active trust may not be terminated, even with the consent of all the beneficiaries, if a material purpose of the settlor remains to be accomplished.[\[FN6\]](#)

Practice Guide: Where no procedure for termination is stated in the trust instrument, any reasonable method may be used.[\[FN7\]](#)

Ordinarily, however, the duration of a trust is governed by the trust instrument.[\[FN8\]](#) The trust may not be terminated before the expiration of the term for which it is established,[\[FN9\]](#) at least not when the trustor has fixed the time for the termination of a trust, and where it is active and its purposes and objects have not been fully accomplished and its termination would not best accomplish the testator's intent;[\[FN10\]](#) rather, the trust expires in accordance with the limitation or condition stated.[\[FN11\]](#)

Observation: The issue of trust termination, like any other matter relating to the rights created by a trust instrument, including the extent of a trustee's discretion, initially is a question of law that turns on the settlor's intention as reflected in the words of the instrument.[\[FN12\]](#)

The mere fact that no time is stated in a trust instrument, or declaration for the termination of a trust, does not render it void for uncertainty,[\[FN13\]](#) as its limitation in time can be inferred.[\[FN14\]](#)

Observation: When no intention to the contrary appears, the trust estate will not be continued beyond the purposes of its creation as set forth in the trust instrument.[\[FN15\]](#)

The termination of a trust leaves the trustee with a mere administrative title to the property, and the trustee is not immediately divested of all duties and responsibilities, but has the powers and duties appropriate for winding up trust affairs.[\[FN16\]](#) The period for winding up depends upon the facts and circumstances of each particular case,[\[FN17\]](#) although generally, the period for winding up a trust is the period after the time for termination of the trust has arrived and before the trust is terminated by the distribution of trust property.[\[FN18\]](#)

The rule against perpetuities does ordinarily apply to trusts for private purposes.[\[FN19\]](#)

The effect of the termination of a trust is to bring to a conclusion the separation of legal title and equitable ownership, the title, corpus, and principal, including accumulations of income, passing to the beneficiaries entitled to it.[\[FN20\]](#)

Observation: A trust can terminate under several circumstances, including revocation or modification by the settlor, the expiration of the period for which the trust was created, or a conveyance by the trustee to or at the direction of a beneficiary or by other terms of the instrument,[\[FN21\]](#) when no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.[\[FN22\]](#)

Cases:

Issue of whether municipality properly terminated trustee relationship with agency that administered municipality's federal block grants fell within scope of arbitration clause in deed of trust document that originally created trustee relationship between municipality and agency's predecessor, which required arbitration of any controversy arising between the parties with regard to their responsibilities and obligations under their agreement, given deed of trust's explicit reference to both requirements for termination of trustee relationship and responsibilities following termination, and given that court could not say with positive assurance that arbitration clause could not be so construed. [Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital](#), 415 F.3d 145 (1st Cir. 2005)

[END OF SUPPLEMENT]

[FN1] [Smith v. Francis](#), 221 Ga. 260, 144 S.E.2d 439 (1965); [Burnham v. Baltimore Gas & Elec. Co.](#), 217 Md. 507, 144 A.2d 80 (1958).

- A trust estate is vested in the trustee, but its duration and extent are governed by the requirements of the trust. The extent and duration of the trust estate are measured by the objects of its creation. [Macaulay v. Wachovia Bank of South Carolina, N.A.](#), 333 S.C. 201, 508 S.E.2d 46 (Ct. App. 1998).

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[FN2] [Third Nat. Bank In Nashville v. Brown](#), 691 S.W.2d 557 (Tenn. Ct. App. 1985).

- Generally, a trust terminates when the trustee gives a final accounting and conveys the trust property to the beneficiaries. [Shannon v. Johnson](#), 741 S.W.2d 791 (Mo. Ct. App. E.D. 1987).

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[FN3] [Matter of Estate of Binder](#), 386 N.W.2d 910 (N.D. 1986).

- As to the termination of a trust by exercise of a grantor's reserved power of revocation, see [§ 97](#).

- As to the effect of reservation of a power to revoke a trust as affecting the validity of the trust, see [§ 30](#).

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[FN4] [§ 109](#).

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[FN5] [Govern v. Hall](#), 430 N.W.2d 874 (Minn. Ct. App. 1988).

- As a rule, a trust will not terminate prior to the expiration of the time fixed in the trust instrument. [Lynch v. Lynch](#), 147 Vt. 574, 522 A.2d 234 (1987).

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[FN6] [In re Estate of Brown](#), 148 Vt. 94, 528 A.2d 752 (1987).

- As to spendthrift trusts, generally, see [§§ 121 et seq.](#)

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[FN7] [Starcrest Trust v. Berry](#), 926 S.W.2d 343 (Tex. App. Austin 1996).

-

[FN8] [Yates v. Wessel](#), 775 So. 2d 993 (Fla. Dist. Ct. App. 4th Dist. 2000).

- Trust termination language, that the trust would terminate 21 years after the death of the last surviving beneficiary named "herein," was ambiguous and warranted consideration of extrinsic evidence to determine the settlor's intent, as the measuring lives may have been the beneficiaries specifically named in the termination article or any beneficiary named in the entire trust instrument. [Matter of Trusts Created by Ferguson](#), 929 P.2d

[33 \(Colo. Ct. App. 1996\).](#)

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[\[FN9\] University Of Maine Foundation v. Fleet Bank Of Maine, 2003 ME 20 \(Me.,2003\).](#)

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[\[FN10\] Gershaw v. Gershfield, 52 Mass. App. Ct. 81, 751 N.E.2d 424 \(2001\).](#)

- A trust may not be terminated early if: (1) the time fixed by the settlor has not elapsed; or (2) there is a purpose that has not been accomplished. [University Of Maine Foundation v. Fleet Bank Of Maine, 2003 ME 20 \(Me.,2003\).](#)

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[\[FN11\] Grandy v. Robinson, 180 Or. 315, 175 P.2d 463 \(1946\).](#)

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[\[FN12\] Steele v. Kelley, 46 Mass. App. Ct. 712, 710 N.E.2d 973 \(1999\).](#)

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[\[FN13\] Holmes v. Walter, 118 Wis. 409, 95 N.W. 380 \(1903\).](#)

- As to the general requirement that an express trust be reasonably certain in its material terms and parts, see [§ 46.](#)

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[\[FN14\] Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 \(1965\); In re Hedden's Will, 7 A.D.2d 764, 179 N.Y.S.2d 929 \(3d Dep't 1958\).](#)

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[\[FN15\] Macaulay v. Wachovia Bank of South Carolina, N.A., 333 S.C. 201, 508 S.E.2d 46 \(Ct. App. 1998\).](#)

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[\[FN16\] Sorrel v. Sorrel, 1 S.W.3d 867 \(Tex. App. Corpus Christi 1999\).](#)

- As to effect of delay in distribution and payment to beneficiaries as creating constructive trusts, see [§ § 219, 617.](#)

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[\[FN17\] Brown v. Ryan, 338 Ill. App. 3d 864, 273 Ill. Dec. 307, 788 N.E.2d 1183 \(1st Dist. 2003\), appeal denied, 205 Ill. 2d 577, 281 Ill. Dec. 76, 803 N.E.2d 480 \(2003\).](#)

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[\[FN18\] In re Estate of Moring v. Colorado Dept. of Health Care Policy and Financing, 24 P.3d 642 \(Colo. Ct. App. 2001\).](#)

- A pour-over trust continues until the trust assets are collected and distributed according to the trust terms, notwithstanding language in the trust agreement that the trust terminates upon the death of the income beneficiary. [In re Klosinski, 192 Misc. 2d 714, 746 N.Y.S.2d 350 \(Sur. Ct. 2002\).](#)

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[\[FN19\] 61 Am. Jur. 2d, Perpetuities and Restraints on Alienation § 63.](#)

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[\[FN20\] In re French's Estate, 301 Pa. 223, 151 A. 809, 72 A.L.R. 1042 \(1930\).](#)

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[\[FN21\] Chicago Title and Trust Co. v. Steinitz, 288 Ill. App. 3d 926, 224 Ill. Dec. 354, 681 N.E.2d 669 \(1st Dist. 1997\).](#)

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[\[FN22\] Uniform Trust Code § 410\(a\).](#)

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II. Express, Technical, or Direct Trusts; in General
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§ 72. Effect of unborn beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [60](#)

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[Modern status of presumption against possibility of issue being extinct, 98 A.L.R.2d 1285](#)

The tendency of the courts is to treat the possibility of issue as one which prevents the distribution of trust property, and the courts generally refuse to terminate a trust which would be affected by the possible birth of issue,[FN1] that is, if any beneficiary is unascertained or unborn, termination of the trust cannot be forced.[FN2] The rule is not affected by the presence in the suit of the only possible parents of unborn contingent beneficiaries,[FN3] or by the presence of the attorney general of a state as a party to the suit to protect the interests of such unborn persons.[FN4]

Thus, ordinarily, where born and unborn children of a living person were entitled to an estate or interest in a trust fund, the possibility of issue in such living person precludes the termination of the trust by the consent of all the living beneficiaries of the fund.[FN5]

Some authorities, however, recognize the impossibility of a woman to bear children as causing the termination of a trust.[FN6] The recognition and application of the presumption of the possibility of issue until death does not always result in a refusal to terminate the trust, even though the matter in dispute relates to the rights or interests of unborn children of a living person.[FN7] It has been held that the termination of a trust,

dependent upon children not being born to certain persons, should be permitted if the possibility of the birth of children is negligible, even if not absolutely impossible.[FN8]

[FN1] [Sawyer v. Sawyer, 261 Iowa 112, 152 N.W.2d 605 \(1967\); Mumma v. Huntington Natl. Bank of Columbus, 9 Ohio App. 2d 166, 38 Ohio Op. 2d 183, 223 N.E.2d 621 \(10th Dist. Franklin County 1967\).](#)

[FN2] [National City Bank of Cleveland v. Ford, 36 Ohio Misc. 60, 63 Ohio Op. 2d 222, 65 Ohio Op. 2d 84, 299 N.E.2d 310 \(C.P. 1973\), aff'd \(Ohio Ct. App. 8th Dist. Cuyahoga County Aug. 15, 1974\).](#)

[FN3] [§ 674.](#)

[FN4] [§ 674.](#)

[FN5] [Marty v. First Nat. Bank of Baltimore, 209 Md. 210, 120 A.2d 841 \(1956\); Security Nat. Bank of Greensboro v. Hannah, 252 N.C. 556, 114 S.E.2d 273 \(1960\).](#)

[FN6] [White v. Weed, 87 N.H. 153, 175 A. 814 \(1934\).](#)

[FN7] [In re Gordon's Will, 8 Misc. 2d 421, 116 N.Y.S.2d 663 \(Sur. Ct. 1952\).](#)

[FN8] [In re Bassett's Estate, 104 N.H. 504, 190 A.2d 415, 98 A.L.R.2d 1281 \(1963\).](#)

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§ 73. Generally

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Forms

Irrevocable trust agreement—Short form. [17B Am. Jur. Legal Forms 2d, Trusts § 251:72](#)

Power of trustee—To terminate trust when trust principal reaches minimum amount. [17C Am. Jur. Legal Forms 2d, Trusts § 251:227](#)

Termination of trust—By trustee—When trust estate reduces to a certain amount. [17C Am. Jur. Legal Forms 2d, Trusts § 251:266](#)

Form drafting guide—Checklist—Drafting an agreement terminating a trust. [17C Am. Jur. Legal Forms 2d, Trusts § 251:609](#)

Termination of trust by trustee. [17C Am. Jur. Legal Forms 2d, Trusts § 251:611](#)

Agreement between trustor and trustee terminating trust after beneficiary's disclaimer. [17C Am. Jur. Legal Forms 2d, Trusts § 251:613](#)

Complaint, petition, or declaration—To compel termination of trust and distribution of trust property—Pursuant to terms of trust instrument as to duration of trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 299](#)

Complaint, petition, or declaration—To compel distribution of trust property—Allegation—Desire of settlor and beneficiaries that trust be terminated. [24 Am. Jur. Pleading and Practice Forms, Trusts § 305](#)

Model Codes and Restatements

[Restatement Third, Trusts § 65](#)

While different rules have sometimes been applied,[\[FN1\]](#) a trust may be terminated by the agreement of all parties in interest.[\[FN2\]](#) The settlor of a trust, together with the holders of all beneficial interests, have the power to terminate the trust even in the absence of an express power to do so.[\[FN3\]](#) However, it has been said that only where the design and object of a trust has been practically accomplished and all of the interests created by it have become vested may the trust be terminated by agreement.[\[FN4\]](#) Under the Uniform Trust Code, an irrevocable trust may be terminated upon consent of the settlor and all beneficiaries, even if the termination is inconsistent with a material purpose of the trust.[\[FN5\]](#)

As circumstances and situations change, a trust may be revoked.[\[FN6\]](#)

A trust may be orally revoked, although the declaration relied upon to terminate a trust must clearly, unequivocally, and decisively establish a present disaffirmance and revocation thereof.[\[FN7\]](#)

Under the common law, a power of attorney instrument which authorized the "revocation of trusts" expressly evinced an intention to authorize the agent to revoke trusts generally, and thus, the agent could revoke a trust that was not specified in the power of attorney instrument.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

A trustee cannot repudiate a statutory trust. [Nichols v. Nichols, 2009 OK 43, 222 P.3d 1049 \(Okla. 2009\)](#).

[END OF SUPPLEMENT]

[FN1] As to termination by beneficiaries to a trust, see [§ 95](#).

- As to termination by a trustor, see [§ 96](#).

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[FN2] [Hilvering v. Helmholz, 296 U.S. 93, 56 S. Ct. 68, 80 L. Ed. 76 \(1935\)](#); [Ranney v. Zimmerman, 284 S.W.2d 835 \(Ky. 1955\)](#).

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[FN3] [Papale-Keefe v. Altomare, 38 Mass. App. Ct. 308, 647 N.E.2d 722 \(1995\)](#).

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[FN4] [Fleisch v. First American Bank, 305 Ill. App. 3d 105, 238 Ill. Dec. 179, 710 N.E.2d 1281 \(3d Dist. 1999\)](#).

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[FN5] [Uniform Trust Code § 411\(a\)](#).

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[FN6] [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\)](#), cert. denied, [537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\)](#).

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[FN7] [DiLucia v. Clemens, 373 Pa. Super. 466, 541 A.2d 765 \(1988\)](#).

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[FN8] [Matter of Trust of Franzen, 955 P.2d 1018 \(Colo. 1998\)](#).

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II. Express, Technical, or Direct Trusts; in General

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§ 74. Termination by beneficiaries

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Termination of trust—By beneficiaries. [17C Am. Jur. Legal Forms 2d, Trusts § 251:263](#)

Termination of trust—By beneficiaries—With consent of trustor or trustee. [17C Am. Jur. Legal Forms 2d, Trusts § 251:264](#)

Termination of trust—Prohibited before expiration of stated term. [17C Am. Jur. Legal Forms 2d, Trusts § 251:268](#)

Agreement among beneficiaries terminating trust. [17C Am. Jur. Legal Forms 2d, Trusts § 251:610](#)

Disclaimer by beneficiary. [17C Am. Jur. Legal Forms 2d, Trusts § 251:612](#)

Model Codes and Restatements

[Restatement Third, Trusts § 65](#)

A trust instrument may validly make express provisions for the termination of the trust at the request of all or a certain portion of the beneficiaries.^[FN1] Further, in some jurisdictions, even in the absence of such express provisions, where the instrument creating a trust does not prohibit the termination of the trust,^[FN2] the trust may be terminated by the consent of the beneficiaries without judicial action.^[FN3] Thus, for example, a trust may be terminated prior to a stated termination event—such as the death of the testator—by joint demand of all the beneficiaries for the delivery by the trustees of the trust assets, when the settlor has not expressed a contrary intent in the trust document.^[FN4] However, when no considerations of public policy are involved, and the trust is active, rather than passive, the foregoing rule must yield to the principle that when a settlor expresses a clear intention that the beneficiaries shall not terminate the trust by compelling delivery, the courts must uphold the settlor's expressed intention.^[FN5] Also, the beneficiaries may not prematurely terminate a trust restricted by a spendthrift clause.^[FN6] Furthermore, a trust ordinarily cannot be terminated by the consent, contract, conveyance, or transfer of a beneficiary unless the object of the trust has been attained,^[FN7] or at least

practically accomplished,[FN8] and termination of the trust is not justified merely because of the judgment of beneficiaries that a testator's intention will be better achieved some other way.[FN9] A desire of the beneficiaries to terminate a trust created by a will cannot prevail over the intention expressed in the will that it shall continue during the lifetime of a specified person.[FN10]

A trust cannot be terminated by the consent, contract, transfer, or conveyance of beneficiaries unless all beneficiaries have given their consent or joined in the contract, conveyance, or transfer,[FN11] and unless all beneficiaries are of full age[FN12] and otherwise sui juris.[FN13] Furthermore, a trust cannot be terminated by the consent or acts of beneficiaries where there are contingent interests in the trust which cannot be determined until the happening of certain events.[FN14] In other words, beneficiaries with vested interests cannot by termination of the trust shut out contingent beneficiaries.[FN15]

[FN1] [In re French's Estate](#), 301 Pa. 223, 151 A. 809, 72 A.L.R. 1042 (1930).

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[FN2] [Rowley v. American Trust Co.](#), 144 Va. 375, 132 S.E. 347, 45 A.L.R. 738 (1926); [Holmes v. Walter](#), 118 Wis. 409, 95 N.W. 380 (1903).

- As to provisions in the trust instrument for termination by beneficiaries of the trust, see [§ 95](#).

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[FN3] [Heifetz v. Bank of America Nat. Trust & Sav. Ass'n](#), 147 Cal. App. 2d 776, 305 P.2d 979, 62 A.L.R.2d 1403 (2d Dist. 1957).

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[FN4] [Landmark Communications, Inc. v. Sovran Bank, N.A.](#), 239 Va. 158, 387 S.E.2d 484 (1990).

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[FN5] [Schmucker v. Walker](#), 226 Va. 582, 311 S.E.2d 108 (1984).

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[FN6] [University Of Maine Foundation v. Fleet Bank Of Maine](#), 2003 ME 20, 817 A.2d 871 (Me.,2003).

- As to termination of spendthrift trusts by beneficiaries, generally, see [§§ 155 et seq.](#)

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[FN7] [Smith v. Massachusetts Mut. Life Ins. Co.](#), 116 Fla. 390, 156 So. 498, 95 A.L.R. 508 (1934); [Fidelity Union Trust Co. v. Margetts](#), 7 N.J. 556, 82 A.2d 191 (1951).

- All holders of a beneficial interest, without the settlor, may terminate a trust if it appears that the settlor's purpose for creating the trust has been fulfilled. [Papale-Keefe v. Altomare](#), 38 Mass. App. Ct. 308, 647 N.E.2d 722 (1995).

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[FN8] [Sawyer v. Sawyer](#), 261 Iowa 112, 152 N.W.2d 605 (1967).

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[FN9] [In re Stack's Will](#), 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

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[FN10] [Fidelity Union Trust Co. v. Margetts](#), 7 N.J. 556, 82 A.2d 191 (1951).

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[FN11] [Smith v. Massachusetts Mut. Life Ins. Co.](#), 116 Fla. 390, 156 So. 498, 95 A.L.R. 508 (1934); [Rowley v. American Trust Co.](#), 144 Va. 375, 132 S.E. 347, 45 A.L.R. 738 (1926).

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[FN12] [Anderson v. Williams](#), 262 Ill. 308, 104 N.E. 659 (1914); [Fowler v. Lanpher](#), 193 Wash. 308, 75 P.2d 132 (1938).

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[\[FN13\] Pernod v. American Nat. Bank & Trust Co. of Chicago, 8 Ill. 2d 16, 132 N.E.2d 540, 59 A.L.R.2d 1223 \(1956\).](#)

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[\[FN14\] Anderson v. Williams, 262 Ill. 308, 104 N.E. 659 \(1914\).](#)

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[\[FN15\] Schuster v. Schuster, 75 Ariz. 20, 251 P.2d 631 \(1952\); Hills v. Travelers Bank & Trust Co., 125 Conn. 640, 7 A.2d 652, 123 A.L.R. 1419 \(1939\).](#)

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§ 75. Termination by trustor

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#)

Forms

Termination of trust—By beneficiaries—With consent of trustor or trustee. [17C Am. Jur. Legal Forms 2d, Trusts § 251:264](#)

Revocation of trust—Partial revocation. [17C Am. Jur. Legal Forms 2d, Trusts § 251:601](#)

Complaint, petition, or declaration—To declare revocation of trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 16](#)

A settlor may terminate a trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.^[FN1] However, the rule is sometimes stated that where a valid voluntary trust has been created, and no power of revocation has been reserved,^[FN2] the trust cannot be revoked by the settlor without the consent of all beneficiaries.^[FN3] Further, it has been said that a trustor cannot generally revoke a trust without the consent of the trustee and all beneficiaries.^[FN4] Even so, an exception to the general rule applies where the trustor is the sole beneficiary, such that a trustor may generally revoke a trust without the consent of the trustee and all beneficiaries where the trustor is the sole beneficiary,^[FN5] and this is so notwithstanding a provision making the trust irrevocable.^[FN6]

In addition, it has been stated, in this regard, that a settlor who is the sole remaining beneficiary of a trust may terminate the trust even though he or she has no reserved power of revocation and the purposes of the trust have not been fully accomplished,^[FN7] and that a settlor may revoke a trust as to his or her own life interest therein.^[FN8]

Creditors of a settlor cannot generally compel a settlor, in the absence of fraud, to revoke a trust created for the benefit of another in the absence of a statute providing otherwise.^[FN9]

^[FN1] [Wils v. Robinson, 934 S.W.2d 774 \(Tex. App. Houston 14th Dist. 1996\)](#), vacated pursuant to settlement, [938 S.W.2d 717 \(Tex. 1997\)](#) and writ granted, (Feb. 6, 1997).

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^[FN2] As to termination of trust by exercise of the trustor's power of revocation, see [§ 97](#).

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^[FN3] [Salem United Methodist Church v. Bottorff, 138 S.W.3d 788 \(Mo. Ct. App. S.D. 2004\)](#).

- Where the settlor makes no reservation in the language to revoke a trust, he or she may not unilaterally revoke the trust. [In re Guardianship of Lombardo, 86 Ohio St. 3d 600, 1999-Ohio-132, 716 N.E.2d 189 \(1999\)](#).

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^[FN4] [Lucas v. Velikanje, 2 Wash. App. 888, 471 P.2d 103 \(Div. 3 1970\)](#).

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^[FN5] [Lucas v. Velikanje, 2 Wash. App. 888, 471 P.2d 103 \(Div. 3 1970\)](#).

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^[FN6] [Couch v. Director, Missouri State Div. of Family Services, 795 S.W.2d 91 \(Mo. Ct. App. W.D. 1990\)](#).

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^[FN7] [Heifetz v. Bank of America Nat. Trust & Sav. Ass'n, 147 Cal. App. 2d 776, 305 P.2d 979, 62 A.L.R.2d 1403 \(2d Dist. 1957\)](#).

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^[FN8] [Fernald v. Lawsten, 26 Cal. App. 2d 552, 79 P.2d 742 \(3d Dist. 1938\)](#).

- As to the revocation of a spendthrift trust, see [§§ 155 et seq.](#)

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^[FN9] [In re Estate of Knickerbocker, 912 P.2d 969 \(Utah 1996\)](#).

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§ 76. Termination by trustor—Termination by exercise of power of revocation

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [59\(1\)](#) to [59\(4\)](#)

Forms

Revocable trust agreement—Form drafting guide. [17B Am. Jur. Legal Forms 2d, Trusts § 251:47](#)

General revocable trust agreements. [17B Am. Jur. Legal Forms 2d, Trusts §§ 251:48 to 251:64.2](#)

Joint revocable trust agreements. [17B Am. Jur. Legal Forms 2d, Trusts §§ 251:65, 251:66, 251:67](#)

Retirement trust—To provide income for professional upon retirement. [17B Am. Jur. Legal Forms 2d, Trusts § 251:68](#)

Reservation by trustor of power of revocation. [17C Am. Jur. Legal Forms 2d, Trusts §§ 251:503 to 251:507](#)

Complaint, petition, or declaration—To declare revocation of trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 16](#)

Model Codes and Restatements

[Restatement Third, Trusts § 63](#)

As a general rule, a trust executed without the reservation of a power by the settlor to revoke the trust is irrevocable,[\[FN1\]](#) and a valid trust, once created, cannot be revoked except by the exercise of a reserved power to do so.[\[FN2\]](#) However, it has been said that unless otherwise specifically provided, a trust is revocable.[\[FN3\]](#) It should be noted that a trust may be designated as either revocable or irrevocable.[\[FN4\]](#)

Observation: The Uniform Trust Code endorses the minority approach, that is, that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable.[\[FN5\]](#)

Practice Guide: The view has been followed that a trust can be revoked if the settlor intended to reserve the power of revocation but the instrument mistakenly omitted such.[\[FN6\]](#)

When the settlor of a trust provides for a mechanism by which the power of revocation is to be exercised, these procedures must be followed for there to be a valid revocation of the trust.[\[FN7\]](#) Stated another way, if a settlor reserves the power to revoke a trust only in a particular manner or under particular circumstances, the settlor can revoke the trust only in that manner or under those circumstances.[\[FN8\]](#) On the other hand, where the right to revoke is reserved and no particular mode is specified, any mode sufficiently manifesting an intention of the trustor to revoke is effective.[\[FN9\]](#)

Observation: Ordinarily, if a power to modify a trust is subject to no restrictions, then a reserved power to amend or modify includes the power to revoke.[\[FN10\]](#)

A trust revocation requires an express statement and cannot be accomplished through implication, especially by allowing oral testimony from outside the four corners of the document to determine intent.[\[FN11\]](#) To revoke a trust, the instrument claimed to be in exercise of the power of revocation must show an intent to use the power, although it need not necessarily refer expressly to the power.[\[FN12\]](#) The revocation of a trust may be held to have occurred by means of a conveyance by the settlor to a third person that covers the trust property.[\[FN13\]](#)

Any powers that a settlor has to revoke a trust dies with him or her.[\[FN14\]](#) Accordingly, if a settlor retains a restricted power to revoke a trust during his or her life, a revocation is valid only if it takes effect before the death of the settlor.[\[FN15\]](#) A trust in which the creators reserve the power to revoke during "our lifetime" becomes irrevocable upon the first creator's death.[\[FN16\]](#)

Observation: Unless the settlor of a trust expressly states otherwise in the trust document, the power to revoke a trust is personal to the settlor and is nondelegable,[\[FN17\]](#) and does not pass to the settlor's successors in interest on the settlor's death.[\[FN18\]](#)

A trustor must specifically give a trustee the power to revoke under an agreement.[\[FN19\]](#) A mere statement that the trustee may disburse principal is not a specific reservation of the right to revoke.[\[FN20\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Under Pennsylvania law, a trust may be revoked by the settlor unless the trust instrument expressly provides that the trust is irrevocable. [20 Pa.C.S.A. § 7752. In re Michael, 436 B.R. 323 \(Bankr. M.D. Pa. 2010\).](#)

[END OF SUPPLEMENT]

[\[FN1\] Rebidas v. Murasko, 450 Pa. Super. 546, 677 A.2d 331 \(1996\).](#)

[FN2] [L'Argent v. Barnett Bank, N.A., 730 So. 2d 395 \(Fla. Dist. Ct. App. 2d Dist. 1999\)](#); [Bongaards v. Millen, 440 Mass. 10, 793 N.E.2d 335 \(2003\)](#); [Salem United Methodist Church v. Bottorff, 138 S.W.3d 788 \(Mo. Ct. App. S.D. 2004\)](#).

- A trust is revocable by the settlor if and to the extent that by the terms of the trust he or she reserved such a power. [In re Last Will and Testament of Tamplin, 48 P.3d 471 \(Alaska 2002\)](#); [Banks v. Means, 2002 UT 65, 52 P.3d 1190 \(Utah 2002\)](#).

- As to the effect of the reservation of the power of revocation on the validity of a trust, see [§ 30](#).

- As to the exercise by will of a reserved power to revoke a trust, see [§ 98](#).

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[FN3] [Bank of America v. Angel View Crippled Children's Foundation, 72 Cal. App. 4th 451, 85 Cal. Rptr. 2d 117 \(1st Dist. 1999\)](#); [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\)](#), cert. denied, [537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\)](#).

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[FN4] [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\)](#), cert. denied, [537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\)](#).

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[FN5] [Uniform Trust Code § 602](#), Comment.

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[FN6] [Cruse v. Leary, 727 S.W.2d 408 \(Ky. Ct. App. 1987\)](#).

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[FN7] [Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund, 128 Idaho 539, 916 P.2d 1264 \(1996\)](#).

- The only limitations on an unlimited power to revoke a trust is that the power be exercised at the time and in the manner provided for in the instrument creating the power in the first place. [Rollins v. Alvarez, 792 So. 2d 695 \(Fla. Dist. Ct. App. 5th Dist. 2001\)](#).

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[FN8] [Matter of Estate of Sanders, 261 Kan. 176, 929 P.2d 153 \(1996\)](#); [Salem United Methodist Church v. Bottorff, 138 S.W.3d 788 \(Mo. Ct. App. S.D. 2004\)](#).

- A requirement in a trust instrument that the settlor give written notice of intent to revoke the trust to the trustee is deemed waived where the same person acts as both settlor and trustee. [Argo v. Moncus, 721 So. 2d 218 \(Ala. Civ. App. 1998\)](#).

- A grantor need not adhere to a provision of a revocable trust requiring written notice of revocation to the trustee if the trustee voluntarily waives the right to notice by discovering the revocation and acquiescing to it. [In re Estate of Mueller, 933 S.W.2d 903 \(Mo. Ct. App. E.D. 1996\)](#).

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[FN9] [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\)](#), cert. denied, [537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\)](#); [Salem United Methodist Church v. Bottorff, 138 S.W.3d 788 \(Mo. Ct. App. S.D. 2004\)](#).

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[FN10] [In re Estate of Flake, 2003 UT 17, 71 P.3d 589 \(Utah 2003\)](#).

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[FN11] [Matter of Estate of Sanders, 261 Kan. 176, 929 P.2d 153 \(1996\)](#).

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[FN12] [Starcrest Trust v. Berry, 926 S.W.2d 343 \(Tex. App. Austin 1996\)](#).

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[\[FN13\] Starcrest Trust v. Berry, 926 S.W.2d 343 \(Tex. App. Austin 1996\).](#)

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[\[FN14\] Griffin v. Cogliano, 2002 Mass.APPDIV 55, 2002 WL 500343 \(Mass.APPDIV,2002\).](#)

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[\[FN15\] In re Estate of Davis, 109 Ohio App. 3d 181, 671 N.E.2d 1302 \(12th Dist. Clermont County 1996\).](#)

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[\[FN16\] Gaigal v. Laub, 236 A.D.2d 362, 653 N.Y.S.2d 637 \(2d Dep't 1997\).](#)

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[\[FN17\] Muller v. Bank of America, N.A., 28 Kan. App. 2d 136, 12 P.3d 899 \(2000\).](#)

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[\[FN18\] In re Guardianship and Conservatorship of Garcia, 262 Neb. 205, 631 N.W.2d 464 \(2001\).](#)

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[\[FN19\] Matter of Estate of West, 915 P.2d 504 \(Utah Ct. App. 1996\), judgment rev'd on other grounds, 948 P.2d 351 \(Utah 1997\).](#)

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[\[FN20\] Matter of Estate of West, 915 P.2d 504 \(Utah Ct. App. 1996\), judgment rev'd on other grounds, 948 P.2d 351 \(Utah 1997\).](#)

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[Exercise by will of trustor's reserved power to revoke or modify inter vivos trust, 81 A.L.R.3d 959](#)

Forms

Revocation of trust—By trustor's will. [17C Am. Jur. Legal Forms 2d, Trusts § 251:602](#)

While there is authority for the view that revocation of a trust may be effected by a devise of the corpus of the trust by a will which is duly executed,[\[FN1\]](#) and, in this regard, it has been stated that a will is an instrument in writing which can be an appropriate mode of fully or partially revoking an inter vivos trust when signed by the settlor and delivered to the trustee in accordance with the terms of the trust, at least insofar as the intent to revoke the trust as to the specific property involved is explicitly manifested,[\[FN2\]](#) a power to revoke by written instrument delivered to the trustee is generally not exercised by the executor's filing a copy of the will with the trustee after the settlor's death.[\[FN3\]](#) As a rule, a will cannot terminate a trust where the power to revoke the trust ends with the settlor's death.[\[FN4\]](#) If a trust instrument reserves the power to the trustor to revoke the trust by giving notice to the trustee in a specified form or manner, the trustor may exercise that power only during his or her lifetime and in the manner prescribed, but the trustor cannot exercise such power by will.[\[FN5\]](#) Furthermore, a settlor's general testamentary disposition of his or her property is ineffective to exercise a general or unrestricted power to revoke an inter vivos trust.[\[FN6\]](#) However, there is authority stating that a will can operate as an in praesenti instrument capable of revoking or amending a revocable trust during the life of the settlor where the settlor uses language which appropriately manifests an intention to do so.[\[FN7\]](#)

[\[FN1\] Matter of Lowry's Estate, 93 Ill. App. 3d 1077, 49 Ill. Dec. 366, 418 N.E.2d 10 \(1st Dist. 1981\).](#)

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[\[FN2\] Euart v. Yoakley, 456 So. 2d 1327 \(Fla. Dist. Ct. App. 4th Dist. 1984\).](#)

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[\[FN3\] Rosenauer v. Title Ins. & Trust Co., 30 Cal. App. 3d 300, 106 Cal. Rptr. 321, 81 A.L.R.3d 953 \(2d Dist. 1973\).](#)

- A will that was not delivered to the trustee during the lifetime of the trustor cannot revoke a trust. [Estate of Lindstrom, 191 Cal. App. 3d 375, 236 Cal. Rptr. 376 \(4th Dist. 1987\).](#)

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[\[FN4\] In re Last Will and Testament of Tamplin, 48 P.3d 471 \(Alaska 2002\); Matter of Estate of Lohrie, 950 P.2d 1030 \(Wyo. 1997\).](#)

- Under Kentucky law, a testator who also was a settlor and trustee could not exercise the power to terminate the inter vivos trust through his will, as he reserved the power to alter or revoke the trust during his lifetime. [Wright v. Rains, 106 S.W.3d 678 \(Tenn. Ct. App. 2003\)](#), appeal denied, (May 27, 2003).

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[\[FN5\] Gamage v. Liberty Nat. Bank and Trust Co., 598 S.W.2d 463 \(Ky. Ct. App. 1980\).](#)

- Trust was not revoked by will executed by settlor after trust was established, though language of will provided that will revoked any and all wills and testamentary documents previously made, where trust instrument specifically provided that settlor could revoke trust only during his lifetime and that no revocation would be

valid unless made in acknowledged writing, and no such document existed. [One Valley Bank, Nat. Ass'n v. Hunt, 205 W. Va. 112, 516 S.E.2d 516 \(1999\)](#).

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[\[FN6\] Matter of Estate of Sanders, 261 Kan. 176, 929 P.2d 153 \(1996\)](#).

- Where an inter vivos trust document provided that it could be amended, altered, or revoked by a written instrument filed with the trustee, the trust could be revoked in only the manner specified, and a subsequent will filed with the trustee after the death of the settlor was not sufficient to revoke or amend the trust. [Estate of Lindstrom, 191 Cal. App. 3d 375, 236 Cal. Rptr. 376 \(4th Dist. 1987\)](#).

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[\[FN7\] In re Estate of Davis, 109 Ohio App. 3d 181, 671 N.E.2d 1302 \(12th Dist. Clermont County 1996\)](#).

- The general rule is that a will cannot revoke a trust unless it specifically states that intention. [Matter of Estate of Lohrie, 950 P.2d 1030 \(Wyo. 1997\)](#).

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§ 78. Termination by trustor—Effect of trustor's competency, skill, or knowledge; undue influence

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(3\)](#)

In order to revoke a trust, a trustor merely needs to have the capacity to understand the nature of the transaction, not necessarily an aptitude in dealing with financial matters.[\[FN1\]](#) Furthermore, the principle of undue influence has no place in determining whether a competent settlor can revoke a revocable trust.[\[FN2\]](#)

Generally, in the absence of express direction to the contrary, the power to revoke a trust is personal to the settlor when reserved to him or her.^[FN3] Thus, if an individual who has retained the power of revocation of a trust created by him or her becomes incompetent, the person's guardian does not succeed to the power, although it may be exercised by the court for the person.^[FN4] Accordingly, upon the adjudication of a settlor's incapacity to manage his or her own affairs and the appointment of a guardian, a revocable living trust, in which the settlor has reserved the power to revoke solely to him or herself, becomes irrevocable.^[FN5]

^[FN1] [Freeman v. Lane, 504 So. 2d 1297 \(Fla. Dist. Ct. App. 5th Dist. 1987\).](#)

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^[FN2] [Florida Nat. Bank of Palm Beach County v. Genova, 460 So. 2d 895 \(Fla. 1984\).](#)

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^[FN3] [§ 97.](#)

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^[FN4] [Friedrich v. BancOhio Nat. Bank, 14 Ohio App. 3d 247, 470 N.E.2d 467, 53 A.L.R.4th 1285 \(12th Dist. Madison County 1984\).](#)

- As a matter of public policy, a guardian should not be given authority to revoke an irrevocable trust because to do so would frustrate the intent of the settlor. [In re Guardianship of Lombardo, 86 Ohio St. 3d 600, 1999-Ohio-132, 716 N.E.2d 189 \(1999\).](#)

- As to the propriety of acts and elections by a guardian on behalf of a ward, generally, see [39 Am. Jur. 2d, Guardian and Ward §§ 128 et seq.](#)

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^[FN5] [In re Guardianship of Lee, 1999 OK CIV APP 50, 982 P.2d 539 \(Div. 3 1999\).](#)

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Forms

Release by beneficiary pursuant to settlement agreement. [17C Am. Jur. Legal Forms 2d, Trusts § 251:604](#)

Petition or application—For order terminating trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 297](#)

Complaint, petition, or declaration—To compel distribution of trust property—Allegation—Desire of settlor and beneficiaries that trust be terminated. [24 Am. Jur. Pleading and Practice Forms, Trusts § 305](#)

Order—Terminating trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 310](#)

Where proper grounds are set forth and proved, a court of equity will set a trust aside or decree its termination.^[FN1] Further, where all parties interested consent to the termination of a trust,^[FN2] the court will act to terminate it in accordance with their agreement and settlement^[FN3] where no reason appears for denying a judicial termination of the trust.^[FN4] It has been said that if the settlor and all of the beneficiaries consent to the termination of a trust and none of them is incapacitated, they can compel termination even though the purposes of the trust have not been accomplished and the trust agreement specifically provides that the trust shall be irrevocable.^[FN5] In this regard, a court called upon to terminate a trust must be careful not to defeat any object of the trustor which is obvious from the declaration.^[FN6] To effect this end, the court must decline to act when parties interested in the trust are not before the court.^[FN7] Otherwise, a court of equity generally will not by its decree or order set aside, terminate, or dissolve a trust before the expiration of the term for which it was created,^[FN8] and should not yield to the importunities of interested parties to terminate a trust without justification for such termination.^[FN9] However, a court of equity has the power by the consent of the interested parties to close a trust and distribute the assets thereof sooner than was contemplated by the trustor.^[FN10] A court of equity may have the power to terminate a trust and distribute the trust property prior to the happening of the contingency prescribed by the trustor, but only when such action is necessary or expedient, and the condition or emergency asserted must be one not contemplated by the testator and which, had it been anticipated, would undoubtedly have been provided for.^[FN11]

Practice Guide: Whether any of the grounds for the termination of a trust exists is ordinarily a question of fact.^[FN12]

In some instances, the rule that has been followed is that in the absence of a reservation of a power of revocation, a voluntary trust may be set aside only upon a showing that it was induced by fraud, duress, undue influence,^[FN13] or mistake,^[FN14] except where all parties in interest are ascertained, are under no incapacity, and consent to the revocation.^[FN15]

Practice Guide: In order to properly plead a cause of action for the variation or termination of a trust, pursuant to a statute governing the power of a court to permit deviations or vary the terms of a trust, the petitioner must plead ultimate facts establishing that: (1) all the adult beneficiaries of the subject trust had

consented to the requested variation or termination of the trust; and (2) the requested variation or termination would benefit the disabled, minor, unborn, and unascertained beneficiaries of the trusts.[FN16]

The Uniform Trust Code specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications or terminations.[FN17] Depending upon the specific action brought, the settlor, trustee, or beneficiary may have standing to bring the action.[FN18]

[FN1] [In re Thurston, 154 Mass. 596, 29 N.E. 53 \(1891\)](#).

- As to causes and grounds for terminating trusts, generally, see [§§ 106 et seq.](#)

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[FN2] [Hills v. Travelers Bank & Trust Co., 125 Conn. 640, 7 A.2d 652, 123 A.L.R. 1419 \(1939\)](#); [Byers v. Beddow, 106 Fla. 166, 142 So. 894 \(1932\)](#).

- A request to transfer the assets of an irrevocable supplemental needs trust to a pooled asset trust was a request for a de facto termination of the trust, which could not be done without the written consent of the original residuary beneficiaries, since no power was reserved in the trust which would otherwise permit a total transfer of assets. [Matter of Altschuler, 169 Misc. 2d 613, 645 N.Y.S.2d 999 \(Sup 1996\)](#).

- As to the specific requirements as to consent of beneficiaries and trustees, see [§ 105](#).

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[FN3] [Spencer v. Spencer, 31 Ind. App. 321, 67 N.E. 1018 \(Div. 1 1903\)](#).

- As to the procedure in proceedings to terminate or set aside a trust, generally, see [§ 674](#).

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[FN4] [Ricards v. Safe Deposit & Trust Co. of Baltimore, 97 Md. 608, 55 A. 384 \(1903\)](#).

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[FN5] [In re Green Valley Financial Holdings, 32 P.3d 643 \(Colo. Ct. App. 2001\)](#).

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[FN6] [Sun Bank/Miami, N.A. v. Hogarth, 536 So. 2d 263 \(Fla. Dist. Ct. App. 3d Dist. 1988\)](#).

- As to the failure of the purpose of the trust as a ground for judicial termination of a trust, see [§ 111](#).

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[FN7] [Sun Bank/Miami, N.A. v. Hogarth, 536 So. 2d 263 \(Fla. Dist. Ct. App. 3d Dist. 1988\)](#).

- Persons beneficially interested in trust are necessary parties to a suit to terminate the trust. [Nickas v. Capadalis, 954 S.W.2d 735 \(Tenn. Ct. App. 1997\)](#).

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[FN8] [Byers v. Beddow, 106 Fla. 166, 142 So. 894 \(1932\)](#); [Underhill v. U.S. Trust Co., 227 Ky. 444, 13 S.W.2d 502 \(1929\)](#).

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[FN9] [In re Stack's Will, 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 \(1935\)](#).

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[FN10] [Horne v. Timber Hill Holdings, 163 N.C. App. 582, 594 S.E.2d 207 \(2004\)](#).

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[FN11] [Horne v. Timber Hill Holdings, 163 N.C. App. 582, 594 S.E.2d 207 \(2004\)](#).

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[FN12] [Dodd v. Berlinsky, 344 S.C. 172, 543 S.E.2d 237 \(Ct. App. 2001\)](#).

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[FN13] [§ 119](#).

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[\[FN14\] § 118.](#)

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[\[FN15\] Pernod v. American Nat. Bank & Trust Co. of Chicago, 8 Ill. 2d 16, 132 N.E.2d 540, 59 A.L.R.2d 1223 \(1956\).](#)

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[\[FN16\] Brock v. Blackwood, 143 S.W.3d 47 \(Mo. Ct. App. W.D. 2004\),](#) reh'g and/or transfer denied, (July 27, 2004) and transfer denied, (Sept. 28, 2004).

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[\[FN17\] Uniform Trust Code § 410,](#) Comment.

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[\[FN18\] Uniform Trust Code § 410\(b\).](#)

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§ 80. Termination on application of trustors or trustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(1\)](#)

Forms

Checklist—Drafting petition by trustee for order declaring trust terminated—Directing distribution of trust assets.
[24 Am. Jur. Pleading and Practice Forms, Trusts § 294](#)

Petition—By trustee—To terminate trusts—Proceeds for minors to custodian. [24 Am. Jur. Pleading and Practice Forms, Trusts § 300](#)

Petition—By successor trustee—For termination of trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 301](#)

In the absence of a reserved power to revoke a trust, the trustor generally cannot by judicial action have a trust revoked against the consent of the beneficiaries,[\[FN1\]](#) unless the trustor can show good cause for its revocation, such as that its execution was induced by fraud, duress, or undue influence.[\[FN2\]](#) Nor can the trust be revoked even for good cause unless all interests are before the court.[\[FN3\]](#) However, there is authority for the view that a settlor who is the sole beneficiary of the trust may have the trust revoked and set aside, even though it was initially established in the form of an irrevocable trust.[\[FN4\]](#)

A legally created trust may not be terminated at the pleasure of the trustee.[\[FN5\]](#) However, the trustee may petition for dissolution of the trust under certain circumstances, such as if the purposes for which it was created have been accomplished or have been so frustrated that the trust serves no lawful purpose.[\[FN6\]](#)

[\[FN1\] Taylor v. Buttrick, 165 Mass. 547, 43 N.E. 507 \(1896\); Neisler v. Pearsall, 22 R.I. 367, 48 A. 8 \(1901\).](#)

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[\[FN2\] §§ 119 et seq.](#)

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[\[FN3\] § 674.](#)

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[\[FN4\] Johnson v. First Nat. Bank of Jackson, 386 So. 2d 1112 \(Miss. 1980\).](#)

- A settlor was not the sole beneficiary of an inter vivos trust, as would allow her to compel its termination even if it was labeled irrevocable, under the Restatement Second, Trusts, where, under the terms of the trust, the settlor's son and grandson were successor income beneficiaries after the settlor's death, and son, grandson, and daughter were remainder beneficiaries. [Matter of Estate of Sanders, 261 Kan. 176, 929 P.2d 153 \(1996\).](#)

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[\[FN5\] City of Islandia v. Metropolitan Dade County, 362 So. 2d 385 \(Fla. Dist. Ct. App. 3d Dist. 1978\).](#)

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[\[FN6\] City of Islandia v. Metropolitan Dade County, 362 So. 2d 385 \(Fla. Dist. Ct. App. 3d Dist. 1978\).](#)

- As to accomplishment and failure or impairment, of trust purposes as grounds for termination of trusts, generally, see § § [109](#), [111](#).

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§ 81. Termination on application of beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(1\)](#)

Model Codes and Restatements

[Restatement Third, Trusts § 65](#)

Law Reviews and Other Periodicals

Walker, [Get your dead hands off me: Beneficiaries' right to terminate or modify a trust under the Uniform Trust Code. 67 Mo. L. Rev. 443 \(2002\)](#)

A trust may be ordered terminated if all beneficiaries consent to its termination, and if the trust instrument does not by express terms or by implication prohibit its termination.[FN1] Even though its prescribed duration has not passed, the beneficiaries of a trust can require a court of equity to decree the termination of the trust where: (1) all beneficiaries consent; (2) no beneficiary is under an incapacity; and (3) the continuance of the trust is not necessary to carry out a material purpose of the trust.[FN2] So, if the continuance of a trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination,[FN3] although it has been said that a trust should be terminated if all beneficiaries consent to its termination unless such termination would defeat a material purpose of the trust.[FN4] Further, a court will not end the trust as a whole on the request of only a part of the beneficiaries, and it is not sufficient for purposes of this rule that beneficiaries have no objection to its termination or take no position on the matter, as all beneficiaries must consent.[FN5]

Under the Uniform Trust Code, an irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.[FN6]

Practice Guide: An instruction regarding the termination of a trust should explicitly alert the jury to the fact that, if any material purpose of the trust could still be accomplished, the beneficiaries cannot compel its termination pursuant to the doctrine of frustration.[FN7]

Under the doctrine of election, trust beneficiaries who accepted distributions from a trust were barred from bringing an action to set aside the trust on the grounds that the settlor lacked capacity to form the trust, that the trust did not reflect the settlor's intent, and that the trust was the result of undue influence and misrepresentations.[FN8]

[FN1] [Carnahan v. Johnson, 127 Ohio App. 3d 195, 711 N.E.2d 1093 \(12th Dist. Madison County 1998\).](#)

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[FN2] [Neeley v. Neeley, 26 Kan. App. 2d 924, 996 P.2d 346 \(2000\); American Nat. Bank of Cheyenne, Wyo. v. Miller, 899 P.2d 1337 \(Wyo. 1995\).](#)

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[FN3] [In re Estate of Somers, 277 Kan. 761, 89 P.3d 898 \(2004\).](#)

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[FN4] [Carnahan v. Johnson, 127 Ohio App. 3d 195, 711 N.E.2d 1093 \(12th Dist. Madison County 1998\).](#)

-

[FN5] [Sundquist v. Sundquist, 639 P.2d 181 \(Utah 1981\).](#)

- The termination of a trust before the occurrence of the event upon which the trust was to cease was improper, where fewer than all trust beneficiaries consented to the trust's termination. [Nickas v. Capadalis, 954 S.W.2d 735 \(Tenn. Ct. App. 1997\).](#)

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[FN6] [Uniform Trust Code § 411\(b\).](#)

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[FN7] [Steele v. Kelley, 46 Mass. App. Ct. 712, 710 N.E.2d 973 \(1999\).](#)

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[FN8] [In re Beglinger Trust, 221 Mich. App. 273, 561 N.W.2d 130 \(1997\).](#)

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§ 82. Necessity of consent of trustees or beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(1\)](#)

Forms

Release by beneficiary pursuant to settlement agreement. [17C Am. Jur. Legal Forms 2d, Trusts § 251:604](#)

Complaint, petition, or declaration—To compel distribution of trust property—Allegation—Desire of settlor and beneficiaries that trust be terminated. [24 Am. Jur. Pleading and Practice Forms, Trusts § 305](#)

The view has been expressed that a court cannot terminate an active trust against the consent of the trustee.[\[FN1\]](#) In this regard, it has been stated that although the trust may be terminated for good cause or by operation of the Statute of Uses, in the former instance the consent of the trustee should be obtained.[\[FN2\]](#) Other cases, however, have expressed the view that the consent of the trustee is not essential to a decree authorizing the termination of a trust.[\[FN3\]](#)

Where all the beneficiaries of the trust, of whom none is under legal incapacity, consent to the termination of the trust, that result can be accomplished, unless the material purposes of the trust require its continuance.[\[FN4\]](#) Thus, consent is also ordinarily required for judicial termination of a trust in an action brought therefor by the settlor,[\[FN5\]](#) or by the beneficiaries.[\[FN6\]](#)

[\[FN1\]](#) [Cuthbert v. Chauvet, 136 N.Y. 326, 32 N.E. 1088 \(1893\).](#)

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[\[FN2\]](#) [Cuthbert v. Chauvet, 136 N.Y. 326, 32 N.E. 1088 \(1893\).](#)

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[\[FN3\]](#) [La Salle Nat. Bank v. MacDonald, 2 Ill. 2d 581, 119 N.E.2d 266, 46 A.L.R.2d 901 \(1954\).](#)

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[\[FN4\]](#) [Disher v. Fulgoni, 161 Ill. App. 3d 1, 112 Ill. Dec. 949, 514 N.E.2d 767 \(1st Dist. 1987\).](#)

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[\[FN5\]](#) [§ 103.](#)

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[\[FN6\]](#) [§ 104.](#)

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§ 83. Trustee's conduct

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(3\)](#)

A trust does not terminate or lapse merely by reason of misconduct or violation of the trust by the trustee,[\[FN1\]](#) the trustee's inability to administer the trust,[\[FN2\]](#) or his or her neglect of, inattention to,[\[FN3\]](#) or abandonment of the trust, or an improper lease of the trust property.[\[FN4\]](#) Nor is a trust terminated merely by the trustee's wrongful conversion of the trust property.[\[FN5\]](#) However, under some circumstances, the failure of a trustee to carry out the purposes of a trust is ground for its termination.[\[FN6\]](#) The fact that a settlor/trustee exceeds the powers as trustee and violates his or her trust does not terminate the trust, but merely provides a justification for removal of the trustee and appointment of a successor.[\[FN7\]](#)

A trustee's representations to the beneficiaries about the termination date of the trust had no legal significance and could not be used against the trustees either as a basis for estoppel or as admissions against interest in a petition by the beneficiaries to terminate the trust, as the settlor's intent controlled the trust termination.[\[FN8\]](#)

[\[FN1\]](#) [Johnson v. Thornton, 264 S.C. 252, 214 S.E.2d 124, 87 A.L.R.3d 918 \(1975\).](#)

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[\[FN2\]](#) [Girard v. City of Philadelphia, 74 U.S. 1, 19 L. Ed. 53 \(1868\).](#)

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[\[FN3\]](#) [Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co., 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219 \(1920\).](#)

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[\[FN4\]](#) [People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270 \(1896\).](#)

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[\[FN5\] Noble v. Noble, 198 Cal. 129, 243 P. 439, 43 A.L.R. 1235 \(1926\).](#)

- As to the right of a beneficiary to impress a trust on proceeds, see [§§ 292 et seq.](#)

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[\[FN6\] In re Patterson's Estate, 333 Pa. 92, 3 A.2d 320, 120 A.L.R. 967 \(1939\).](#)

- As to failure of trust purpose as a ground for termination of a trust, generally, see [§ 111.](#)

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[\[FN7\] Taliaferro v. Taliaferro, 260 Kan. 573, 921 P.2d 803 \(1996\).](#)

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[\[FN8\] Matter of Trusts Created by Ferguson, 929 P.2d 33 \(Colo. Ct. App. 1996\).](#)

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§ 84. Absence or death of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(2\)](#)

In general, a trust will never fail for want of a trustee.[\[FN1\]](#) Furthermore, a trust will not be terminated by the death of the trustee[\[FN2\]](#) unless the trust is personal to the trustee in the sense that the trustor intended no other person to administer it.[\[FN3\]](#) The courts generally have jurisdiction to appoint a trustee in such cases, to prevent failure of the trust.[\[FN4\]](#) Further, where one of two trustees dies, the trust is not revoked by such occurrence;[\[FN5\]](#) the trusteeship instead devolves on the surviving trustee, pending appointment, if any, of a new trustee.[\[FN6\]](#)

[FN1] [In re V-I-D, Inc.](#), 198 F.2d 392 (7th Cir. 1952); [In re Hill's Will](#), 261 Wis. 290, 52 N.W.2d 867 (1952).

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[FN2] [Mast v. Blackburn](#), 248 N.C. 231, 102 S.E.2d 812 (1958).

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[FN3] [Booth v. Krug](#), 368 Ill. 487, 14 N.E.2d 645, 117 A.L.R. 1193 (1938); [Gathright's Trustee v. Gaut](#), 276 Ky. 562, 124 S.W.2d 782, 120 A.L.R. 1403 (1939).

- The death of a single trustee does not revoke a trust. [Bumbaugh v. Burns](#), 635 S.W.2d 518 (Tenn. Ct. App. 1982).

- As to a trust as being personal or impersonal to a trustee, generally, see [§ 343](#).

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[FN4] [§ 250](#).

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[FN5] [Bumbaugh v. Burns](#), 635 S.W.2d 518 (Tenn. Ct. App. 1982).

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[FN6] [§ 262](#).

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§ 85. Accomplishment of trust purposes or requirements

West's Key Number Digest

Forms

Complaint, petition, or declaration—To compel distribution of trust property—Allegation—Trust purpose accomplished on attainment of majority by beneficiaries. [24 Am. Jur. Pleading and Practice Forms, Trusts § 304](#)

The termination of a trust is authorized if its purpose has been fulfilled.[FN1] Thus, for example, a trustee may petition for dissolution of a trust if the purposes for which it was created have been accomplished.[FN2] However, a trust established by a will cannot be judicially terminated on the ground that its primary purposes had been accomplished where the trust expressly provides for the termination of the trust upon the death of the last survivor of the named beneficiaries, and this event had not yet occurred.[FN3] Clearly, to determine whether the settlor's purpose has been accomplished, so as to warrant the early termination of a trust, the courts must determine the settlor's intent.[FN4]

When the purposes of a trust are accomplished, the trust estate ceases to exist and the trustee's title becomes extinct.[FN5]

Definition: Under common law, a wasting trust is a trust whose purposes have been accomplished, such that the continuation of the trust would frustrate the settlor's intent.[FN6]

[FN1] [Ivey v. Ivey](#), 266 Ga. 143, 465 S.E.2d 434 (1996); [University Of Maine Foundation v. Fleet Bank Of Maine](#), 2003 ME 20, 817 A.2d 871 (Me.,2003).

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[FN2] [§ 103](#).

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[FN3] [Frost Nat. Bank of San Antonio v. Newton](#), 554 S.W.2d 149 (Tex. 1977).

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[FN4] [University Of Maine Foundation v. Fleet Bank Of Maine](#), 2003 ME 20, 817 A.2d 871 (Me.,2003).

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[FN5] [Macaulay v. Wachovia Bank of South Carolina, N.A.](#), 333 S.C. 201, 508 S.E.2d 46 (Ct. App. 1998).

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[FN6] [Hughes Aircraft Co. v. Jacobson](#), 525 U.S. 432, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999).

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§ 86. Absence or extinguishment of trust purposes

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), (3)

While the nonexistence of a valid trust purpose makes a trust passive, so that it is executed by the statute of uses,[\[FN1\]](#) the nonexistence of a purpose—that is, the dry or passive character of the trust—is a ground for judicial termination of such a trust.[\[FN2\]](#) Furthermore, grounds for the judicial termination of a trust are provided where the purpose of the trust no longer exists.[\[FN3\]](#) However, a trust will not be terminated by the court on the ground that the reason or motive for the creation of the trust has ceased to exist, where no motive is expressed in the instrument and the language is perfectly plain and unambiguous.[\[FN4\]](#)

A court may terminate a trust when there is no good reason for the trust to continue and all beneficiaries are competent and release their interests.[\[FN5\]](#)

A trust may also be terminated when an event happens upon which the trust is to cease.[\[FN6\]](#)

[\[FN1\]](#) § 7.

[\[FN2\]](#) [Warner v. Tullis](#), 206 Iowa 680, 218 N.W. 575 (1928); [Carpenter v. Carpenter's Trustee](#), 119 Ky. 582, 27 Ky. L. Rptr. 206, 84 S.W. 737 (1905).

- A testamentary trust may be terminated by a court of equity for failure of purpose, performance, or accomplishment, as of the date of such failure. [Dennis v. Omaha Nat. Bank](#), 153 Neb. 865, 46 N.W.2d 606, 27 A.L.R.2d 674 (1951).

[\[FN3\]](#) [Dimity v. Dixon](#), 74 Cal. App. 714, 241 P. 905 (1st Dist. 1925) (trust for firm ends on death of partner); [Fidelity & Columbia Trust Co. v. Gwynn](#), 206 Ky. 823, 268 S.W. 537, 38 A.L.R. 937 (1925) (trustor and sole beneficiary no longer subject to attacks of epilepsy, which attacks were reason for creation of trust).

[\[FN4\]](#) [Carpenter v. Carpenter's Trustee](#), 119 Ky. 582, 27 Ky. L. Rptr. 206, 84 S.W. 737 (1905).

[\[FN5\]](#) [University Of Maine Foundation v. Fleet Bank Of Maine](#), 2003 ME 20, 817 A.2d 871 (Me.,2003).

[\[FN6\] Nickas v. Capadalis, 954 S.W.2d 735 \(Tenn. Ct. App. 1997\).](#)

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§ 87. Failure or impairment of trust purposes; difficulty of performance

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), (3), 61.5

Forms

Petition or application—Terminate trust or change trustee—Trust income small and independent trustee expenses high—Add to university endowment fund. [24 Am. Jur. Pleading and Practice Forms, Trusts § 298](#)

Grounds for the judicial termination of a trust are provided where the trust purpose fails.[\[FN1\]](#) The termination of a trust may be ordered if the costs of administration defeat or substantially impair its purposes.[\[FN2\]](#) Under the Uniform Trust Code, a court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.[\[FN3\]](#) However, a trust is not terminated, nor is a ground for its termination provided, by the mere fact that the trust has become impracticable[\[FN4\]](#) or burdensome.[\[FN5\]](#)

[FN1] [Dennis v. Omaha Nat. Bank](#), 153 Neb. 865, 46 N.W.2d 606, 27 A.L.R.2d 674 (1951); [Workingman's Building & Loan Ass'n v. Johnson](#), 28 Pa. D. & C. 683, 1936 WL 5719 (C.P. 1936) (failure of purpose on failure of HOLC to accept a mortgage).

- As to the applicability of the cy pres doctrine to effectuate the avowed purposes of charitable trusts, see [15 Am. Jur. 2d, Charities §§ 148 et seq.](#)

[FN2] [Ivey v. Ivey](#), 266 Ga. 143, 465 S.E.2d 434 (1996).

[FN3] [Uniform Trust Code § 412\(b\)](#).

[FN4] [People ex rel. Ellert v. Cogswell](#), 113 Cal. 129, 45 P. 270 (1896).

[FN5] [In re Stack's Will](#), 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

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§ 88. Impossibility of performance or achievement of trust purposes

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(3\)](#)

Forms

Complaint, petition, or declaration—To compel termination and distribution of trust to settlor—Impossibility of performance of conditions of charitable trust. [24 Am. Jur. Pleading and Practice Forms, Trusts § 302](#)

Model Codes and Restatements

[Restatement Third, Trusts § 66](#)

When the performance of a trust becomes impossible, such impossibility may constitute a ground for termination of the trust, in a proper case.^[FN1] Thus, if the continuance of a trust becomes hopeless as to the achieving of its purpose, it may be terminated by an equity decree.^[FN2] Furthermore, if a trust is founded with the dominant purpose of producing income, or an eventual profit, and that purpose becomes unattainable, it is clear that a termination should be ordered.^[FN3] The Uniform Trust Code provides for the modification or termination of an uneconomic trust.^[FN4]

^[FN1] [Fish v. Valley Nat. Bank of Phoenix, 64 Ariz. 164, 167 P.2d 107 \(1946\); Byers v. Beddow, 106 Fla. 166, 142 So. 894 \(1932\).](#)

- The primary purpose of a trust, which was to provide a lifetime home to the settlor's surviving spouse, could be fulfilled by obtaining a reverse mortgage on the home, and thus, the trust was not subject to termination for impossibility, even though the trust did not hold assets with which to make the mortgage, maintenance, and tax payments on the home, and a reverse mortgage might exhaust the home's equity during the surviving spouse's lifetime. [In re Rowe, 669 N.W.2d 260 \(Iowa Ct. App. 2003\).](#)

^[FN2] [Townsend v. Charles Schalkenbach Home for Boys, 33 Wash. 2d 255, 205 P.2d 345 \(1949\).](#)

- A judicial sale of the trust property to satisfy a mortgage indebtedness, which was made prior to the creation of a trust, necessarily rendered the trust impossible of accomplishment. [Ringo v. Ringo, 299 S.W.2d 112 \(Ky. 1957\).](#)

^[FN3] [In re Dowell's Estate, 1954 OK 159, 270 P.2d 1098 \(Okla. 1954\).](#)

^[FN4] [Uniform Trust Code § 414.](#)

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§ 89. Change of conditions or unanticipated occurrence of events

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(1\)](#), [61\(3\)](#)

Forms

Trust provision for spouse—Subject to reduction on remarriage. [17C Am. Jur. Legal Forms 2d, Trusts § 251:188](#)

Complaint, petition, or declaration—To compel distribution—Allegation—Termination of trust on remarriage of beneficiary. [24 Am. Jur. Pleading and Practice Forms, Trusts § 303](#)

Model Codes and Restatements

[Restatement Third, Trusts § 66](#)

There is authority for the view that a trust is not terminated, nor is a ground for its termination provided, by a mere change of condition,[\[FN1\]](#) such as by a mere occurrence of events not anticipated by the trustor.[\[FN2\]](#) However, the termination of a trust is authorized if, due to unknown and unanticipated circumstances, continuance would defeat or substantially impair the accomplishment of trust purposes.[\[FN3\]](#) The doctrine of "deviation" allows modification of the terms of a trust's administrative provisions when there is both an unforeseen change in circumstances and a frustration of the settlor's main objectives by this change if strict adherence to the settlor's directions is required.[\[FN4\]](#) Under the "doctrine of deviation," a court can direct or permit a deviation from the terms of a trust where compliance is impossible or illegal, or where owing to circumstances not known to the settlor and not anticipated by him or her compliance would defeat or substantially impair accomplishment of the purposes of the trust.[\[FN5\]](#) It has been said that the modification or deviation from the terms of a trust or trust provisions depends upon an analysis of four essential elements:[\[FN6\]](#)

- (1) what is the purpose of the trust;

- (2) what are the change of circumstances, if any;

(3) whether the result of the change of circumstances was anticipated by the settlor; and

(4) whether the change of circumstances not anticipated by the settlor defeats or substantially impairs the purposes of the trust.

Although a court has considerable discretion to adapt a trust to changed circumstances, this flexibility is not unlimited.[\[FN7\]](#)

Under the Uniform Trust Code, a court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.[\[FN8\]](#) To the extent practicable, the modification must be made in accordance with the settlor's probable intention.[\[FN9\]](#) This provision gives a court authority to evaluate the circumstances of the trust and determine whether the settlor anticipated such circumstances, and if the settlor did not anticipate the circumstances, the court can modify the trust in furtherance of the trust's purpose.[\[FN10\]](#)

[\[FN1\] Anderson v. Bean, 272 Mass. 432, 172 N.E. 647, 72 A.L.R. 959 \(1930\).](#)

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[\[FN2\] Hills v. Travelers Bank & Trust Co., 125 Conn. 640, 7 A.2d 652, 123 A.L.R. 1419 \(1939\).](#)

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[\[FN3\] Ivey v. Ivey, 266 Ga. 143, 465 S.E.2d 434 \(1996\); Wils v. Robinson, 934 S.W.2d 774 \(Tex. App. Houston 14th Dist. 1996\), vacated pursuant to settlement, 938 S.W.2d 717 \(Tex. 1997\) and writ granted, \(Feb. 6, 1997\).](#)

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[\[FN4\] In re Trust of Hirt, 2003 PA Super 287, 832 A.2d 438 \(PASUPER,2003\); In re Rubin, 4 Misc. 3d 634, 781 N.Y.S.2d 421 \(Sur. Ct. 2004\).](#)

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[\[FN5\] Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 79 Ohio St. 3d 98, 1997-Ohio-402, 679 N.E.2d 1084 \(1997\).](#)

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[\[FN6\] In re James C. Atkinson Clifford Trust, 762 So. 2d 775 \(La. Ct. App. 1st Cir. 2000\), writ denied, 772 So. 2d 655 \(La. 2000\).](#)

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[\[FN7\] All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina, 358 S.C. 209, 595 S.E.2d 253 \(Ct. App. 2004\).](#)

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[\[FN8\] Uniform Trust Code § 412\(a\).](#)

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[\[FN9\] Uniform Trust Code § 412\(a\).](#)

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[\[FN10\] In re Estate of Somers, 277 Kan. 761, 89 P.3d 898 \(2004\).](#)

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§ 90. Meeting of legal and equitable interests in same person or persons; merger

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(3\)](#)

A.L.R. Library

[Termination of trust where life interest and remainder or reversion are acquired by same person, 50 A.L.R.2d 1161](#)

Model Codes and Restatements

[Restatement Third, Trusts § 69](#)

It is essential to the creation and existence of a valid express trust that there be—and continue to be—a separation in different persons of the legal and equitable interests in the same property,^[FN1] and, if there is no separation of legal and equitable interests of a trust—that is, if the entire legal and equitable estates come together in the same person—the doctrine of merger may apply and the trust is terminated.^[FN2] Thus, for example, a trust may be terminated based on merger of equitable and legal estates where the beneficial ownership vests in or inures to the trustee,^[FN3] or where the legal interest or estate of the trust may be, and is, conveyed and transferred to the beneficiary.^[FN4]

It is essential, in order to have a merger of the legal and equitable titles, rendering an attempted trust invalid, that the equitable interest of no other person than the holder of the legal title shall intervene,^[FN5] and that the legal and equitable estates be coextensive and commensurate^[FN6]—that is, the legal estate and the equitable

estate are the same[FN7] or the legal estate is at least as extensive as the equitable estate.[FN8] The legal estate and the equitable estate are the same so that merger applies where, for instance, by operation of law, the entire beneficial interest passes to the trustee, or the legal title passes to a sole beneficiary.[FN9] Where the sole trustee has by subsequent events become the sole beneficiary of the trust—the trustee's legal interest and the beneficiary's equitable interest being of the same quality and duration—the legal and the equitable interests merge, the trust terminates, and the trustee holds the property free from the trust.[FN10] However, a trust was not terminated where the life-income beneficiary had no authority or power over the real property of the trust; although the life-income beneficiary had broad discretion to direct sales, investments, and distribution of the income; where the legal interests as to the real property were still held solely by the trustee, separate from any legal or equitable interests held by the life-income beneficiary; and the beneficiary's children held the equitable remainder interest, which had not legally or equitably merged with their father's interests in the trust; so that the beneficiaries' legal and equitable interests in the trust were not coextensive or commensurate and did not encompass the whole trust interest.[FN11]

Observation: Equity may refuse to recognize a merger, notwithstanding union of the legal and equitable estates in trust property in the same person, where such result would be contrary to the trustor's intention and would destroy a valid trust.[FN12] Furthermore, there is authority to the effect that the doctrine of merger does not apply to terminate a trust naming two or more trustees the exclusive beneficiaries of the trust.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

When it is applied to the law of trusts, the so-called "merger doctrine" is the equitable concept that a valid trust must have a separation of the legal estate from the beneficial enjoyment, and that no trust can exist where the same person possesses both. [Welch v. Crow, 2009 OK 20, 206 P.3d 599 \(Okla. 2009\)](#).

[END OF SUPPLEMENT]

[\[FN1\] § 49.](#)

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[\[FN2\] First Alabama Bank of Tuscaloosa, N.A. v. Webb, 373 So. 2d 631, 7 A.L.R.4th 610 \(Ala. 1979\); Contella v. Contella, 559 So. 2d 1217 \(Fla. Dist. Ct. App. 5th Dist. 1990\).](#)

- As to the merger of legal and equitable estates, generally, see [28 Am. Jur. 2d, Estates § 429.](#)

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[\[FN3\] Restatement Third, Trusts § 69, Comment a.](#)

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[\[FN4\] Restatement Third, Trusts § 69, Comment b.](#)

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[\[FN5\] Blades v. Norfolk Southern Ry. Co., 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 \(1944\).](#)

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[\[FN6\] Contella v. Contella, 559 So. 2d 1217 \(Fla. Dist. Ct. App. 5th Dist. 1990\); Blades v. Norfolk Southern Ry. Co., 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 \(1944\).](#)

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[\[FN7\] Contella v. Contella, 559 So. 2d 1217 \(Fla. Dist. Ct. App. 5th Dist. 1990\).](#)

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[\[FN8\] *Blades v. Norfolk Southern Ry. Co.*, 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 \(1944\).](#)

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[\[FN9\] *Contella v. Contella*, 559 So. 2d 1217 \(Fla. Dist. Ct. App. 5th Dist. 1990\).](#)

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[\[FN10\] *Reed v. Browne*, 295 N.Y. 184, 66 N.E.2d 47, 165 A.L.R. 1061 \(1946\).](#)

- As to the general rule that the sole beneficiary cannot be the sole trustee of that trust, and implications therefrom, see [§ 243](#).

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[\[FN11\] *Contella v. Contella*, 559 So. 2d 1217 \(Fla. Dist. Ct. App. 5th Dist. 1990\).](#)

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[\[FN12\] *Dennis v. Omaha Nat. Bank*, 153 Neb. 865, 46 N.W.2d 606, 27 A.L.R.2d 674 \(1951\); *Horlick v. Sidley*, 241 Wis. 81, 3 N.W.2d 710 \(1942\).](#)

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[\[FN13\] *First Alabama Bank of Tuscaloosa, N.A. v. Webb*, 373 So. 2d 631, 7 A.L.R.4th 610 \(Ala. 1979\).](#)

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§ 91. Whole beneficial interest in sole beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(3\)](#)

A.L.R. Library

[Termination of trust where life interest and remainder or reversion are acquired by same person, 50 A.L.R.2d 1161](#)

A trust may be terminated as the consequence of a merger or meeting of beneficial estates in the same person.[FN1] Thus, a trust may be terminated where the life interest and the fee in the beneficial ownership merge in the same person.[FN2]

Where a trust is established for only the purpose of preserving the corpus for the benefit of the remainderman, in the absence of a contravening statute, if the holder of the beneficial interest for life also acquires an absolute interest in the remainder, to the exclusion of any outstanding beneficial interest in the property in question, the trust may be terminated as to such property, and the trust beneficiary will take an absolute legal and equitable title which he or she may dispose of freely.[FN3] Since a trust intended only to preserve the corpus for the remaindermen will terminate where the life-beneficiary acquires the remainder interest, notwithstanding the outstanding legal title in the trustee, a fortiori such a trust will terminate where the life-beneficiary in question also holds the legal title as trustee.[FN4]

There is authority that a life-beneficiary's acquisition of a contingent or defeasible remainder interest in the corpus, or the acquisition of the life interest by one holding a contingent or defeasible remainder, will not justify the termination of a trust.[FN5] However, other courts have taken the position that possible contingent remainders in trust property might be destroyed by the merger of an existing life estate into the remainder in fee.[FN6]

There is authority for the view that where a legacy is vested, although the enjoyment is postponed, it may be ordered to be paid to the beneficiary when he or she is, or becomes, sui juris, such cases being based upon the theory that the postponement of enjoyment is inconsistent with the absolute interest given, and that this is true irrespective of the intent of the creator of the trust.[FN7] To the contrary, however, in some instances the conclusion has been reached that even though the right is vested, the enjoyment may be postponed in accordance with the plain intent of the creator of the trust, unless it contravenes some positive rule of law or is against public policy.[FN8]

[FN1] [Stuart v. Stuart, 33 Del. Ch. 501, 106 A.2d 771, 50 A.L.R.2d 1156 \(1953\); Nichols v. First Nat. Bank of Baker, 199 Or. 659, 264 P.2d 451 \(1953\).](#)

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[FN2] [Rowley v. American Trust Co., 144 Va. 375, 132 S.E. 347, 45 A.L.R. 738 \(1926\).](#)

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[FN3] [Stuart v. Stuart, 33 Del. Ch. 501, 106 A.2d 771, 50 A.L.R.2d 1156 \(1953\); Nichols v. First Nat. Bank of Baker, 199 Or. 659, 264 P.2d 451 \(1953\).](#)

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[FN4] [Ormsby v. Dumesnil, 91 Ky. 601, 13 Ky. L. Rptr. 209, 16 S.W. 459 \(1891\); Langley v. Conlan, 212 Mass. 135, 98 N.E. 1064 \(1912\).](#)

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[FN5] [In re Easterday's Estate, 45 Cal. App. 2d 598, 114 P.2d 669 \(1st Dist. 1941\).](#)

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[FN6] [Dickson v. Neal, 2 F.2d 533 \(C.C.A. 8th Cir. 1924\); Randall v. Randall, 60 F. Supp. 308 \(S.D. Fla. 1944\).](#)

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[\[FN7\] Heifetz v. Bank of America Nat. Trust & Sav. Ass'n, 147 Cal. App. 2d 776, 305 P.2d 979, 62 A.L.R.2d 1403 \(2d Dist. 1957\)](#) (settlor who is the sole remaining beneficiary of a trust may terminate it even though settlor has no reserved power of revocation and the purposes of the trust have not been fully accomplished); [Crumlish v. Delaware Trust Co., 29 Del. Ch. 503, 46 A.2d 888, 169 A.L.R. 451 \(1946\)](#).

[\[FN8\] Shelton v. King, 229 U.S. 90, 33 S. Ct. 686, 57 L. Ed. 1086 \(1913\); In re Hamburger's Will, 185 Wis. 270, 201 N.W. 267, 37 A.L.R. 1413 \(1924\)](#).

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§ 92. Mistake or misunderstanding

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(3\)](#)

A.L.R. Library

[Cancellation of irrevocable inter vivos trust on ground of mistake or misunderstanding, 59 A.L.R.2d 1229](#)

A trust can be rescinded because of a material mistake in its creation,[\[FN1\]](#) and under one view, in the absence of a reservation of a power of revocation, inducement of the trust by mistake is one of only a limited number of factors which may be shown in order to set aside a voluntary trust,[\[FN2\]](#) except where all parties in interest are ascertained, are under no incapacity, and consent to the revocation,[\[FN3\]](#) the other factors being

inducement by fraud, duress, or undue influence.[FN4] The existence of a mistake which has induced a trust, and is thereby grounds for rescinding such trust, is ordinarily a fact question for the jury.[FN5] Thus, mistake preventing a voluntary deed of trust from constituting a true expression of the real intention of the grantor is ground for setting such deed of trust aside[FN6] where established by sufficient proof.[FN7] However, if no provision is omitted which the grantor or settlor intended to insert in the trust instrument, the trust cannot be set aside merely because the settlor failed to think of some contingency and therefore failed to make provision for it in the instrument.[FN8]

A mistake of law or a misunderstanding as to the legal effect of a trust instrument is ordinarily not sufficient ground, by itself, to authorize the instrument's cancellation.[FN9] Further, ordinarily, the mere omission of a power to revoke the trust does not in itself constitute reason for cancellation of the trust on the ground of mistake or misunderstanding.[FN10] However, in some instances, misunderstanding or ignorance as to the legal effect of an inter vivos trust instrument or agreement may justify the cancellation of the trust, at least under certain circumstances.[FN11]

[FN1] In re Schulz' Estate, 180 Pa. Super. 243, 120 A.2d 181 (1956).

- A trust can be rescinded upon a showing of mistake. Cruse v. Leary, 727 S.W.2d 408 (Ky. Ct. App. 1987).

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[FN2] Pernod v. American Nat. Bank & Trust Co. of Chicago, 8 Ill. 2d 16, 132 N.E.2d 540, 59 A.L.R.2d 1223 (1956).

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[FN3] § 101.

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[FN4] § 119.

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[FN5] Cruse v. Leary, 727 S.W.2d 408 (Ky. Ct. App. 1987).

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[FN6] Lambdin v. Dantzebecker, 169 Md. 240, 181 A. 353, 102 A.L.R. 277 (1935); Osterhof v. Grand Haven State Bank, 239 Mich. 313, 214 N.W. 178 (1927).

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[FN7] § 705.

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[FN8] Taylor v. Buttrick, 165 Mass. 547, 43 N.E. 507 (1896).

- As to the effect of the mere omission of the power to revoke a trust, see § 107.

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[FN9] Pernod v. American Nat. Bank & Trust Co. of Chicago, 8 Ill. 2d 16, 132 N.E.2d 540, 59 A.L.R.2d 1223 (1956).

- In an action by the settlor to invalidate an irrevocable trust, there was no clear showing that the settlor was mistaken as to the legal effect of the document she signed, as to the contrary, evidence—including the testimony of the settlor's attorney who prepared the trust documents at the settlor's request and the settlor's own statements that she wished to make secure financial provisions for both her children and her fiance—indicated that the settlor knew precisely the purport and implication of the document she executed. Harrison v. Grobe, 790 F. Supp. 443 (S.D. N.Y. 1992), judgment aff'd, 984 F.2d 594 (2d Cir. 1993).

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[FN10] § 107.

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[FN11] [Markell v. Sidney B. Pfeifer Foundation, Inc.](#), 9 Mass. App. Ct. 412, 402 N.E.2d 76 (1980) (abrogated on other grounds by, [Cleary v. Cleary](#), 427 Mass. 286, 692 N.E.2d 955 (1998)) (elderly woman relying on attorney); [Greene v. Greene](#), 56 N.Y.2d 86, 451 N.Y.S.2d 46, 436 N.E.2d 496 (1982) (unfair advantage of the attorney-client relationship).

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§ 93. Fraud, undue influence, or duress

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [61\(.5\)](#), [61\(3\)](#), [61.5](#)

A court in equity can terminate even an irrevocable trust where the trust was procured through fraud, undue influence, duress, or coercion.[FN1]

For a declaration of a trust to be invalid and unenforceable as procured by undue influence, the influence exerted must be undue and operate to such a degree as to amount to coercion.[FN2] That is, there must have been the kind of mental coercion which destroyed the free agency of the creator of the trust and constrained the trustor to do that which was against his or her will and what the trustor would not have done if the trustor had been left to his or her own judgment and volition.[FN3] Even so, whether fraud, duress, or undue influence as to the creation of a trust exists is ordinarily a fact question for the jury.[FN4]

Practice guide: In some jurisdictions, the person seeking revocation or termination of the trust must bring evidence to raise a presumption of undue influence[FN5] or duress[FN6] in order to get the issue before the

jury. Also, in order to raise a presumption that the trust was the product of duress or undue influence, a cotrustee has been required to show that another trustee has unduly profited from such trust.[\[FN7\]](#)

Observation: The remedy for a settlor who alleges a lack of intent to create an irrevocable trust is to seek a rescission based on mistake, fraud, duress, or undue influence, rather than a termination of the trust.[\[FN8\]](#)

CUMULATIVE SUPPLEMENT

Cases:

It is not enough when attempting to establish undue influence and invalidate a trust to show that there was an opportunity to exert influence coupled with a substantial benefit under the trust; actual deprivation of the grantor's free will is required. [Lewis v. Van Anda, 282 Ga. 763, 653 S.E.2d 708 \(2007\)](#).

Evidence supported finding that relations between settlor and his stepdaughter and stepdaughter's husband afforded stepdaughter and husband an opportunity to control testamentary act, as would support finding of undue influence in settlor's amendment of trust and will to disinherit son and leave entire estate to two stepdaughters; stepdaughter and husband had moved into settlor's ranch, husband sat in on estate planning meeting with settlor and his attorney, and husband called estate planning attorney and told him of settlor's intended disposition of property. [Kelly v. McNeel, 2011 WY 79, 250 P.3d 1105 \(Wyo. 2011\)](#).

Undue influence in amendment of a trust is seldom susceptible of direct proof and may be established by proof of facts from which it may be fairly and reasonably inferred. [Kelly v. McNeel, 2011 WY 79, 250 P.3d 1105 \(Wyo. 2011\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Rebidas v. Murasko, 450 Pa. Super. 546, 677 A.2d 331 \(1996\); Dodd v. Berlinsky, 344 S.C. 172, 543 S.E.2d 237 \(Ct. App. 2001\)](#).

- As to duress and undue influence, generally, see 25 Am. Jur. 2d, Duress and Undue Influence.

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[\[FN2\] Alexander v. Walden, 287 S.C. 126, 337 S.E.2d 241 \(Ct. App. 1985\)](#).

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[\[FN3\] Alexander v. Walden, 287 S.C. 126, 337 S.E.2d 241 \(Ct. App. 1985\)](#).

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[\[FN4\] Cruse v. Leary, 727 S.W.2d 408 \(Ky. Ct. App. 1987\)](#).

- As to the weight and sufficiency of evidence of fraud or undue influence in procuring a trust, generally, see [§ 705](#).

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[\[FN5\] Alexander v. Walden, 287 S.C. 126, 337 S.E.2d 241 \(Ct. App. 1985\); In re Betty A. Luhrs Trust, 443 N.W.2d 646 \(S.D. 1989\)](#).

- As to proof and presumptions regarding undue influence in procuring a trust agreement, see [§ § 688, 692, 705](#).

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[\[FN6\] In re Betty A. Luhrs Trust, 443 N.W.2d 646 \(S.D. 1989\)](#).

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[\[FN7\] § 106](#).

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[\[FN8\] Wils v. Robinson, 934 S.W.2d 774 \(Tex. App. Houston 14th Dist. 1996\)](#), vacated pursuant to settlement, [938 S.W.2d 717 \(Tex. 1997\)](#) and writ granted, (Feb. 6, 1997).

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§ 94. General nature and purpose of protective trusts; spendthrift trusts, generally

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The purpose of a spendthrift trust being to provide a fund for the maintenance of the beneficiary while at the same time protecting the beneficiary not only from himself or herself, but also from his or her creditors,[[FN1](#)] a "spendthrift trust" has been defined as one in which the beneficiary is unable to transfer, assign, or alienate his or her right to future payments of income or principal.[[FN2](#)] That is, a "spendthrift trust" is a trust in which the power of alienation has been suspended.[[FN3](#)] By the terms of such a trust, or by statutes pertaining to spendthrift trusts, a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed.[[FN4](#)]

[FN1] [In re Martin](#), 119 B.R. 297 (Bankr. M.D. Fla. 1990).

- The purpose of a spendthrift trust is to protect the beneficiary from himself and his creditors. [In re Lichstrahl](#), 750 F.2d 1488 (11th Cir. 1985) (rejected on other grounds by, [In re Lucas](#), 924 F.2d 597 (6th Cir. 1991)) and (abrogated on other grounds by, [Patterson v. Shumate](#), 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992)).

- Spendthrift trusts are designed to provide for the maintenance of the beneficiary, while protecting the fund from both the beneficiary's improvidence and his or her creditors. [In re Atallah](#), 95 B.R. 910 (Bankr. E.D. Pa. 1989).

- Spendthrift trusts are trusts created to maintain a designated beneficiary and to insulate the fund from claims of the beneficiary's creditors. [In re Schwartz](#), 58 B.R. 606 (Bankr. N.D. Iowa 1984).

- Spendthrift trusts serve many useful purposes such as protecting beneficiaries from their own providence, protecting parties from their financial incapacities, and providing a front for support. [Bacardi v. White](#), 463 So. 2d 218 (Fla. 1985).

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[FN2] [Brosamer v. Mark](#), 540 N.E.2d 652 (Ind. Ct. App. 2d Dist. 1989), aff'd, 561 N.E.2d 767 (Ind. 1990).

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[FN3] [Morrison v. Doyle](#), 582 N.W.2d 237 (Minn. 1998).

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[FN4] [Matter of Petrey](#), 116 B.R. 95 (Bankr. S.D. Ohio 1990); [In re Estate of Brown](#), 148 Vt. 94, 528 A.2d 752 (1987); [In re Atallah](#), 95 B.R. 910 (Bankr. E.D. Pa. 1989); [Matter of Nuttleman](#), 117 B.R. 975 (Bankr. D. Neb. 1990), decision aff'd in part, rev'd in part on other grounds, 128 B.R. 254 (D. Neb. 1991).

- A spendthrift trust of either income or principal is one in which by the terms of the trust a valid restraint on the voluntary and involuntary transfer of assets by the beneficiary is imposed. [McNeal v. Bonnel](#), 412 S.W.2d 167 (Mo. 1967).

- A trust creating an equitable interest in the trust estate for the life of the beneficiary and restricting him from anticipating or alienating, either voluntarily or involuntarily, his interest in the trust is a spendthrift trust. [Germann v. New York Life Ins. Co.](#), 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985).

- If the terms of a trust provide that a beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditors, the restraint on voluntary and involuntary alienation of the interest is valid. [Restatement Third, Trusts § 58\(1\)](#).

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§ 95. Basic requisites of trust

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West's Key Number Digest, [Trusts](#) 12, 28

Forms

Spendthrift trust provisions direct prohibition against alienation, [Am. Jur. Legal Forms 2d, Spendthrift Trusts §§ 237:5 to 237:8.1](#)

where valid, certain prerequisites must appear before a valid spendthrift, discretionary, support, or other protective trust can be said to be created.[FN1] A spendthrift trust must comply with the requisites and essentials pertaining to the creation, existence, and validity of trusts, generally.[FN2]

It is not requisite to the creation and validity of such a trust that the beneficiary be in fact a spendthrift,[FN3] or an incompetent, and the beneficiary of a spendthrift trust may indeed be a very astute businessperson.[FN4]

A spendthrift trust can only be created by an express restraint on alienation;[FN5] the trust agreement must include a spendthrift clause.[FN6] In some instances, it is required for a trust to qualify as a spendthrift trust that the beneficiary show that he or she cannot alienate his or her interest in the trust res.[FN7]

In some jurisdictions, to determine whether a trust qualifies as a spendthrift trust, the courts examine the following characteristics: (1) whether the trust restricts the beneficiary's ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiary settled and retained the right to revoke the trust; and (3) whether the beneficiary has exclusive and effective dominion and control over the trust corpus, distribution of the trust corpus, and termination of the trust; in this determination, the degree of control which a beneficiary exercises over the trust corpus has been viewed as being the principal consideration.[FN8]

In some jurisdictions, to create a spendthrift trust, three elements are necessary: (1) the property must have "proceeded from another person"; (2) it must be held in trust for the debtor, not by him or her; and (3) the trust must be "declared by a will duly recorded or deed duly registered." [FN9] Furthermore, the spendthrift trust doctrine will not be extended to apply when the instrument creating the property rights fails to (1) create a trust in unmistakable terms, and (2) provide for a trustee; lacking these elements, an appellate court will not hold that property may be so fenced around by inhibitions and restrictions as to secure to it the inconsistent characteristic of right and enjoyment to the beneficiary and immunity from its creditors.[FN10]

[FN1] [In re Morgan's Estate, 223 Pa. 228, 72 A. 498 \(1909\); Lynch v. Lynch, 161 S.C. 170, 159 S.E. 26, 80 A.L.R. 997 \(1931\).](#)

[FN2] [Kessner v. Phillips](#), 189 Mo. 515, 88 S.W. 66 (1905); [Chinnis v. Cobb](#), 210 N.C. 104, 185 S.E. 638 (1936).

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[FN3] [In re Moulton's Estate](#), 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 (1951); [Long v. Long](#), 252 S.W.2d 235 (Tex. Civ. App. Texarkana 1952), writ refused n.r.e..

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[FN4] [Cronquist v. Utah State Agr. College](#), 114 Utah 426, 201 P.2d 280 (1949).

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[FN5] [Sanders v. Putman](#), 315 Ark. 251, 866 S.W.2d 827 (1993).

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[FN6] [Morrison v. Doyle](#), 582 N.W.2d 237 (Minn. 1998).

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[FN7] [In re Lyons](#), 118 B.R. 634 (C.D. Ill. 1990), judgment aff'd, 957 F.2d 444 (7th Cir. 1992).

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[FN8] [Matter of Perkins](#), 902 F.2d 1254, 60 Ed. Law Rep. 447 (7th Cir. 1990) (holding modified on other grounds by, [In re Dur Jac Ltd.](#) 254 B.R. 279 (Bankr. M.D. Ala. 2000)).

- As to the self-settled nature of a spendthrift trust as generally invalidating spendthrift provisions, see [§ 102](#).
- As to the dominion and control of the beneficiary as generally invalidating spendthrift provisions, see [§ 103](#).
- A spendthrift trust is one in which: (1) the trust implicitly or explicitly prohibits the voluntary and involuntary alienation of the beneficiary's interest; (2) the beneficiary is a donee or testamentary beneficiary and is not the settlor of the trust; and (3) the beneficiary has no present dominion or control over the trust corpus. [In re Fritsvold](#), 115 B.R. 192 (Bankr. D. Minn. 1990).

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[FN9] [Baskin v. Commerce Union Bank of Rutherford County](#), 715 S.W.2d 350 (Tenn. Ct. App. 1986).

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[FN10] [Baskin v. Commerce Union Bank of Rutherford County](#), 715 S.W.2d 350 (Tenn. Ct. App. 1986).

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§ 96. Basic requisites of trust—Intent to create trust and manifestation thereof; use of particular language

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No particular language or form of words need be employed by the settlor in creating a spendthrift trust;[FN1] the creator of a spendthrift trust need only manifest the intention, either expressly or impliedly in the instrument creating the trust, that the beneficiaries shall be entitled to their equitable interests in the trust property, free from the claims of their creditors.[FN2] A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.[FN3] However, it is not necessary that the trust be denominated a spendthrift trust, or that specific restraints of alienation and anticipation be expressed;[FN4] it is sufficient if by the terms of the trust the settlor manifests an intention to impose the restrictions common to such trust.[FN5] That is, where the trust agreement does not contain a specific spendthrift clause, a court looks to the settlor's intent as evidenced by the language used in the trust agreement to determine whether the settlor intended to create a spendthrift trust.[FN6] But, in the absence of specific language declaring the trust a spendthrift trust or of language from which such an intent may reasonably be inferred, no such trust can be deemed to have been created.[FN7] Thus, to create a spendthrift restriction against voluntary assignment, the settlor must, at a minimum, use words that express his or her intention that no part of the gift shall be assigned by the beneficiaries.[FN8]

[FN1] [In re Kaplan](#), 97 B.R. 572 (B.A.P. 9th Cir. 1989); [Morrison v. Doyle](#), 582 N.W.2d 237 (Minn. 1998); [Cronquist v. Utah State Agr. College](#), 114 Utah 426, 201 P.2d 280 (1949).

- No special language must be employed to create a spendthrift restriction against voluntary assignment. [Bank of New England v. Strandlund](#), 402 Mass. 707, 529 N.E.2d 394 (1988).

[FN2] [Duvall v. McGee](#), 375 Md. 476, 826 A.2d 416 (2003).

- The settlor's intent determines whether a trust is classified as a support or a discretionary trust. [Eckes v. Richland County Social Services](#), 2001 ND 16, 621 N.W.2d 851 (N.D. 2001).

- Intention to create a spendthrift trust was found where a settlor directed that the interest of the beneficiary and trust should not be liable for debts of the beneficiary prior to the actual receipt of funds by the beneficiary, and that the undistributed income not be invested but be deposited with the bank to accumulate interest, and the fact that the beneficiary had been unavailable to receive the accrued income for some years did not have the effect of offering terms of trust and making the beneficiary the settlor of accumulated income under his own revocable trust. [First Bank and Trust v. Goss](#), 533 S.W.2d 93 (Tex. Civ. App. Houston 1st Dist. 1976).

[FN3] [Uniform Trust Code § 502\(b\)](#).

[FN4] [Cronquist v. Utah State Agr. College](#), 114 Utah 426, 201 P.2d 280 (1949).

- An intent to restrain alienation by a beneficiary may be inferred from a trust instrument when read as a whole.

[In re Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 \(1951\).](#)

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[\[FN5\] Morrison v. Doyle, 582 N.W.2d 237 \(Minn. 1998\).](#)

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[\[FN6\] Morrison v. Doyle, 582 N.W.2d 237 \(Minn. 1998\).](#)

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[\[FN7\] Mohler v. Wesner, 382 Ill. 225, 47 N.E.2d 64 \(1943\).](#)

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[\[FN8\] Bank of New England v. Strandlund, 402 Mass. 707, 529 N.E.2d 394 \(1988\).](#)

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§ 97. Construction of trust instruments

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An instrument designed to create a spendthrift or other protective trust is to be construed so far as possible to carry out the intention and purpose of the trustor or founder.[\[FN1\]](#) The intention of the settlor that the beneficiary should receive the trust property free and clear of liens and other charges should be given effect.[\[FN2\]](#)

[FN1] [Cromwell v. Converse](#), 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 (1928); [Mohler v. Wesner](#), 382 Ill. 225, 47 N.E.2d 64 (1943); [Sheridan v. Krause](#), 161 Va. 873, 172 S.E. 508, 91 A.L.R. 1067 (1934).

- In the execution of a spendthrift trust, the concern of the law is not for the donees, but rather it is to give to the will of the donor the effect he has expressed for it. [In re Heyl's Estate](#), 156 Pa. Super. 277, 40 A.2d 149 (1944), judgment aff'd, [352 Pa. 407](#), 43 A.2d 130 (1945).

[FN2] [Milner v. Outcalt](#), 36 Wash. 2d 720, 219 P.2d 982 (1950).

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§ 98. Right of beneficiary to renounce trust prior to acceptance

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[Beneficiary's right to disclaim or renounce spendthrift trust prior to acceptance](#), 14 A.L.R.3d 1437

The view has been expressed in some cases that the beneficiary of a spendthrift trust may, prior to accepting the trust, effectively disclaim or renounce the trust so as to permit acceleration of his or her interest under the trust.[FN1] On the other hand, even though it is done prior to acceptance thereof, other courts have held that the beneficiary of a spendthrift trust is without power to disclaim or renounce where the effect of such disclaimer or renunciation would be to accelerate the beneficiary's remainder interest and so defeat the trust.[FN2]

[FN1] [Commerce Trust Co. v. Fast, 396 S.W.2d 683, 14 A.L.R.3d 1427 \(Mo. 1965\)](#) (a beneficiary was entitled to renounce immediately all provisions of a will for her benefit, including a spendthrift trust provision, after she had instituted a suit to contest the will, thereby enabling her to receive a sum under a settlement agreement with the other beneficiaries whose interests were accelerated because of the renunciation); [Central Nat. Bank of Cleveland v. Eells, 5 Ohio Misc. 187, 33 Ohio Op. 2d 418, 215 N.E.2d 77 \(Prob. Ct. 1965\)](#) (a trust making the interest of the beneficiary inalienable and providing for termination in case of attempted alienation was valid but did not preclude the beneficiary from renouncing the interest in consideration of a lump-sum settlement with the trustee).

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[FN2] [In re Nicely's Estate, 235 Cal. App. 2d 174, 44 Cal. Rptr. 804 \(3d Dist. 1965\)](#).

- While the right of a beneficiary to renounce is established beyond question, he may not thereby effect termination of a spendthrift trust and accelerate the remainder by virtue of a statute relating to renunciation of testamentary dispositions; the effect of such renunciation is that income is payable to persons presumptively entitled to next eventual estate. [Estate of Dexter, 75 Misc. 2d 239, 347 N.Y.S.2d 93 \(Sur. Ct. 1973\)](#).

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§ 99. Generally; view recognizing validity

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[Validity of spendthrift trusts, 34 A.L.R.2d 1335](#)

The vast majority of states which have considered the validity of spendthrift trusts or spendthrift provisions in trusts have found them valid.[FN1]

Spendthrift provisions and trusts are generally upheld on one of two policy grounds.[FN2] First, the intention of the testator, as far as possible, should be given effect by the courts; traditionally, a testator who gives without any pecuniary return can attach conditions to the gift during the life of the donee.[FN3] In this regard, it is sometimes stated that the law recognizes a public policy allowing a donor to condition his or her bounty as suits himself or herself as long as he or she violates no law in so doing,[FN4] and that although the power to alienate is requisite to a legal estate, it is not an essential quality of an equitable estate, and therefore cannot be advanced as a valid objection to a spendthrift trust.[FN5] Second, spendthrift provisions are upheld because the creditor has no reason to rely on assets or income from a spendthrift trust; inasmuch as such a gift in a spendthrift trust takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors.[FN6]

Observation: Those who favor the validity of spendthrift trusts argue that creditors should not complain about being unable to reach amounts made available to their debtor as a beneficiary of a spendthrift trust, because they could, by the exercise of diligence, have avoided relying upon such amounts as a source for payment of their claims.[FN7]

[FN1] [Levey v. First Virginia Bank, 845 F.2d 80 \(4th Cir. 1988\) \(applying Virginia law\)](#); [Matter of Brooks, 844 F.2d 258 \(5th Cir. 1988\)](#) (under Texas statutory law); [Cotham v. First Nat. Bank of Hot Springs, 287 Ark. 167, 697 S.W.2d 101 \(1985\)](#); [Bacardi v. White, 463 So. 2d 218 \(Fla. 1985\)](#); [Lundgren v. Hoglund, 219 Mont. 295, 711 P.2d 809 \(1985\)](#); [Domo v. McCarthy, 66 Ohio St. 3d 312, 612 N.E.2d 706 \(1993\)](#); [Baskin v. Commerce Union Bank of Rutherford County, 715 S.W.2d 350 \(Tenn. Ct. App. 1986\)](#); [Erickson v. Bank of California, N. A., 97 Wash. 2d 246, 643 P.2d 670 \(1982\)](#).

- A restraint on the voluntary and involuntary alienation of an interest in a trust is valid. [Restatement Third, Trusts § 58\(1\)](#).

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[FN2] [Lundgren v. Hoglund, 219 Mont. 295, 711 P.2d 809 \(1985\)](#).

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[FN3] [Lundgren v. Hoglund, 219 Mont. 295, 711 P.2d 809 \(1985\)](#).

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[FN4] [In re Bucklin's Estate, 243 Iowa 312, 51 N.W.2d 412, 34 A.L.R.2d 1327 \(1952\)](#); [Frensley v. Frensley, 1936 OK 382, 177 Okla. 221, 58 P.2d 307 \(1936\)](#).

- The validity of a spendthrift trust is upheld on the theory that the owner of property, in the free exercise of his will in disposing of it, may secure such benefits to the objects of his bounty as he sees fit and may, if he so desires, limit its benefits to persons of his choice, who part with nothing in return, to the exclusion of creditors and others. [In re Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 \(1951\)](#).

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[FN5] [In re Bucklin's Estate](#), 243 Iowa 312, 51 N.W.2d 412, 34 A.L.R.2d 1327 (1952); [Mattison v. Mattison](#), 53 Or. 254, 100 P. 4 (1909).

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[FN6] [Lundgren v. Hoglund](#), 219 Mont. 295, 711 P.2d 809 (1985).

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[FN7] [Sherrow v. Brookover](#), 174 Ohio St. 310, 22 Ohio Op. 2d 373, 189 N.E.2d 90 (1963) (overruled on other grounds by, [Scott v. Bank One Trust Co., N.A.](#), 62 Ohio St. 3d 39, 577 N.E.2d 1077 (1991)).

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[Validity of spendthrift trusts, 34 A.L.R.2d 1335](#)

In a few jurisdictions spendthrift trusts have been found invalid;[FN1] in such jurisdictions, the so-called "English" rule—that a spendthrift trust restraining the alienability or other interest of the beneficiary in the trust is invalid—has been followed.[FN2]

Reasons that have been given for the rule against the validity of spendthrift trusts are that public policy is opposed to restraints on the ordinary rights of property, to the withdrawing of property from the ordinary channels of commerce and trade, and to one having the enjoyment of his or her property[[FN3](#)] or the income therefrom, to the exclusion of his or her creditors.[[FN4](#)]

[[FN1](#)] [Athorne v. Athorne, 100 N.H. 413, 128 A.2d 910 \(1957\); Industrial Nat. Bank v. Budlong, 106 R.I. 780, 264 A.2d 18 \(1970\).](#)

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[[FN2](#)] [Athorne v. Athorne, 100 N.H. 413, 128 A.2d 910 \(1957\); Industrial Nat. Bank v. Budlong, 106 R.I. 780, 264 A.2d 18 \(1970\).](#)

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[[FN3](#)] [Industrial Nat. Bank v. Budlong, 106 R.I. 780, 264 A.2d 18 \(1970\).](#)

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[[FN4](#)] [Sherman v. Havens, 94 Kan. 654, 146 P. 1030 \(1915\)](#) (not following the English rule).

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§ 101. Effect of invalidity of spendthrift provisions upon other provisions of trust

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[Invalidity of spendthrift provisions as affecting other provisions of trust, 9 A.L.R.2d 1361](#)

Where there is a provision in the terms of the trust imposing restraint on the transfer by a beneficiary of his or her interest and the provision is illegal, the provision fails, but the whole trust does not fail, since provisions like this can ordinarily be separated from other provisions without defeating the purpose of the settlor in creating the trust.[FN1] The problem is really one of severability, that is, whether the particular trust, consistently with the evident or presumptive intent of the trustor, can stand or be enforced, when stripped of the provisions which are invalid.[FN2] Thus, when spendthrift provisions of a trust have been held invalid, the courts have generally upheld the trusts themselves as valid and have held only the particular restraints to be invalid.[FN3]

Trusts naming as beneficiaries the trustors themselves, and thus containing invalid spendthrift provisions for their own protection, have been upheld against attack by trustors or persons claiming under them.[FN4] Thus, where a settlor creates a trust for his or her own benefit and inserts a spendthrift clause, the trust remains valid, only the spendthrift clause being rendered void, thus allowing creditors to reach the property held in trust by garnishment.[FN5] Even if spendthrift provisions in a trust are void as to a settlor-beneficiary, this does not render the trust void; where evidence establishes that the trust has purposes other than the protection of the settlor-beneficiary's interest through the spendthrift provisions and that the whole purpose of the trust will not become impossible to accomplish merely because the spendthrift provisions are invalid, such provisions are severable and the trust is properly continued.[FN6]

[FN1] [In re Goff, 812 F.2d 931 \(5th Cir. 1987\).](#)

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[FN2] [Peter v. Peter, 136 Md. 157, 110 A. 211 \(1920\); Fewell v. Republic Nat. Bank of Dallas, 513 S.W.2d 596 \(Tex. Civ. App. Eastland 1974\), writ refused n.r.e. \(Feb. 12, 1975\).](#)

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[FN3] [In re Goff, 812 F.2d 931 \(5th Cir. 1987\) \(applying Texas law\); City of Philadelphia v. Meredith, 49 Pa. Super. 600, 1912 WL 4572 \(1912\); State ex rel. v. Nashville Trust Co., 28 Tenn. App. 388, 190 S.W.2d 785 \(1944\).](#)

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[FN4] [In re Goff, 812 F.2d 931 \(5th Cir. 1987\) \(applying Texas law\); Liberty Nat. Bank v. Hicks, 173 F.2d 631, 9 A.L.R.2d 1355 \(D.C. Cir. 1948\); Murphey v. C. I. T. Corp., 347 Pa. 591, 33 A.2d 16 \(1943\).](#)

- As to the self-settled nature of a spendthrift trust as generally invalidating spendthrift provisions, see [§ 102](#).
- The invalidity of severable provisions of a spendthrift trust regarding the distribution of the remainder does not invalidate the trustees' purchase and sale of real property under a trust provision authorizing the trustees to do so. [Burns v. Grable, 138 Cal. App. 2d 280, 291 P.2d 969 \(4th Dist. 1956\).](#)

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[FN5] [In re Goff, 812 F.2d 931 \(5th Cir. 1987\).](#)

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[FN6] [Fewell v. Republic Nat. Bank of Dallas, 513 S.W.2d 596 \(Tex. Civ. App. Eastland 1974\), writ refused n.r.e., \(Feb. 12, 1975\).](#)

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§ 102. Settlor as beneficiary of trust

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As a rule, spendthrift trusts for the benefit of the settlor are invalid^[FN1] and do not protect a settlor-beneficiary from creditors^[FN2] or transferees,^[FN3] regardless of whether the settlor intends to defraud his or her creditors or is solvent at the time of the creation of the trust.^[FN4]

In rejecting the validity of self-settled spendthrift trusts, it has been stated that the effect of a self-settled trust is not to provide maintenance and support for someone else, but to merely shift the settlor's assets from one pocket to another, so that a self-settled trust will not be afforded spendthrift protection despite the existence of spendthrift language.^[FN5] Furthermore, it has been reasoned that a self-settled trust enables the beneficiary to have dominion and control over the trust inconsistent with spendthrift principles,^[FN6] and self-settled spendthrift trusts have been said to be unenforceable in furtherance of a traditional public policy guarding against a strong potential for fraud and abuse.^[FN7] The predominance of the rule is borne out by the view followed by some courts that the threshold inquiry in determining whether a plan is a spendthrift trust is whether the plan is self-settled; even so, the fact that the trust is not self-settled does not necessarily mean that it is a spendthrift trust.^[FN8]

The rule prohibiting self-settled spendthrift trusts applies in respect to attempts to protect the trust income of corpus from claims of both present and future creditors.^[FN9]

By definition, because an Individual Retirement Account (IRA) is established for the settlor's own benefit, it cannot be a spendthrift trust.^[FN10] Similarly, to allow an individual to shelter assets in a discretionary trust of which the person is both settlor and beneficiary would defeat the express requirement of a statute providing that individuals reimburse the state for services rendered to them by the Department of Mental Health.^[FN11]

Observation: The rule that spendthrift trusts created by the beneficiary for himself or herself cannot be made inalienable or freed from liability for the debts of the beneficiary does not preclude one from settling his or her property in trust to protect himself or herself against his or her own spendthrift or other bad habits, or lack of capacity; such a trust is binding on him or her except insofar as it is still within his or her power to alienate it or encumber it with debts.[\[FN12\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Under Florida law, when settlor creates trust for his or her own benefit rather than for benefit of another, spendthrift provision will not protect trust assets. [In re Nichols, 434 B.R. 906 \(Bankr. M.D. Fla. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\]](#) [In re Kincaid, 917 F.2d 1162 \(9th Cir. 1990\)](#) (interpreting Massachusetts and Oregon law); [Matter of Witlin, 640 F.2d 661 \(5th Cir. 1981\)](#) (applying Florida law); [In re Williams, 118 B.R. 812 \(Bankr. N.D. Fla. 1990\)](#); [Fornell v. Fornell Equipment, Inc., 390 Mich. 540, 213 N.W.2d 172 \(1973\)](#); [Electrical Workers, Local No. 1 Credit Union v. IBEW-NECA Holiday Trust Fund, 583 S.W.2d 154 \(Mo. 1979\)](#); [Waldron v. Commerce Union Bank, 577 S.W.2d 669 \(Tenn. Ct. App. 1978\)](#).

- Texas law provides that if a settlor creates a trust for his own benefit and inserts a spendthrift clause, restraining alienation or assignment, it is void as far as creditors are concerned and they can reach a settlor's interest in the trust. [In re Goff, 812 F.2d 931 \(5th Cir. 1987\)](#).

- A debtors' status as both settlors and beneficiaries renders a spendthrift provision unenforceable under California law. [In re Barnes, 275 B.R. 889 \(Bankr. E.D. Cal. 2002\)](#).

- A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid. [Restatement Third, Trusts § 58\(2\)](#).

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[\[FN2\]](#) [In re Cohen, 8 P.3d 429 \(Colo. 1999\)](#); [Matter of Estate of Nagel, 580 N.W.2d 810 \(Iowa 1998\)](#); [In re Hertsberg Inter Vivos Trust, 457 Mich. 430, 578 N.W.2d 289 \(1998\)](#); [Sligh v. First Nat. Bank of Holmes County, 704 So. 2d 1020 \(Miss. 1997\)](#).

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[\[FN3\]](#) [In re Hertsberg Inter Vivos Trust, 457 Mich. 430, 578 N.W.2d 289 \(1998\)](#).

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[\[FN4\]](#) [Matter of Estate of Nagel, 580 N.W.2d 810 \(Iowa 1998\)](#).

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[\[FN5\]](#) [In re Green, 115 B.R. 1001 \(Bankr. W.D. Mo. 1990\)](#), order aff'd, [123 B.R. 327 \(W.D. Mo. 1990\)](#), rev'd on other grounds, [967 F.2d 1216 \(8th Cir. 1992\)](#), also stating that it is generally recognized as a matter of public policy that an individual is not entitled to shield his assets from his creditors by simply transferring them to a trust of which he is a beneficiary.

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[\[FN6\]](#) [In re Hartman, 115 B.R. 171 \(Bankr. W.D. Ark. 1990\)](#) (interpreting Arkansas law).

- Dominion and control of beneficiary as generally invalidating spendthrift provisions, see [§ 103](#).

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[\[FN7\]](#) [In re Ree, 114 B.R. 286 \(Bankr. N.D. Okla. 1990\)](#) (applying Oklahoma law).

- In invalidating spendthrift trusts created for the settlor's own benefit, the courts find that it would be against

public policy to allow a debtor to isolate property from the claims of creditors while enjoying the benefits of such property. [In re Atallah, 95 B.R. 910 \(Bankr. E.D. Pa. 1989\)](#).

- The rationale for the rule prohibiting a person from putting his own property in a spendthrift trust with himself as beneficiary is that a person cannot put his property beyond the reach of his creditors and still have the use of it for his personal benefit, but if the money comes from someone else, then the beneficiary's creditors are not deprived of any property that the beneficiary would necessarily have had. [In re Cassada, 86 B.R. 541 \(Bankr. E.D. Tenn. 1988\)](#).

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[FN8] [In re Kincaid, 917 F.2d 1162 \(9th Cir. 1990\)](#).

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[FN9] [Matter of Brooks, 844 F.2d 258 \(5th Cir. 1988\)](#); [Petty v. Moores Brook Sanitarium, 110 Va. 815, 67 S.E. 355 \(1910\)](#).

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[FN10] [Greening Donald Co., Ltd. v. Oklahoma Wire Rope Products, Inc., 1988 OK 125, 766 P.2d 970 \(Okla. 1988\)](#).

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[FN11] [In re Hertsberg Inter Vivos Trust, 457 Mich. 430, 578 N.W.2d 289 \(1998\)](#).

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[FN12] [Fidelity & Columbia Trust Co. v. Gwynn, 206 Ky. 823, 268 S.W. 537, 38 A.L.R. 937 \(1925\)](#); [Merchants Nat. Bank of New Bedford v. Morrissey, 329 Mass. 601, 109 N.E.2d 821 \(1953\)](#).

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§ 103. Dominion and control of beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [19](#) to [23](#), [28](#), [45](#) to [51](#)

The very basis of a spendthrift trust—provision of maintenance and support to someone in any manner that protects the assets from the beneficiary's improvidence—fails when the settlor has given the beneficiary the ability to exercise dominion or control over the corpus form.^[FN1] Implicit in the term spendthrift is the notion that the distribution of the trust is controlled by someone other than the beneficiary of the trust;^[FN2] to qualify as a spendthrift trust, a beneficiary must show that he or she does not possess exclusive and effective control over the termination or distribution of the trust.^[FN3] Otherwise, where the beneficiary exercises absolute dominion over the property of a spendthrift trust, such trust fails.^[FN4]

Observation: Where a beneficiary-debtor's access to trust funds is conditioned upon termination of employment, death, or disability, then an otherwise valid spendthrift trust will be enforceable.^[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Under Florida law, trusts containing valid spendthrift provisions are generally protected from claims of beneficiary's creditors, as long as beneficiary cannot exercise dominion over trust assets. [In re Nichols, 434 B.R. 906 \(Bankr. M.D. Fla. 2010\)](#).

[END OF SUPPLEMENT]

^[FN1] [In re Green, 115 B.R. 1001 \(Bankr. W.D. Mo. 1990\)](#), order aff'd, [123 B.R. 327 \(W.D. Mo. 1990\)](#), rev'd on other grounds, [967 F.2d 1216 \(8th Cir. 1992\)](#).

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^[FN2] [In re Kincaid, 917 F.2d 1162 \(9th Cir. 1990\)](#).

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^[FN3] [In re Lyons, 118 B.R. 634 \(C.D. Ill. 1990\)](#), judgment aff'd, [957 F.2d 444 \(7th Cir. 1992\)](#).

- A beneficiary of a spendthrift trust is not allowed to have control of the trust property; the rationale apparently is that control of the property while it is in the trust would be essentially the same as ownership, as if there were no trust. [In re Cassada, 86 B.R. 541 \(Bankr. E.D. Tenn. 1988\)](#).

- A trust was not a spendthrift trust although the trust contained spendthrift language; the terms of the trust allowed the debtor to make payments to himself from the corpus to any extent that he alone determined to be "desirable." [In re McCoy, 274 B.R. 751 \(Bankr. N.D. Ill. 2002\)](#), decision aff'd, [48 Collier Bankr. Cas. 2d \(MB\) 772, 2002 WL 1611588 \(N.D. Ill. 2002\)](#).

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^[FN4] [In re Lichstrahl, 750 F.2d 1488 \(11th Cir. 1985\)](#) (rejected on other grounds by, [In re Lucas, 924 F.2d 597 \(6th Cir. 1991\)](#)) and (abrogated on other grounds by, [Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 \(1992\)](#)).

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^[FN5] [In re Atallah, 95 B.R. 910 \(Bankr. E.D. Pa. 1989\)](#), holding; however, that where a debtor's access to his Individual Retirement Account (IRA) funds was not conditioned upon such dire consequences, and that even

though the IRA agreements in issue contained "spendthrift" provisions purporting to restrict a creditor's rights to attach funds in the IRAs, given the degree of control which the debtor enjoyed with respect to his IRA accounts, such IRAs were not enforceable spendthrift trusts.

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§ 104. Restraint as applicable to principal or income

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 19 to 23, 28, 45 to 51

Some authorities, while recognizing the validity of spendthrift trusts restraining alienation of income, take the position that spendthrift trusts protective of the corpus or principal of trust estates by reason of restraint on alienation thereof are not valid in respect to such restraint.^[FN1] On the other hand, it has been held that either or both the income and the corpus of a trust can be denominated spendthrift if all requisite elements for a spendthrift trust are present;^[FN2] a spendthrift trust clause is not just applicable to income, the corpus of a trust may also be the subject of a spendthrift trust.^[FN3] Thus, the validity of spendthrift trusts which are protective of the corpus or principal of trust estates against grantees and creditors, and in restraint of alienation to such extent, is recognized by many authorities.^[FN4] Furthermore, restraints upon the alienation or subjection of the trust income have also generally been recognized as valid.^[FN5]

^[FN1] [Chinnis v. Cobb](#), 210 N.C. 104, 185 S.E. 638 (1936) (effect of statutory provision).

- Though a spendthrift trust was validly established under state law, the income from the trust was subject to

seizure in satisfaction of a federal tax lien where the income beneficiary had a vested property right in the income generated by the trust and federal law determined whether the lien would attach. [Howard v. U. S., 566 S.W.2d 521 \(Tenn. 1978\)](#).

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[FN2] [Levey v. First Virginia Bank, 845 F.2d 80 \(4th Cir. 1988\)](#).

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[FN3] [State Cent. Collection Unit v. Brent, 71 Md. App. 265, 525 A.2d 241 \(1987\)](#), judgment aff'd, [311 Md. 626, 537 A.2d 227 \(1988\)](#).

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[FN4] [Levey v. First Virginia Bank, 845 F.2d 80 \(4th Cir. 1988\)](#) (under Virginia statutory and case law); [Johnson v. Morawitz, 292 F.2d 341 \(10th Cir. 1961\) \(applying Kansas law\)](#); [State Cent. Collection Unit v. Brent, 71 Md. App. 265, 525 A.2d 241 \(1987\)](#), judgment aff'd, [311 Md. 626, 537 A.2d 227 \(1988\)](#); [Preminger v. Union Bank & Trust Co., N.A., 54 Mich. App. 361, 220 N.W.2d 795 \(1974\)](#); [Domo v. McCarthy, 66 Ohio St. 3d 312, 612 N.E.2d 706 \(1993\)](#).

- The weight of authority, where not controlled by statute, supports the power to impose inalienability of principal as well as of life estates. [In re Vought's Estate, 25 N.Y.2d 163, 303 N.Y.S.2d 61, 250 N.E.2d 343 \(1969\)](#).

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[FN5] [Levey v. First Virginia Bank, 845 F.2d 80 \(4th Cir. 1988\)](#) (under Virginia statutory and case law); [Johnson v. Morawitz, 292 F.2d 341 \(10th Cir. 1961\) \(applying Kansas law\)](#); [Matter of Nichols, 42 B.R. 772 \(Bankr. M.D. Fla. 1984\) \(applying Florida law\)](#); [Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 \(1976\)](#); [Hoffman Chevrolet, Inc. v. Washington County Nat. Sav. Bank, 297 Md. 691, 467 A.2d 758 \(1983\)](#); [Domo v. McCarthy, 66 Ohio St. 3d 312, 612 N.E.2d 706 \(1993\)](#).

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§ 105. Effect of giving principal and income to one or two beneficiaries

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There is no reason to maintain a distinction between a spendthrift trust in which the income and principal are given to two people and one in which they are given to the same person, as such a distinction cannot be supported legally or policy wise and has not been relied on in practice, and where the language of the trust is explicit it should not be defeated by an outdated rule which furthers no public policy interest and is contrary to the general rule in the United States.[FN1]

[FN1] [Matter of Estate of Edgar, 425 Mich. 364, 389 N.W.2d 696 \(1986\).](#)

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§ 106. Statutory provisions

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Statutes sometimes expressly authorize the creation of spendthrift trusts,[\[FN1\]](#) while in some jurisdictions restrictions on an income beneficiary's right to alienate his or her interest in the trust are purely statutory.[\[FN2\]](#)

Statutory language sometimes protects the corpus of a spendthrift trust, the income of a trust, or both, from the beneficiaries' creditors only if the moneys of the trust are to be used for the support and maintenance of the beneficiary.[\[FN3\]](#) Furthermore, statutory provisions have sometimes provided for spendthrift trust treatment so far as the voluntary assignment of the receipts of rents and profits of lands included in a trust is concerned; under such a statute, the beneficiary of a trust for the receipt of the rents and profits of lands cannot dispose of such interest unless authorized by the instrument creating the trust.[\[FN4\]](#) Even where there is nonalienability legislation in effect, the courts have sometimes upheld a wife's right to an involuntary transfer of future income for her support from the husband's spendthrift trust.[\[FN5\]](#)

In a garnishment action by a credit union against a labor union vacation trust fund that accumulated employees' earnings, a spendthrift clause which purported to prevent garnishment of trust funds was invalid as contravening a garnishment statute and public policy.[\[FN6\]](#)

[\[FN1\] *Levey v. First Virginia Bank*, 845 F.2d 80 \(4th Cir. 1988\)](#) (interpreting Virginia law).

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[\[FN2\] *In re Knauth's Trust*, 12 N.Y.2d 259, 238 N.Y.S.2d 942, 189 N.E.2d 482 \(1963\).](#)

- For purposes of a statute governing spendthrift trusts, "restraining alienation" means a beneficiary cannot transfer, assign, or encumber his interest in the trust. [Albritton v. Albritton](#), 600 So. 2d 1328 (La. 1992).

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[\[FN3\] *Levey v. First Virginia Bank*, 845 F.2d 80 \(4th Cir. 1988\)](#) (stating that under state law where the income is to be paid to the beneficiary without any exercise of discretion on the part of the bank as trustee, the income of the trust is unprotected, and under Virginia law a spendthrift trust has three defining characteristics: first, the trust must provide for the support and maintenance of its beneficiary; second, the settlor must intend to protect the trust from the beneficiary's creditors; and third, the settlor must intend to prevent the beneficiary's voluntary or involuntary alienation of trust property).

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[\[FN4\] *Johnson v. Morawitz*, 292 F.2d 341 \(10th Cir. 1961\).](#)

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[\[FN5\] *In re Knauth's Trust*, 12 N.Y.2d 259, 238 N.Y.S.2d 942, 189 N.E.2d 482 \(1963\).](#)

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[\[FN6\] *Electrical Workers, Local No. 1 Credit Union v. IBEW-NECA Holiday Trust Fund*, 583 S.W.2d 154 \(Mo. 1979\).](#)

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§ 107. Other matters affecting validity

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West's Key Number Digest, [Trusts](#) 19 to 23, 28, 45 to 51

Where a person is both the trustee and the primary beneficiary of a trust, the trust's spendthrift characteristics are defeated.^[FN1] Furthermore, the doctrine of unclean hands may not be applied to invalidate or intrude upon the spendthrift provision of a trust.^[FN2] On the other hand, as a spendthrift or other protective trust cannot be established in contravention of statute or public policy, despite the language of the document creating the trust, spendthrift provisions will be rendered invalid, as a matter of public policy, if not consistent with the traditional purpose and character of spendthrift trusts.^[FN3]

In some jurisdictions the law allows a settlor to create a spendthrift trust which prevents creditors from reaching the beneficiary's interest, but which also allows the beneficiary to assign the interest voluntarily; and in this regard the view has been stated that a spendthrift provision restraining only involuntary alienation is not invalid as being unfairly prejudicial to creditors.^[FN4] However, the Uniform Trust Code provides that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.^[FN5]

^[FN1] [In re Kaplan, 97 B.R. 572 \(B.A.P. 9th Cir. 1989\)](#); [Morrison v. Doyle, 582 N.W.2d 237 \(Minn. 1998\)](#).

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^[FN2] [First Nat. Bank, Little Rock v. Merchants & Planters Bank of Newport, 256 Ark. 871, 510 S.W.2d 874, 83 A.L.R.3d 1138 \(1974\)](#).

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^[FN3] [In re Green, 115 B.R. 1001 \(Bankr. W.D. Mo. 1990\)](#), order aff'd, [123 B.R. 327 \(W.D. Mo. 1990\)](#), rev'd on other grounds, [967 F.2d 1216 \(8th Cir. 1992\)](#).

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^[FN4] [Bank of New England v. Strandlund, 402 Mass. 707, 529 N.E.2d 394 \(1988\)](#).

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^[FN5] [Uniform Trust Code § 502\(a\)](#).

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§ 108. Generally; discretionary trusts

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A "discretionary trust" is one that grants a trustee uncontrolled discretion over payment to the beneficiary^[FN1] and a purely discretionary trust is not subject to the claims of a beneficiary's creditors.^[FN2] Under the Uniform Trust Code, except as otherwise provided by law, whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if the discretion is expressed in the form of a standard of distribution; or the trustee has abused the discretion.^[FN3] However, the Restatement provides that subject to the rules pertaining to spendthrift trusts, if the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment.^[FN4]

Distinction: While a discretionary trust is sometimes called a "spendthrift trust,"^[FN5] it is ordinarily distinguished from a true spendthrift trust.^[FN6]

^[FN1] [Hecker v. Stark County Social Service Bd., 527 N.W.2d 226 \(N.D. 1994\).](#)

^[FN2] [Goforth v. Gee, 975 S.W.2d 448 \(Ky. 1998\).](#)

- A trust conferring upon the trustees power to distribute income and principal in their "absolute discretion," but which provides standards by which that discretion is to be exercised with reference to the needs of the trust

beneficiary for education, care, comfort or support, is not a purely discretionary trust. [Martin v. Martin, 54 Ohio St. 2d 101, 8 Ohio Op. 3d 106, 374 N.E.2d 1384 \(1978\)](#).

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[\[FN3\] Uniform Trust Code § 504\(b\)](#).

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[\[FN4\] Restatement Third, Trusts § 60](#), referring to [Restatement Third, Trusts §§ 58, 59](#).

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[\[FN5\] Cromwell v. Converse, 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 \(1928\)](#).

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[\[FN6\] In re Bucklin's Estate, 243 Iowa 312, 51 N.W.2d 412, 34 A.L.R.2d 1327 \(1952\)](#), stating that a discretionary trust, as distinguished from a spendthrift trust, is designed to prevent alienation by lodging discretion in the trustee as to the payment of income and withholding from the beneficiary a vesting of the equitable right to compel the distribution.

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§ 109. Trusts for support and education; validity and creation, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [11](#), [19](#) to [23](#), [45](#) to [52](#)

A "support trust" is one which essentially provides that the trustee shall pay or apply only so much of income and principal or either as is necessary for the education or support of the beneficiary.[\[FN1\]](#)

Observation: The discretion with which a trustee of a support trust is clothed in determining how much of the trust property should be made available for the support of the beneficiary, and when it shall be used, is not an unbridled discretion; the trustee may not act arbitrarily in the matter; however, pure may be his or her motives, and his or her discretion must be reasonably exercised to accomplish the purposes of the trust according to the settlor's intention.[\[FN2\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Beneficiary, who also was settlor, and trustee did not have to rely on termination provision to move trust assets under Arkansas law, since beneficiary and trustee consented to trust's termination and transfer of assets, and trustee had discretionary authority to distribute entire trust corpus to beneficiary. [In re Schultz, 324 B.R. 712 \(Bankr. E.D. Ark. 2005\)](#), opinion supplemented, [324 B.R. 722 \(Bankr. E.D. Ark. 2005\)](#)

[END OF SUPPLEMENT]

[\[FN1\] Hecker v. Stark County Social Service Bd., 527 N.W.2d 226 \(N.D. 1994\).](#)

- A trust conferring upon the trustees power to distribute income and principal in their "absolute discretion," but which provides standards by which that discretion is to be exercised with reference to the needs of the trust beneficiary for education, care, comfort, or support is not a strict support trust. [Martin v. Martin, 54 Ohio St. 2d 101, 8 Ohio Op. 3d 106, 374 N.E.2d 1384 \(1978\).](#)

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[\[FN2\] State v. Rubion, 158 Tex. 43, 308 S.W.2d 4 \(1957\).](#)

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§ 110. Trusts for support and education; validity and creation, generally—Distinctions of trusts for support from spendthrift trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [11](#), [19](#) to [23](#), [45](#) to [52](#)

Unlike a spendthrift trust, a so-called "trust for support" has no express provisions forbidding anticipatory alienations and attachments by creditors; rather, in a trust for support the limitation of the power of alienation arises only by implication from the nature of the beneficiary's interest and the indicated purpose of the trust.[\[FN1\]](#)

Generally, support trusts may be reached by creditors for support-related debts, but discretionary trusts may not be reached by creditors for any reason.[\[FN2\]](#)

Observation: While trusts for support are sometimes loosely referred to as spendthrift trusts,[\[FN3\]](#) they are not ordinarily so regarded.[\[FN4\]](#)

[\[FN1\]](#) [In re Keeler's Estate](#), 334 Pa. 225, 3 A.2d 413, 121 A.L.R. 1301 (1939).

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[\[FN2\]](#) [Smith v. Smith](#), 246 Neb. 193, 517 N.W.2d 394 (1994).

- Income in excess of amount necessary for support, maintenance, or education of beneficiary, see [§ 114](#).

- Ability of creditors to reach spendthrift trusts for support-related debts, see [§ 117](#).

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[\[FN3\]](#) [Cromwell v. Converse](#), 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 (1928); [In re Keeler's Estate](#), 334 Pa. 225, 3 A.2d 413, 121 A.L.R. 1301 (1939); [Town of Shrewsbury v. Bucklin](#), 105 Vt. 188, 163 A. 626, 86 A.L.R. 133 (1933).

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[\[FN4\]](#) [In re Keeler's Estate](#), 334 Pa. 225, 3 A.2d 413, 121 A.L.R. 1301 (1939).

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§ 111. Trusts conditioning receipt of or forfeiting beneficial interest on occurrence of specified events

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West's Key Number Digest, [Trusts](#) [11](#), [19](#) to [23](#), [45](#) to [52](#)

A condition precedent to the receipt of benefits may protect grantees, assignees, or creditors of a beneficiary from his or her beneficial interest under a trust and such a condition precedent may be the attainment of a certain age by the beneficiary before the payment to him or her of the benefit settled on him or her in trust.[\[FN1\]](#) A trust may also validly be protective against grantees or assignees and creditors of a beneficiary by a provision making solvency of the beneficiary a condition precedent to receipt of his or her benefit under the trust, the theory being that the trustor does not restrain alienation, but merely prescribes a condition on which he or she makes a gift.[\[FN2\]](#) There is nothing in such a condition that is contrary to public policy.[\[FN3\]](#)

Furthermore, the terms of a trust may validly provide for termination or forfeiture of the interest of a beneficiary upon his or her attempt to alienate it, or upon an attempt of his or her creditors to reach it, or in the event of his or her insolvency or bankruptcy.[\[FN4\]](#)

[\[FN1\]](#) [Shelton v. King](#), 229 U.S. 90, 33 S. Ct. 686, 57 L. Ed. 1086 (1913).

- A beneficiary had no attachable interest in a spendthrift trust that could be attached by his creditor, where the creditor contended that when the beneficiary reached the age of 35 the beneficiary would be entitled to a one-third share of the trust principal and, thus, had an equitable future interest in the trust principal subject to the creditor's judgment which would be enforceable if and when the beneficiary's future interest vested, because, in order for the beneficiary's interest in the principal to vest, he had to reach age 35 and he had to have actual receipt of the principal. [Domo v. McCarthy](#), 66 Ohio St. 3d 312, 612 N.E.2d 706 (1993).

- [\[FN2\]](#) [Kerens v. St. Louis Union Trust Co.](#), 283 Mo. 601, 223 S.W. 645, 11 A.L.R. 288 (1920); [Beals v. Croughwell](#), 140 Neb. 320, 299 N.W. 638, 138 A.L.R. 1330 (1941); [Sheridan v. Krause](#), 161 Va. 873, 172 S.E. 508, 91 A.L.R. 1067 (1934).

- [\[FN3\]](#) [Beals v. Croughwell](#), 140 Neb. 320, 299 N.W. 638, 138 A.L.R. 1330 (1941).

- [\[FN4\]](#) [Nichols v. Eaton](#), 91 U.S. 716, 23 L. Ed. 254 (1875); [Roberts v. Stevens](#), 84 Me. 325, 24 A. 873 (1892); [Lynch v. Lynch](#), 161 S.C. 170, 159 S.E. 26, 80 A.L.R. 997 (1931).

- A creditor's filing of a creditor's bill against a debtor, who was one of several beneficiaries of a spendthrift trust, could not be reached by the creditor, where the spendthrift provision of the trust provided in part that if "any part or all of any such interest, but for this provision, would vest in or be enjoyed by any other individual or entity, other than by disclaimer or release, such interest shall terminate," and thereafter the trustee from time

to time in its discretion pay to or expend for such person such income or principal as the trustee deemed proper, because the filing of the creditor's bill triggered the spendthrift provision, which converted the debtor's interest from an absolute right in income and principal to an interest in which the trustee was required to administer the trust as a purely discretionary trust for the debtors and other beneficiaries. [Domo v. McCarthy, 66 Ohio St. 3d 312, 612 N.E.2d 706 \(1993\)](#).

- The terms of a trust may validly provide that an interest shall terminate or become discretionary upon an attempt by the beneficiary to transfer it or by the beneficiary's creditors to reach it, or upon the bankruptcy of the beneficiary. [Restatement Third, Trusts § 57](#).

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§ 112. "Hybrid" trusts

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Trusts are neither support trusts nor discretionary trusts, but, rather, a hybrid of those two types, namely, a discretionary support trust, where the language of the trust instruments indicates that the settlors' purpose is not only to support the beneficiaries, but also to grant the trustee greater liberty in decision making than the trustee of an ordinary support trust.[\[FN1\]](#)

[\[FN1\] Smith v. Smith, 246 Neb. 193, 517 N.W.2d 394 \(1994\)](#) (the purpose of the trusts was to provide for the "health, support, care, comfort, and education" of the primary beneficiary and the trust also provided that the

trustee "shall have full, absolute, and uncontrolled discretionary power and authority").

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Forms

Am. Jur. Legal Forms 2d, Spendthrift Trusts §§ 237:17.1, 237:23 to 237:28, 237:32

[Am. Jur. Pleading and Practice Forms, Spendthrift Trusts §§ 4, 5, 9, 11, 15, 16](#)

Model Codes and Restatements

[Uniform Trust Code §§ 501 to 504](#)

[Restatement Third, Trusts §§ 50\(1\), 59\(a\), \(b\)](#)

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[Validity and construction of beneficiary's arrangement for payment to another, as they become due, of sums due under spendthrift trust, 83 A.L.R.3d 1142](#)

[Transfer of interest in spendthrift trust by beneficiary, 24 A.L.R.2d 1105](#) (sec. 6 superseded in part by [Validity and construction of beneficiary's arrangement for payment to another, as they become due, of sums due under spendthrift trust, 83 A.L.R.3d 1142](#))

The most important effect of a spendthrift or similar trust is to restrain alienation, voluntary or involuntary, of the interest of the beneficiary, or to limit or condition that interest by a condition precedent, relating to alienation or liability for debts, or by a provision for the exercise of discretion by the trustee or restriction to personal use or support and education of the beneficiary, in accordance with the terms of the trust.[FN1] Where the alienation by a beneficiary of his or her interest or estate in the trust may be prohibited by means of spendthrift trust provisions, a purported transfer of such interest or estate in violation of such provisions is invalid.[FN2] Under the Uniform Trust Code, a beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided by law, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.[FN3] However, to the extent a beneficiary's interest is not protected by a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means.[FN4] Questions may still arise, however, as to whether a particular transaction is within the operation of the restrictive provision, and the conclusion may, in some jurisdictions, depend upon or be affected by various factors, such as the purpose of or consideration for the transfer, and the status of the interest as future or accrued; thus it has been contended in some cases, but without success, that an assignment in consideration of legal services rendered in connection with the establishment or preservation of the beneficiary's interest in or under the trust was not within the restrictive provisions thereof.[FN5]

[FN1] [Waterbury v. Munn, 159 Fla. 754, 32 So. 2d 603, 174 A.L.R. 620 \(1947\)](#); [In re Keeler's Estate, 334 Pa. 225, 3 A.2d 413, 121 A.L.R. 1301 \(1939\)](#); [Town of Shrewsbury v. Bucklin, 105 Vt. 188, 163 A. 626, 86 A.L.R. 133 \(1933\)](#).

- Spendthrift trust assets are not ordinarily subject to the claims of a beneficiary's creditors. [Sligh v. First Nat. Bank of Holmes County, 704 So. 2d 1020 \(Miss. 1997\)](#).

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[FN2] [Johnson v. Morawitz, 292 F.2d 341 \(10th Cir. 1961\) \(applying Kansas law\)](#); [Kelley v. Lincoln Nat. Bank, 235 F.2d 23 \(D.C. Cir. 1956\) \(applying Maryland law\)](#); [De Korwin v. First Nat. Bank of Chicago, 170 F. Supp. 112 \(N.D. Ill. 1958\), judgment aff'd, 275 F.2d 755 \(7th Cir. 1960\) \(applying Illinois law\)](#); [Waterbury v. Munn, 159 Fla. 754, 32 So. 2d 603, 174 A.L.R. 620 \(1947\)](#); [In re Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 \(1951\)](#); [Hines v. Sands, 312 S.W.2d 275 \(Tex. Civ. App. Fort Worth 1958\)](#) (by implication).

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[FN3] [Uniform Trust Code § 502\(c\)](#).

- Trust interests received by or accrued in a beneficiary, generally, see [§ 115](#).

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[FN4] [Uniform Trust Code § 501](#), further providing that the court may limit the award to such relief as is appropriate under the circumstances.

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[FN5] [McKeown v. Pridmore, 310 Ill. App. 634, 35 N.E.2d 376 \(1st Dist. 1941\)](#).

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§ 114. Income in excess of amount necessary for support, maintenance, or education of beneficiary

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West's Key Number Digest, [Trusts](#) [112](#) to [128](#), [146](#) to [154](#)

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[Surplus income of trust, in excess of amount required for support and education of beneficiary, as subject to claims of creditors, 36 A.L.R.2d 1215](#)

Forms

Complaint and order—To reach surplus not needed for support. [Am. Jur. Pleading and Practice Forms, Spendthrift Trusts §§ 5, 16](#)

Where it is provided in the trust instrument that the income is to be used for the support, maintenance, or education of the beneficiary, the surplus in excess of the amount reasonably required for such purpose generally may be subjected by creditors to the payment of their claims.^[FN1] On the other hand, it is sometimes held in the case of trusts containing express provisions in restraint of the alienation or transfer of the interest of the beneficiary—commonly referred to as "spendthrift" trusts—that such surplus cannot be reached by creditors.^[FN2] However, a statute may permit a judgment creditor to execute against a beneficiary's interest in a spendthrift trust for any amount to which the beneficiary is entitled in excess of the amount necessary for the education and support of the beneficiary.^[FN3]

Practice Guide: Since statutory provisions authorizing the subjection of the surplus income of a trust to creditors of the beneficiary have not always precisely defined the extent or quantum of support to which the beneficiary is entitled or have not prescribed any definite standard for the measurement thereof, in determining the amount available to creditors each case must largely depend upon its particular facts.[FN4]

[FN1] [Johnston v. Redd, 59 Ga. 621, 1877 WL 3283 \(1877\); Leigh v. Harrison, 69 Miss. 923, 11 So. 604 \(1892\).](#)

- Support trusts, generally, see [§ 109](#).

- Under California law, a spendthrift trust can only be reached by a judgment creditor, and then only to the extent that income is not needed for support and education of the beneficiary. [Hearst v. Hearst, 123 F. Supp. 756 \(N.D. Cal. 1954\).](#)

[FN2] [Spring Street Corp. v. Walsh, O'Connor & Barneson, 101 P.2d 783 \(Cal. App. 2d Dist. 1940\)](#), certified question accepted.

[FN3] [Ammco Ornamental Iron, Inc. v. Wing, 26 Cal. App. 4th 409, 31 Cal. Rptr. 2d 564 \(2d Dist. 1994\).](#)

- Where a creditor's claim was filed by the guardian of a mentally ill trust beneficiary against a trust for reimbursement of necessary expenditures advanced by the guardian for the beneficiary's support, the spendthrift provision in the trust did not bar the trustee from invading the trust principal to reimburse the guardian for the funds advanced, since the trust instrument evidenced an intent by the testator to support the beneficiary, and since barring a claim for the necessary services rendered would have unjustly enriched the trust corpus at the expense of the creditor, which would have effectively vested the trustee with greater discretion than that granted by the trust instrument. [Matter of Dodge's Estate, 281 N.W.2d 447 \(Iowa 1979\).](#)

[FN4] [Ammco Ornamental Iron, Inc. v. Wing, 26 Cal. App. 4th 409, 31 Cal. Rptr. 2d 564 \(2d Dist. 1994\); Johnston v. Redd, 59 Ga. 621, 1877 WL 3283 \(1877\); Howard v. Leonard, 3 A.D. 277, 38 N.Y.S. 363 \(2d Dep't 1896\).](#)

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§ 115. Trust interests received by or accrued in beneficiary, generally

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[Transfer of interest in spendthrift trust by beneficiary, 24 A.L.R.2d 1105](#) (sec. 6 superseded in part by [Validity and construction of beneficiary's arrangement for payment to another, as they become due, of sums due under spendthrift trust, 83 A.L.R.3d 1142](#))

Forms

Complaint, petition, or declaration—By beneficiary's judgment creditor—To reach accumulated income payable to beneficiary. [Am. Jur. Pleading and Practice Forms, Spendthrift Trusts § 4](#)

A spendthrift trust provides that the beneficiary's creditors are unable to subject the beneficiary's interest to the payment of their claims while in the hands of the trustee; when funds from a spendthrift trust are paid to a beneficiary, those funds are no longer protected by the trust.[FN1] An enforceable spendthrift trust prevents a creditor of the beneficiary from collecting the debt by seizing the trust property while it is still in the trustee's possession.[FN2] Similarly, creditors, who stand in the shoes of a beneficiary of a discretionary trust, have no remedy until the trustee distributes the property.[FN3]

A restraint on the alienation of the right to receive the principal from the trust is effective until the principal is actually transferred by the trustee to the beneficiary.[FN4] However, it has been held that whether the principal of a spendthrift trust which at the expiration of the trust is to be handed over to the beneficiary is to be protected in transmission to him or her depends upon the intention manifested by the creator of the trust.[FN5]

[FN1] [Brosamer v. Mark, 540 N.E.2d 652 \(Ind. Ct. App. 2d Dist. 1989\)](#), aff'd, [561 N.E.2d 767 \(Ind. 1990\)](#).

- If under the terms of a spendthrift trust, a disbursement of corpus or income is due to the debtor-beneficiary, such disbursement may be subject to garnishment; if disbursements are wholly within the trustee's discretion, the court may not order the trustee to make such disbursements, however, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment. [Bacardi v. White, 463 So. 2d 218 \(Fla. 1985\)](#).

[FN2] [In re Cassada, 86 B.R. 541 \(Bankr. E.D. Tenn. 1988\)](#).

- A spendthrift trust protects income which has been received by the trustee but has not been paid by him to the beneficiary; the income of a spendthrift trust can be reached by creditors or transferred once it has been paid to the beneficiary, but the corpus of the trust is not the debtors' property so the creditors cannot attach any interest

until the debtors' rights to the payments are vested. [Matter of Nuttleman, 117 B.R. 975 \(Bankr. D. Neb. 1990\)](#), decision aff'd in part, rev'd in part on other grounds, [128 B.R. 254 \(D. Neb. 1991\)](#).

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[\[FN3\] U.S. v. O'Shaughnessy, 517 N.W.2d 574 \(Minn. 1994\)](#).

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[\[FN4\] Domo v. McCarthy, 66 Ohio St. 3d 312, 612 N.E.2d 706 \(1993\)](#).

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[\[FN5\] Sproul-Bolton v. Sproul-Bolton, 383 Pa. 85, 117 A.2d 688 \(1955\)](#), holding that the duration of immunity of a corpus of a spendthrift trust from attachment by a creditor of the beneficiary after the beneficiary has become entitled to receive the trust depends entirely upon the intention manifested by the creator of the trust.

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§ 116. Anticipatory assignment of interest by beneficiary

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[Validity and construction of beneficiary's arrangement for payment to another, as they become due, of sums due under spendthrift trust, 83 A.L.R.3d 1142](#)

Forms

Spendthrift trust provision—Legal protection of payments of principal and income—No anticipation or assignment by any beneficiary or attachment by creditor. Am. Jur. Legal Forms 2d, Spendthrift Trusts § 237:17.1

The rule invalidating a purported transfer of the interest of the beneficiary under a spendthrift trust has been applied in the case of instruments purporting or attempting to assign the right to future income, and, in a number of cases, such an instrument has been held or declared invalid or unenforceable as violative of the restrictive provisions of the trust instrument.^[FN1] The rule of invalidity has also been applied in the case of instruments purporting to transfer the interest of the beneficiary in the corpus of the estate prior to the time fixed for its payment or distribution.^[FN2]

But the view is sometimes taken that while an assignment executed during the continuance of the trust is not effective as a conveyance or transfer with respect to income or property subsequently received by the beneficiary from the trustee, it is effective as a contract to convey or transfer that property after it is received by the beneficiary, with the consequence that the beneficiary's failure to convey or transfer it constitutes a breach of contract for which he or she is liable in damages.^[FN3] The view has also been taken that direction by the beneficiary to the trustee to pay income to an assignee is valid and enforceable as to each installment after it accrues, and will justify the trustee in paying installments over to the assignee until the beneficiary notifies him or her to cease making such payments.^[FN4] Moreover, a beneficiary can revoke a trustee's authority to make payments under such instructions at any time before the trustee makes a payment.^[FN5]

The execution of a binding power of attorney to another to receive sums due from the trust to the beneficiary is revocable by the beneficiary,^[FN6] even when expressly declared to be irrevocable.^[FN7]

In addition, a spendthrift trust beneficiary may enter into a binding agreement with a third person to pay over to such person sums received by the beneficiary from the trust.^[FN8] However, to avoid the antiassignment feature of a spendthrift trust, the agreement must obligate the beneficiary to pay over the money to the third person rather than require the trustee to pay the third person directly.^[FN9]

^[FN1] [Waterbury v. Munn](#), 159 Fla. 754, 32 So. 2d 603, 174 A.L.R. 620 (1947) (under a trust requiring payments to be made only on the personal receipt of the beneficiary, and prohibiting anticipation or encumbrance); [Bucknam v. Bucknam](#), 294 Mass. 214, 200 N.E. 918, 104 A.L.R. 774 (1936) (prohibition against alienation or anticipation); [In re Moulton's Estate](#), 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 (1951) (implied prohibition against alienation).

^[FN2] [Kelly v. Kelly](#), 11 Cal. 2d 356, 79 P.2d 1059, 119 A.L.R. 71 (1938); [In re Moulton's Estate](#), 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 (1951) (alienation prohibited by implication).

^[FN3] [Kelly v. Kelly](#), 11 Cal. 2d 356, 79 P.2d 1059, 119 A.L.R. 71 (1938).

- Parties to whom the corpus of trust was to be distributed only when the trust terminated upon the death of the income beneficiaries and the settlors had no vested interest in the corpus protected by a spendthrift clause; accordingly, a party's purported mortgage of the land which constituted the corpus of the trust did not violate a spendthrift clause. [Boyle v. A.W.A., Inc.](#), 319 Ark. 390, 892 S.W.2d 242 (1995).

- Once the beneficiary receives a gift under a trust, whatever he or she does with it no longer constitutes anticipation of the income of the trust, even if the beneficiary uses it pursuant to an advance agreement spelling out what he or she would do once he or she got his or her hands on it; this type of agreement is one which the

beneficiary is free to make and one which should be enforced. [State v. Dodson, 642 S.W.2d 641 \(Mo. 1982\)](#).

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[\[FN4\] In re Keeler's Estate, 334 Pa. 225, 3 A.2d 413, 121 A.L.R. 1301 \(1939\)](#).

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[\[FN5\] First Nat. Bank, Little Rock v. Merchants & Planters Bank of Newport, 256 Ark. 871, 510 S.W.2d 874, 83 A.L.R.3d 1138 \(1974\); In re Van Heusen's Estate, 145 Misc. 884, 262 N.Y.S. 149 \(Sur. Ct. 1932\)](#).

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[\[FN6\] First Nat. Bank, Little Rock v. Merchants & Planters Bank of Newport, 256 Ark. 871, 510 S.W.2d 874, 83 A.L.R.3d 1138 \(1974\); Seely v. Fletcher, 63 Misc. 448, 117 N.Y.S. 86 \(Sup 1909\), aff'd, 135 A.D. 920, 120 N.Y.S. 1145 \(1st Dep't 1909\)](#).

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[\[FN7\] Seely v. Fletcher, 63 Misc. 448, 117 N.Y.S. 86 \(Sup 1909\), aff'd, 135 A.D. 920, 120 N.Y.S. 1145 \(1st Dep't 1909\)](#).

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[\[FN8\] Minot v. Minot, 319 Mass. 253, 66 N.E.2d 5 \(1946\); In re Vought's Estate, 70 Misc. 2d 781, 334 N.Y.S.2d 720 \(Sur. Ct. 1972\), order aff'd, 45 A.D.2d 991, 360 N.Y.S.2d 199 \(1st Dep't 1974\)](#).

- A beneficiary of a spendthrift trust who had the unqualified present right to exercise complete ownership of the trust assets could, by a stipulated property settlement in a divorce proceeding, make a binding and enforceable agreement to transfer to the other party at a future date such portion of the principal of the trust assets as he, at the time of such agreement, had an unqualified right to presently possess and own. [Smith v. Smith, 312 Minn. 541, 253 N.W.2d 143 \(1977\)](#).

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[\[FN9\] In re Lee's Estate, 214 Minn. 448, 9 N.W.2d 245 \(1943\)](#).

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III. Spendthrift and Similar Protective Trusts
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§ 117. Generally; taxes

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Although it has been held that the responsibility of creditors when they enter into transactions with spendthrift trust beneficiaries does not apply to tort judgment creditors and does not support shielding spendthrift trust assets from judgments against the beneficiaries for intentional torts or gross negligence,^[FN1] it has also been held that a spendthrift provision does protect against recovery for intentional torts.^[FN2]

A spendthrift provision is unenforceable against a claim of a State or the United States to the extent a statute of the State or federal law so provides,^[FN3] such as claims of a state or its subdivisions in the enforcement of taxes.^[FN4] Furthermore, federal estate taxes imposed upon the estate of a decedent are enforceable against spendthrift trusts created by his or her will,^[FN5] and federal income taxes of the beneficiary of a spendthrift trust are enforceable against his or her interest in the trust.^[FN6]

Under the Restatement, the interest of a beneficiary in a valid spendthrift trust can be reached in satisfaction of an enforceable claim against the beneficiary for services or supplies provided for necessities or for the protection of the beneficiary's interest in the trust.^[FN7] Similarly, under the Uniform Trust Code, even if a trust contains a spendthrift provision, a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.^[FN8]

Also, under the Restatement, the interest of a beneficiary in a valid spendthrift trust can be reached in satisfaction of an enforceable claim against the beneficiary for the support of a child, spouse, or former spouse.^[FN9] Similarly, under the Uniform Trust Code, even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.^[FN10]

^[FN1] [Sligh v. First Nat. Bank of Holmes County](#), 704 So. 2d 1020 (Miss. 1997).

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^[FN2] [Duvall v. McGee](#), 375 Md. 476, 826 A.2d 416 (2003) (murder by beneficiary); [Scheffel v. Krueger](#), 146 N.H. 669, 782 A.2d 410 (2001) (sexual assault by beneficiary) .

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^[FN3] [Uniform Trust Code § 503](#)(c).

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^[FN4] [City of Louisville v. Cooke](#), 135 Ky. 261, 122 S.W. 144 (1909); [Fetting v. Flanigan](#), 185 Md. 499, 45 A.2d 355, 174 A.L.R. 301 (1946).

- Under the law of trust, a spendthrift trust cannot insulate a beneficiary from a claim by the state based on income or other tax obligations. [Retirement Fund Trust of Plumbing v. Franchise Tax Bd.](#), 909 F.2d 1266 (9th Cir. 1990).

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^[FN5] [Fetting v. Flanigan](#), 185 Md. 499, 45 A.2d 355, 174 A.L.R. 301 (1946).

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[FN6] [U.S. v. Dallas Nat. Bank, 152 F.2d 582 \(C.C.A. 5th Cir. 1945\).](#)

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[FN7] [Restatement Third, Trusts § 59\(b\).](#)

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[FN8] [Uniform Trust Code § 503\(b\).](#)

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[FN9] [Restatement Third, Trusts § 59\(a\).](#)

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[FN10] [Uniform Trust Code § 503\(b\).](#)

- Power of court to order payment from trust for support or maintenance of the beneficiary's child, spouse, or former spouse, see [§ 154](#).

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§ 118. Claims of trustor, estate of testator, or trust estate

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Generally, the protection of a spendthrift or similar trust has been regarded as extending to an indebtedness of the beneficiary of the trust to the testator or other settlor of the trust, to the estate of the testator, or to the trust estate itself,[[FN1](#)] and, according to some cases, even where the indebtedness is contracted after the execution of the instrument creating the trust.[[FN2](#)]

The question of protection of such a trust against claims of the trustor, the testator's estate, or the trust estate depends upon a proper construction of the trust instrument in respect to the intention of the creator of the trust.[FN3] Indicia in the instrument itself that the beneficiary is to enjoy the entire benefit irrespective of his or her indebtedness to the trustor, the estate of the testator, or the trust estate itself, are, among others, the trust instrument's express use of the word "spendthrift" in describing the trust, a provision for an annuity in case the trust income should be insufficient,[FN4] and a provision for personal payment to, on personal receipt of, the beneficiary.[FN5] There is no public policy contrary to restraint by the trust of liability of the interest of the beneficiary even for such debts.[FN6]

[FN1] [Blakemore v. Jones, 303 Mass. 557, 22 N.E.2d 112, 123 A.L.R. 1317 \(1939\)](#) (indebtedness to the estate); [In re Chamberlin's Estate, 289 N.Y. 456, 46 N.E.2d 883, 145 A.L.R. 1314 \(1943\)](#) (to the testator or estate of the testator).

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[FN2] [In re Edwards' Estate, 217 Cal. 25, 17 P.2d 116 \(1932\)](#).

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[FN3] [In re McGregor's Estate, 130 N.J. Eq. 5, 19 A.2d 865 \(Ct. Err. & App. 1941\)](#).

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[FN4] [In re Chamberlin's Estate, 289 N.Y. 456, 46 N.E.2d 883, 145 A.L.R. 1314 \(1943\)](#).

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[FN5] [Blakemore v. Jones, 303 Mass. 557, 22 N.E.2d 112, 123 A.L.R. 1317 \(1939\)](#).

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[FN6] [In re Chamberlin's Estate, 289 N.Y. 456, 46 N.E.2d 883, 145 A.L.R. 1314 \(1943\)](#).

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§ 119. Duty and discretion of trustee, generally

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Forms

Spendthrift trust provision—Withholding distribution. [Am. Jur. Legal Forms 2d, Spendthrift Trusts §§ 237:23 to 237:28](#)

Answer—Defense—Absolute discretion of trustee to determine amount of payments. [Am. Jur. Pleading and Practice Forms, Spendthrift Trusts § 15](#)

A spendthrift or similar protective trust casts upon the trustee the duty to exercise sound, judicious judgment to determine what is necessary for the support of a beneficiary, and to turn over to him or her trust income or property or funds in such amount, in accordance with the terms of the trust.^[FN1] In this regard, the trustee under a spendthrift or other support trust is often vested with discretion to determine the occasion or amount of support payments or other benefits, or the occurrence of or compliance with conditions entitling the beneficiary to a payment or to the corpus of the estate.^[FN2]

While a trustor may impose conditions which govern the trustee in the exercise of the discretion granted,^[FN3] often the discretion is broad or said to be absolute^[FN4] or complete.^[FN5] However, no matter how broad or absolute the discretion is, the general duties of a trustee to exercise good faith, reasonable care, diligence, and skill require that the discretion be exercised upon judicious and responsible consideration.^[FN6]

^[FN1] [Cromwell v. Converse](#), 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 (1928).

^[FN2] [Cleveland Clinic Foundation v. Humphrys](#), 97 F.2d 849, 121 A.L.R. 163 (C.C.A. 6th Cir. 1938); [In re Marre's Estate](#), 18 Cal. 2d 184, 114 P.2d 586 (1941); [Dumaine v. Dumaine](#), 301 Mass. 214, 16 N.E.2d 625, 118 A.L.R. 834 (1938).

^[FN3] [Viall v. Rhode Island Hospital Trust Co.](#), 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 (1924).

^[FN4] [Cromwell v. Converse](#), 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 (1928).

^[FN5] [U.S. v. O'Shaughnessy](#), 517 N.W.2d 574 (Minn. 1994).

^[FN6] [Cavett v. Buck](#), 1964 OK 265, 397 P.2d 901 (Okla. 1964); [Viall v. Rhode Island Hospital Trust Co.](#), 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 (1924).

- A court does not favor a construction of a trust which confers arbitrary or capricious authority upon the trustee. [In re Trust Salimes](#), 43 Wis. 2d 140, 168 N.W.2d 157 (1969).

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§ 120. Particular factors considered in determining amount of allowance for support

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Forms

Spendthrift trust provision—No distributions to beneficiary when otherwise capable of own support. [Am. Jur. Legal Forms 2d, Spendthrift Trusts § 237:32](#)

Petition—By beneficiary—For increased payments necessitated by illness of beneficiary. [Am. Jur. Pleading and Practice Forms, Spendthrift Trusts § 9](#)

In the absence of anything in a trust declaration indicating the amount of support benefit to which the beneficiary is entitled under a spendthrift or other support trust, the amount thereof is to be determined by the trustee in the light of the beneficiary's "station in life"^[FN1] and mode of living, the relation between the trustor and the beneficiary,^[FN2] the needs of the beneficiary, the amount that the ordinary person would provide for the support or home of the beneficiary,^[FN3] and other indicia of what the trustor intended as a sufficient provision for the support of the beneficiary.^[FN4] Ordinarily, in determining the amount of support, the trustee should not consider the needs of residuary legatees or other persons of the same class as the beneficiary of the trust, but only those of the beneficiary.^[FN5] Under some circumstances, however, the means of a parent of

beneficiaries are to be considered in determining the amount to be expended for the support of the beneficiaries.[\[FN6\]](#)

Practice Guide: The determination of the trustees of a spendthrift trust that income set apart and credited on their books to the beneficiary shall be paid to the beneficiary as necessary and desirable for his or her maintenance and support under the terms of the trust, although revocable in the lifetime of the beneficiary under the absolute discretion given the trustees to make such determination, becomes irrevocable upon the beneficiary's death.[\[FN7\]](#)

[\[FN1\] *Alvis v. Bank of America Nat. Trust & Savings Ass'n*, 95 Cal. App. 2d 118, 212 P.2d 608, 36 A.L.R.2d 1209 \(1st Dist. 1949\); *Cromwell v. Converse*, 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 \(1928\).](#)

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[\[FN2\] *Cromwell v. Converse*, 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 \(1928\).](#)

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[\[FN3\] *Eaton v. Lovering*, 81 N.H. 275, 125 A. 433, 35 A.L.R. 1034 \(1924\).](#)

- In determining the amount of income to be expended for the support of a life beneficiary under a gift of the income in trust of so much as is necessary to provide for comfortable support, the trustee should take into account the income which the beneficiary has from other sources, such as her personal estate and her share as an heir of intestate surplus income, the intent of the testatrix being to limit the payments to her to those required for her support by reason of her own inability to provide it. [Stempel v. Middletown Trust Co.](#), 127 Conn. 206, 15 A.2d 305, 157 A.L.R. 657 (1940).

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[\[FN4\] *Hooker v. Goodwin*, 91 Conn. 463, 99 A. 1059 \(1917\); *Eaton v. Lovering*, 81 N.H. 275, 125 A. 433, 35 A.L.R. 1034 \(1924\).](#)

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[\[FN5\] *Eaton v. Lovering*, 81 N.H. 275, 125 A. 433, 35 A.L.R. 1034 \(1924\).](#)

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[\[FN6\] *Cleveland Clinic Foundation v. Humphrys*, 97 F.2d 849, 121 A.L.R. 163 \(C.C.A. 6th Cir. 1938\).](#)

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[\[FN7\] *Cromwell v. Converse*, 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 \(1928\).](#)

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§ 121. Payment of support or other benefit out of trust corpus

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[Trust provisions for payment, in the trustee's discretion or for a designated purpose, of part or all of the principal to a beneficiary, 2 A.L.R.2d 1383](#) (secs. 26-30 superseded in part by [Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support, 41 A.L.R.3d 255](#))

Forms

Petition—By beneficiary—To compel trustee to invade principal of trust. [Am. Jur. Pleading and Practice Forms, Spendthrift Trusts § 11](#)

A spendthrift or support trust may give the trustee, either specifically or by implication, the power or discretion to pay benefits out of the corpus of the estate.^[FN1] Where the trust provides that the corpus may be used so far as it shall be necessary for the personal comfort of the cestui que trust, the right to resort to the principal is founded on necessity, and is restricted to necessities determined by station in life, mode of living, and suitability under all the circumstances.^[FN2] Under such a trust provision, resort can be made in a proper case to the corpus for education.^[FN3] A testator may make the beneficiary the person to determine what may be used under a will giving discretion for use of the principal for certain purposes.^[FN4]

^[FN1] [Boston Safe Deposit & Trust Co. v. Stebbins, 309 Mass. 282, 34 N.E.2d 616, 148 A.L.R. 1036 \(1941\); First Wisconsin Trust Co. v. Perkins, 275 Wis. 464, 82 N.W.2d 331, 78 A.L.R.2d 1 \(1957\).](#)

- Under a testamentary trust giving the trustee discretion to invade the corpus if necessary to provide for the support and maintenance of the beneficiary, the trustee would be required to invade the corpus where the beneficiary was confined to a nursing home in ill health, had only Social Security income and income from a small pension, and had been declared not eligible for county medicaid by reason of the existence of the trust. [In re Cooper's Will, 76 Misc. 2d 166, 349 N.Y.S.2d 613 \(Sur. Ct. 1973\).](#)

^[FN2] [Hooker v. Goodwin, 91 Conn. 463, 99 A. 1059 \(1917\).](#)

- Trustee's authorization to invade the trust principal in the event of a beneficiary's "extremity" refers to a case

of extreme need of the beneficiary. [Clark v. Mississippi Valley Trust Co., 360 Mo. 452, 228 S.W.2d 808 \(1950\).](#)

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[\[FN3\] Boston Safe Deposit & Trust Co. v. Stebbins, 309 Mass. 282, 34 N.E.2d 616, 148 A.L.R. 1036 \(1941\).](#)

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[\[FN4\] In re Lyon's Estate, 192 Misc. 306, 80 N.Y.S.2d 369 \(Sur. Ct. 1948\).](#)

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§ 122. Payment of support or other benefit out of trust corpus—Propriety of considering beneficiary's other means

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[Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support, 41 A.L.R.3d 255](#)

A trustee may be required, under the terms of a trust, to consider the beneficiary's other resources in determining whether and to what extent the beneficiary is entitled to receive payments from the principal of a trust for purposes of the beneficiary's support.[\[FN1\]](#) If the settlor's intention was to make a gift to the

beneficiary of sufficient money for his or her specified purpose, as a benefaction complete in itself, the beneficiary's other means must not be considered; however, if the settlor intended only to insure the beneficiary against falling into need for the given purpose, the beneficiary's other means must be considered.[FN2] But where a trust provided that the trustee could pay trust principal if the net income under the trust were not sufficient to provide proper support for any beneficiary without taking into consideration other income or financial resources of the beneficiary, such provision has been interpreted to allow but not mandate disregarding of other income or resources.[FN3]

In some cases, the view has been expressed that in the absence of an indication of contrary intent, there is a rebuttable presumption that the settlor intended that the trustee should not consider other resources of the beneficiary in determining whether to invade the corpus of a trust under support provisions.[FN4] In other instances, however, the view has been expressed that in the absence of a contrary intent on the part of the testator, there is a rebuttable presumption that the settlor's intent is that the trustee should consider the resources of the beneficiary in determining whether to invade the corpus of the trust under a support provision.[FN5]

In determining whether it is proper for the trustee to consider other assets of the beneficiary before invading the corpus, importance has sometimes been placed upon the relationship of the settlor to the beneficiary.[FN6] It has been said in this context that a surviving spouse is a favorite of the law,[FN7] and that the provisions of a husband's will for the benefit of his wife should be construed liberally in her favor.[FN8] Where the beneficiary was the settlor's granddaughter, the trustee was required to take into consideration the financial status and earning capacity of the grandchild's parent, in determining whether to invade the corpus.[FN9]

In particular cases recognizing the propriety of the trustee's looking to the other resources of the beneficiary, it has been stated that the beneficiary should not be required to totally exhaust his or her independent property before being permitted to invade the trust corpus.[FN10] In other instances, however, before the corpus could be invaded, substantial exhaustion of the beneficiary's independent property has been required.[FN11]

[FN1] [Boston Safe Deposit and Trust Co. v. Boynton, 15 Mass. App. Ct. 103, 443 N.E.2d 1344 \(1983\)](#), where trustee was required, under terms of the trust, to consider the beneficiary's other resources, including resources distributed to her children.

- Where a trust gave the trustees the unfettered discretion to invade a trust principal, the trustees properly exercised their discretion in deciding not to use the trust corpus to pay the beneficiary's debts, since the beneficiary, who was the settlor's daughter, had substantial personal assets sufficient to pay the debts.

[NationsBank of Virginia, N.A. v. Estate of Grandy, 248 Va. 557, 450 S.E.2d 140 \(1994\)](#).

- In view of the circumstances and terms of a will, a settlor apparently intended that the beneficiary, her sister, be enabled to spend rest of her life in the style to which she had become accustomed, and the trustee was not required to consider other resources of the beneficiary before invading the corpus of the trust to pay for hospital and medical expenses. [Martin v. Simmons First Nat. Bank, 250 Ark. 774, 467 S.W.2d 165 \(1971\)](#).

- The terms of a testament, considered within the known circumstances of a wife at the time the testator refashioned a legacy under an earlier will into a trust provision for her life support under a subsequent will, without the condition that her pension stipend and other personal resources be given account, disclosed an intention that the wife-beneficiary have her full support from the trust estate; thus, the trustee could not consider other resources available to the wife in refusing to invade the corpus of the trust estate to provide the wife with a "living" according to the terms of the trust. [In re Coats Trust, 581 S.W.2d 392 \(Mo. Ct. App. W.D. 1979\)](#).

[FN2] [In re Wills' Trust Estate, 8 Ariz. App. 591, 448 P.2d 435 \(1968\)](#).

[FN3] [Estate of Jones, 68 Cal. App. 3d 274, 137 Cal. Rptr. 138 \(2d Dist. 1977\)](#).

[\[FN4\] In re Young's Will, 243 Iowa 211, 49 N.W.2d 769 \(1951\); Holyoke Nat. Bank v. Wilson, 350 Mass. 223, 214 N.E.2d 42 \(1966\); In re Demitz' Estate, 417 Pa. 316, 208 A.2d 280 \(1965\).](#)

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[\[FN5\] Munsey v. Laconia Home for Aged, 103 N.H. 42, 164 A.2d 557 \(1960\).](#)

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[\[FN6\] Smith v. Gillikin, 201 Va. 149, 109 S.E.2d 121 \(1959\).](#)

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[\[FN7\] In re Leonard's Estate, 115 Vt. 440, 63 A.2d 179 \(1949\).](#)

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[\[FN8\] In re Houghton's Estate, 118 Vt. 228, 105 A.2d 257 \(1954\).](#)

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[\[FN9\] In re Cameron's Trusts, 127 N.Y.S.2d 870 \(Sur. Ct. 1954\).](#)

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[\[FN10\] Lumbert v. Fisher, 245 Mass. 190, 139 N.E. 446 \(1923\); Sibson v. First Nat. Bank & Trust Co. of Paulsboro, 64 N.J. Super. 225, 165 A.2d 800 \(App. Div. 1960\); In re Mitchell's Will, 30 Misc. 2d 781, 217 N.Y.S.2d 690 \(Sur. Ct. 1961\).](#)

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[\[FN11\] Guaranty Trust Co. of N.Y. v. New York City Cancer Committee, 145 Conn. 542, 144 A.2d 535 \(1958\).](#)

- A provision that a trustee could invade the principal, as well as distribute trust income, to a settlor's sons "if necessary" was construed as requiring that the trust corpus be made available to the beneficiaries as a last resort to sustain them only after their other financial resources were exhausted, and would apply to the situation of the beneficiary-son whose poor health caused him to exhaust all financial resources available to him. [Emmert v. Old Nat. Bank of Martinsburg, 162 W. Va. 48, 246 S.E.2d 236 \(1978\).](#)

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§ 123. Judicial review and interference

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Where the terms of a spendthrift or other form of protective trust do not specifically determine the interest or benefit of the beneficiary, but leave that to the discretion of the trustee, it is within the power of a court of equity, upon a proper showing of facts and circumstances justifying its interference, to determine the interest or benefit to which a beneficiary is entitled under the terms of the trust, and the rule is as fully applicable in the case of an adult, as it is in the case of an infant, beneficiary.^[FN1] The court, however, will not interfere with or set aside the trustee's determination, in the absence of clear abuse.^[FN2] Only in extreme cases will a court of chancery break in upon the terms of a trust, and the exercise of the power must be based on facts showing that conditions have arisen or exigencies developed which could not have been foreseen by the donor, and that as a result of such unforeseen conditions, the beneficiaries will suffer loss,^[FN3] and that the main object of the party creating the trust will be best served by the court's action in order to actually carry out the intent of the creator of the trust.^[FN4] In this regard, it has been recognized that the fact that no precedent can be found in which relief has been granted under a similar state of facts is no reason for refusing the relief.^[FN5]

A court will not ordinarily substitute its discretion for that of the trustee,^[FN6] but upon a proper showing it may and will control or interfere with such discretion of a trustee and, where necessary, direct a suitable allowance for the support of beneficiaries,^[FN7] as where the trustee is about to act or has acted unreasonably or arbitrarily or from improper motives, or where his or her refusal to act is similarly objectionable.^[FN8] The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee.^[FN9]

Another proper case for judicial control or interference is where the trustee is proceeding to make, or has made applications of corpus or income without compliance with conditions under the terms of the trust.^[FN10] However, where a trust specifically authorizes a trustee to invade the trust principal for the beneficiary: (1) in case of an emergency affecting the beneficiary; and (2) when necessary for the support, maintenance, or for the comfort of the beneficiary, it is improper for a trial judge to interfere with the judgment of the trustee paying out to the beneficiary where the trustee has not abused his or her discretion.^[FN11] And where a trust instrument provided for payment from time to time of net income and so much of the principal as the trustees, in their absolute and uncontrolled discretion, elected to pay for maintenance, comfort, and support of the decedent's daughter, the trustees could not be compelled to pay principal where it was not shown that they acted dishonestly or arbitrarily or from an improper motive.^[FN12]

Under the Uniform Trust Code, to the extent a trustee has not complied with a standard of distribution or has abused a discretion a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.^[FN13]

^[FN1] [Colton v. Colton](#), 127 U.S. 300, 8 S. Ct. 1164, 32 L. Ed. 138 (1888); [Cleveland Clinic Foundation v. Humphrys](#), 97 F.2d 849, 121 A.L.R. 163 (C.C.A. 6th Cir. 1938).

[FN2] [In re Larkins' Will, 243 Iowa 322, 51 N.W.2d 396 \(1952\)](#); [Damon v. Damon, 312 Mass. 268, 44 N.E.2d 657, 143 A.L.R. 463 \(1942\)](#) (discretion to pay the principal to the beneficiary whenever in the opinion of the trustee it is desirable so to do).

- In order to justify the interference of the court, the beneficiary must establish by proof of the clearest character that the refusal of the trustee to act was unreasonable. [Scully v. Scully, 162 Neb. 368, 76 N.W.2d 239 \(1956\)](#).

[FN3] [Dyer v. Paddock, 395 Ill. 288, 70 N.E.2d 49 \(1946\)](#).

[FN4] [Thorne v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 18 Ill. App. 2d 163, 151 N.E.2d 398 \(1st Dist. 1958\)](#).

[FN5] [Thorne v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 18 Ill. App. 2d 163, 151 N.E.2d 398 \(1st Dist. 1958\)](#).

[FN6] [Viall v. Rhode Island Hospital Trust Co., 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 \(1924\)](#).

[FN7] [Watling v. Watling, 15 F.2d 719 \(E.D. Mich. 1926\)](#), aff'd, [27 F.2d 193 \(C.C.A. 6th Cir. 1928\)](#); [Booth v. Krug, 368 Ill. 487, 14 N.E.2d 645, 117 A.L.R. 1193 \(1938\)](#).

[FN8] [Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 \(1967\)](#); [Frye v. Burk, 57 Ohio App. 99, 10 Ohio Op. 152, 25 Ohio L. Abs. 529, 12 N.E.2d 152 \(3d Dist. Hancock County 1936\)](#); [Viall v. Rhode Island Hospital Trust Co., 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 \(1924\)](#).

- The Uniform Trust Code does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion. [Uniform Trust Code § 504\(d\)](#).

- A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee. [Restatement Third, Trusts § 50\(1\)](#).

[FN9] [In re Tone's Estates, 240 Iowa 1315, 39 N.W.2d 401 \(1949\)](#).

[FN10] [Booth v. Krug, 368 Ill. 487, 14 N.E.2d 645, 117 A.L.R. 1193 \(1938\)](#); [Stewart v. Madden, 153 Pa. 445, 25 A. 803 \(1893\)](#).

- The Uniform Trust Code does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for failure to comply with a standard for distribution. [Uniform Trust Code § 504\(d\)](#).

[FN11] [Matter of Rosenberg, 76 A.D.2d 866, 428 N.Y.S.2d 502 \(2d Dep't 1980\)](#).

[FN12] [First Nat. Bank of Maryland v. Department of Health and Mental Hygiene, 284 Md. 720, 399 A.2d 891 \(1979\)](#).

[FN13] [Uniform Trust Code § 504\(c\)](#).

- Ability to reach a spendthrift trust to provide support to a beneficiary's child, spouse, or former spouse, see [§ 117](#).

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§ 124. Termination

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 61

If a settlor of a trust is alive and all of the beneficiaries of an irrevocable spendthrift trust consent—there being no incapacity to consent by any of the parties—the settlor and all of the beneficiaries may consent to a termination of the trust.^[FN1]

Beneficiaries may not prematurely terminate a trust restricted by a spendthrift clause;^[FN2] the nature of the interest of a beneficiary of such a protective trust ordinarily precludes any termination of the trust merely through the consent of the beneficiary^[FN3] or beneficiaries, even though all are sui juris and all join in seeking the termination.^[FN4] A spendthrift trust cannot be terminated by mere agreement of the life beneficiary and the remainder beneficiaries, since to do so would defeat a material purpose of the trust.^[FN5] The rule has sometimes been stated as being that since the continuance of a spendthrift trust is necessary to carry out the testator's purpose, the beneficiaries cannot compel its termination.^[FN6]

If a settlor includes a spendthrift provision in a trust to protect the assets from the beneficiaries' creditors, that purpose may not be accomplished by terminating the trust and purchasing an annuity to maintain the life beneficiaries' ongoing payments.^[FN7]

A spendthrift provision of a trust ceases to be effective upon the termination or expiration of the trust.^[FN8]

^[FN1] [Musick v. Reynolds](#), 798 S.W.2d 626 (Tex. App. Eastland 1990), writ denied, (Feb. 20, 1991).

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^[FN2] [University of Maine Foundation v. Fleet Bank of Maine](#), 2003 ME 20, 817 A.2d 871 (Me. 2003).

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^[FN3] [Merchants' Nat. Bank v. Crist](#), 140 Iowa 308, 118 N.W. 394 (1908); [Rose v. Southern Michigan Nat. Bank](#), 255 Mich. 275, 238 N.W. 284 (1931) (overruled on other grounds by, [Matter of Estate of Edgar](#), 425 Mich. 364, 389 N.W.2d 696 (1986)).

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^[FN4] [Mahan v. Mahan](#), 320 Md. 262, 577 A.2d 70 (1990).

- To permit premature termination of a spendthrift or other support trust by the beneficiaries, either in whole or pro tanto, would amount to an assignment of the corpus, the very thing which a restraint on alienation forbids.

[Kirkland v. Mercantile-Safe Deposit & Trust Co. of Baltimore, 218 Md. 17, 145 A.2d 230 \(1958\).](#)

- If the settlor of a spendthrift trust is deceased and therefore incapable of consenting, such a trust cannot be terminated even though all the beneficiaries desire that it should be. [In re Bosler's Estate, 378 Pa. 333, 107 A.2d 443 \(1954\).](#)

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[\[FN5\] Matter of Estate of Sanders, 158 Misc. 2d 606, 602 N.Y.S.2d 742 \(Sur. Ct. 1991\); Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 \(Ct. App. 1985\).](#)

- A spendthrift provision of a charitable trust, pursuant to which a settlor's grandchildren each had an inalienable right to receive \$100 a month for life, was a material purpose of the trust, and thus the trust could not be terminated by consent of the beneficiaries, even though the remainder beneficiary agreed to continue the grandchildren's monthly payments; a statute established the presumption that a spendthrift provision was a material purpose, the grandchildren did not present evidence to rebut the presumption, and the proposed payments by the remainder beneficiary would not satisfy the purpose because they would not be protected from alienation. [In re Estate of Somers, 277 Kan. 761, 89 P.3d 898 \(2004\).](#)

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[\[FN6\] Cotham v. First Nat. Bank of Hot Springs, 287 Ark. 167, 697 S.W.2d 101 \(1985\).](#)

- A trust's purpose to provide for a beneficiary's support, maintenance, and education could continue to be fulfilled even though the beneficiary was incarcerated for sexually assaulting a minor boy, and thus, the trust did not qualify for termination. [Scheffel v. Krueger, 146 N.H. 669, 782 A.2d 410 \(2001\).](#)

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[\[FN7\] In re Estate of Somers, 277 Kan. 761, 89 P.3d 898 \(2004\).](#)

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[\[FN8\] Domo v. McCarthy, 66 Ohio St. 3d 312, 612 N.E.2d 706 \(1993\).](#)

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§ 125. Termination—Effect of occurrence of condition specified in trust instrument

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 61

A beneficiary's right to the corpus of a trust vests upon the beneficiary satisfying any contingency specified in the trust and neither the beneficiary nor the trustee can thereafter defeat the rights of the creditors of the beneficiary by allowing the corpus to remain in the hands of the trustee; in short, the spendthrift trust terminates when the beneficiary satisfies the contingency specified in the trust and from that point in time forward, the spendthrift trust is invalid as against the beneficiary's creditors.[FN1] Stated otherwise, in the case of a trust to pay a beneficiary the entire trust res on a condition precedent to such payment, such as attainment of solvency, compliance with the condition entitles the beneficiary to payment, and the payment brings the trust to a close.[FN2]

A trust may terminate, and a spendthrift clause cease to have any effect, upon the death of the last-named income beneficiary, where the trust instrument provides that, upon the income beneficiaries' death, the corpus of the trust is to be distributed to specified persons "free from trust." [FN3]

[FN1] [State Cent. Collection Unit v. Brent, 71 Md. App. 265, 525 A.2d 241 \(1987\)](#), judgment aff'd, [311 Md. 626, 537 A.2d 227 \(1988\)](#), also stating that the law permits a creditor to reach the corpus of a spendthrift trust whenever the beneficiary could have terminated the trust.

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[FN2] [Beals v. Croughwell, 140 Neb. 320, 299 N.W. 638, 138 A.L.R. 1330 \(1941\)](#).

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[FN3] [Boyle v. A.W.A., Inc., 319 Ark. 390, 892 S.W.2d 242 \(1995\)](#).

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§ 126. Termination—Effect of conveyance from trustee to beneficiary; merger of interests

West's Key Number Digest

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[Termination of trust where life interest and remainder or reversion are acquired by same person, 50 A.L.R.2d 1161](#)

A spendthrift trust cannot be brought to a conclusion merely by a conveyance by the trustee to the beneficiary,^[FN1] and as a general rule, a merger or vesting of legal and equitable or greater and lesser interests in the same person does not terminate a spendthrift trust.^[FN2]

[FN1] [In re Stewart's Estate, 253 Pa. 277, 98 A. 569 \(1916\).](#)

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[FN2] [Bowlin v. Citizens' Bank & Trust Co., 131 Ark. 97, 198 S.W. 288, 2 A.L.R. 575 \(1917\); Damon v. Damon, 312 Mass. 268, 44 N.E.2d 657, 143 A.L.R. 463 \(1942\).](#)

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§ 127. **Modification or extension**

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 58

In some jurisdictions, if a settlor of a trust is alive and all of the beneficiaries of an irrevocable spendthrift trust consent—and there being no incapacity to consent by any of the parties—the settlor and all of the beneficiaries may consent to a modification of the trust.^[FN1] In a jurisdiction where spendthrift trusts in corpus as well as in income are recognized to be valid, it has been held that the life of a spendthrift trust may be extended by the agreement and consent of trustees and beneficiaries, and that such extension may be made without the consent of a trustee in bankruptcy of one of the beneficiaries.^[FN2] But, the fact that the beneficiary is incompetent, and hence unable to make a valid decision, does not extend the life of the spendthrift trust beyond the settlor's intention.^[FN3] Also, an agreement attempting to create a new trust with a beneficiary's interest in a spendthrift trust prior to the termination of the spendthrift trust was an absolute nullity and was imprescriptible; the settlor of the spendthrift trust did not intend for that trust to be extended beyond the termination dates expressed in the spendthrift trust and by attempting to create a new trust during the existence of the spendthrift trust, the beneficiary was attempting to alienate his interest in violation of the settlor's intent that the interest in the spendthrift trust not be alienated while in trust.^[FN4]

A testamentary trust may be modified to preserve a trustee's discretionary power by changing "shall" to "may" in the clause governing the trustee's authority to invade the trust corpus for the beneficiaries, in light of a subsequent judicial opinion holding that the use of the word "shall" could defeat the discretionary nature of the power and could enable creditors to reach trust assets subject to the power.^[FN5]

Changed circumstances warranted modification of a charitable spendthrift trust to provide for an immediate distribution of most of the trust corpus to the remainder beneficiary, while reserving enough in trust to pay obligations to the life beneficiaries; the settlor did not anticipate the growth in the trust's value, and modification was consistent with the settlor's intent to benefit the remainder beneficiary, and was not detrimental to the interest of the life beneficiaries.^[FN6]

^[FN1] [Musick v. Reynolds](#), 798 S.W.2d 626 (Tex. App. Eastland 1990), writ denied, (Feb. 20, 1991).

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^[FN2] [Medwedeff v. Fisher](#), 179 Md. 192, 17 A.2d 141, 138 A.L.R. 1313 (1941).

- Validity of spendthrift clause as to principal and income, see [§ 104](#).

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^[FN3] [State Cent. Collection Unit v. Brent](#), 71 Md. App. 265, 525 A.2d 241 (1987), judgment aff'd, [311 Md. 626](#), 537 A.2d 227 (1988).

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^[FN4] [Albritton v. Albritton](#), 600 So. 2d 1328 (La. 1992).

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^[FN5] [In re Harris Testamentary Trust](#), 275 Kan. 946, 69 P.3d 1109 (2003).

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^[FN6] [In re Estate of Somers](#), 277 Kan. 761, 89 P.3d 898 (2004).

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§ 128. General characterization and classification; statutory trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [3](#) to [5](#), [7](#), [62](#) to [62.5](#), [91](#) to [92.5](#)

Trusts by operation of law are sometimes referred to as "indirect,"^[FN1] "involuntary,"^[FN2] or "implied" trusts.^[FN3] Involuntary^[FN4] or implied trusts are equitable remedies^[FN5] and an "implied trust" results from the legal implication of the facts and circumstances presumed to evidence the intent of the parties.^[FN6] An implied trust is used by the courts as a remedial device to restore the status quo, and is therefore utilized when a person owning title to property is under an equitable duty to convey it to another because he or she would be unjustly enriched if he or she were permitted to retain it.^[FN7]

However, generally described, such trusts are further classified into resulting trusts and constructive trusts.^[FN8]

^[FN1] [Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\).](#)

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^[FN2] [Sorrels v. McNally, 89 Fla. 457, 105 So. 106 \(1925\); In re Marriage of Malquist, 234 Mont. 419, 763 P.2d 1116 \(1988\).](#)

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^[FN3] [Taylor v. Fields, 178 Cal. App. 3d 653, 224 Cal. Rptr. 186 \(2d Dist. 1986\); Loberg v. Alford, 372 N.W.2d 912 \(N.D. 1985\); Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\).](#)

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[\[FN4\] Hilliard v. Hilliard, 255 Mont. 487, 844 P.2d 54 \(1992\).](#)

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[\[FN5\] Bemis v. Estate of Bemis, 114 Nev. 1021, 967 P.2d 437 \(1998\).](#)

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[\[FN6\] Emberry Community Church v. Bloomington Dist. Missionary and Church Extension Soc., Inc., 482 N.E.2d 288 \(Ind. Ct. App. 1st Dist. 1985\); From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\).](#)

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[\[FN7\] Banner Health System v. Long, 2003 SD 60, 663 N.W.2d 242 \(S.D. 2003\).](#)

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[\[FN8\] Hickman v. Trust of Heath, House and Boyles, 310 Ark. 333, 835 S.W.2d 880 \(1992\); Taylor v. Fields, 178 Cal. App. 3d 653, 224 Cal. Rptr. 186 \(2d Dist. 1986\); From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\); Gitto v. Gitto, 239 Mont. 47, 778 P.2d 906 \(1989\); Schroeder v. Buchholz, 2001 ND 36, 622 N.W.2d 202 \(N.D. 2001\); Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\).](#)

- Resulting trusts, generally, see [§ § 135](#) et seq.

- Constructive trusts, generally, see [§ § 168](#) et seq.

- Both constructive and resulting trusts are creatures of equity. [In re Administration of Estate of Abernathy, 778 So. 2d 123 \(Miss. 2001\).](#)

- The basic objectives of both constructive and resulting trusts are the recognition and protection of property rights that have arisen in an innocent party, and the vital tenet is one of equity. [Bemis v. Estate of Bemis, 114 Nev. 1021, 967 P.2d 437 \(1998\).](#)

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§ 129. Basis and requisites for creation, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 63.9

In some jurisdictions, the requirements for the creation of an involuntary or implied trust are identified by statute.^[FN1] Thus, under statutes in some jurisdictions, an involuntary trust, to be created by operation of law, requires fraud, mistake, undue influence, violation of a trust, or other wrongful acts.^[FN2] Furthermore, it has sometimes been provided by statute that an implied trust arises where one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he or she has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it; each one to whom property is transferred in violation of a trust holds the same as an implied trustee under such trust, unless he or she purchased it in good faith and for a valuable consideration.^[FN3]

Practice Guide: An implied trust, whether resulting or constructive, must be established by clear and convincing evidence.^[FN4]

^[FN1] [Morin v. Mapston](#), 217 Mont. 403, 705 P.2d 118 (1985); [Loberg v. Alford](#), 372 N.W.2d 912 (N.D. 1985).

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^[FN2] [Morin v. Mapston](#), 217 Mont. 403, 705 P.2d 118 (1985).

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^[FN3] [Loberg v. Alford](#), 372 N.W.2d 912 (N.D. 1985).

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^[FN4] [In re Estate of Horrigan](#), 757 So. 2d 165 (Miss. 1999); [Spagnolia v. Monasky](#), 2003 ND 65, 660 N.W.2d 223 (N.D. 2003); [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002).

- Resulting trusts, generally, see [§ § 135](#) et seq.

- Constructive trusts, generally, see [§ § 168](#) et seq.

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§ 130. Distinguished from express or direct trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 3 to 5, 7, 62 to 62.5, 91 to 92.5

Express trusts and constructive trusts are not divisions of the same fundamental concept.^[FN1] They are not species of the same genus, but are distinct concepts.^[FN2]

Unlike voluntary trusts, involuntary trusts arise independently of any express contract^[FN3] or express trust agreement.^[FN4] Actions for implied trusts are separate from contract actions; these claims essentially suggest that, despite the lack of a written agreement, the holder of the property title is wrongfully possessing the property, so that the courts can conclude that the property is being held in trust for the benefit of the complainant.^[FN5]

Express trusts depend upon intention, while implied trusts, such as constructive or resulting trusts, arise by operation of the law.^[FN6]

Recommendation: Although the term "implied trust" has been used to designate an express trust arising from the construction of language, it is preferable to restrict the meaning of that term, and to regard all trusts, oral or written, other than resulting or constructive trusts, as express trusts.^[FN7]

^[FN1] [Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259 \(S.D. 1988\).](#)

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^[FN2] [Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259 \(S.D. 1988\).](#)

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^[FN3] [In re Estate of McDermott, 2002 MT 164, 310 Mont. 435, 51 P.3d 486 \(2002\).](#)

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^[FN4] [Banner Health System v. Long, 2003 SD 60, 663 N.W.2d 242 \(S.D. 2003\).](#)

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^[FN5] [Jahnigen v. Smith, 143 Md. App. 547, 795 A.2d 234 \(2002\)](#), cert. denied, [369 Md. 660, 802 A.2d 439 \(2002\)](#).

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^[FN6] [In re Foam Systems Co., 92 B.R. 406, 7 U.C.C. Rep. Serv. 2d 559 \(B.A.P. 9th Cir. 1988\)](#), decision aff'd, [893 F.2d 1338 \(9th Cir. 1990\)](#) and decision aff'd, [893 F.2d 1338 \(9th Cir. 1990\)](#); [Eychaner v. Gross, 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\)](#); [Matter of Estate of Bolinger, 284 Mont. 114, 943 P.2d 981 \(1997\)](#).

- Resulting trusts, generally, see [§ § 135](#) et seq.

- Constructive trusts, generally, see [§ § 168](#) et seq.

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[\[FN7\] Samuel v. Northern Trust Co., 34 Ill. App. 3d 500, 340 N.E.2d 162 \(1st Dist. 1975\).](#)

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§ 131. Distinguished from express or direct trusts—Powers and duties of trustees; enforcement thereof

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [3](#) to [5](#), [7](#), [62](#) to [62.5](#), [91](#) to [92.5](#)

A resulting trustee, to the extent that a comparison may be made to an express trustee, has been said to be like the trustee of an express passive trust, who was merely the depository of the legal title with no duties being imposed upon him or her as to the management, control, or disposition of the property, except to make a conveyance when called upon by the cestui que trust.[\[FN1\]](#)

[\[FN1\] Hocking v. Hocking, 137 Ill. App. 3d 159, 91 Ill. Dec. 847, 484 N.E.2d 406 \(5th Dist. 1985\).](#)

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§ 132. Similarities and distinctions between resulting and constructive trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 3 to 5, 7, 62 to 62.5, 91 to 92.5

Despite some confusion in the courts between resulting and constructive trusts,[\[FN1\]](#) the concepts are distinguishable.[\[FN2\]](#) A resulting trust exists where the acts or expressions of the parties indicate an intent that a trust relation result from their transaction; a constructive trust is a trust imposed by a court of equity to compel a person who unfairly holds a property interest to convey such interest to the rightful owner.[\[FN3\]](#) While in some jurisdictions a resulting trust arises from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest, and such a trust carries out the inferred intent of the party,[\[FN4\]](#) thus being describable as an "intention-enforcing" trust,[\[FN5\]](#) a constructive trust defeats or prevents the wrongful act of one of the parties,[\[FN6\]](#) and is more aptly characterized as a "fraud-rectifying" trust.[\[FN7\]](#) Thus, the feature which distinguishes constructive trusts from resulting trusts is that the former do not arise by virtue of agreement or intention, either actual or implied, but by operation of law, or, more accurately, by construction of the court.[\[FN8\]](#) The difference has further been expressed as being that, while a resulting trust arises from the presumed intentions of the parties and upon the circumstances surrounding the particular transaction, a constructive trust does not arise from the presumed intent of the parties, but is imposed when a defendant's fraudulent, unfair, or unconscionable conduct causes him or her to be unjustly enriched at the expense of another to whom he or she owed some duty.[\[FN9\]](#) In addition, while a resulting trust stems from acts or expressions of the parties that indicate an intent that a trust relation resulted from their transaction, and such a trust attempts to give a vague or incomplete agreement the substance that was originally intended by the parties, a constructive trust is independent of any agreement between the parties—although the existence of some agreement may serve as a factor in determining whether to impose a constructive trust—and instead stems from the equitable powers of the court.[\[FN10\]](#) In this regard, it has been stated that a constructive trust is a flexible, equitable remedy, and is more tenuous than a resulting trust.[\[FN11\]](#)

Even so, the view has been expressed that while some courts have expressly delineated certain circumstances under which one unfairly holds a property interest in equity belonging to another and have labeled those resulting trusts, and all other circumstances resulting in trusts by operation of law are called constructive trusts,[\[FN12\]](#) the basic objectives of both constructive and resulting trusts are the recognition and protection of property rights that have arisen in an innocent party, and the vital tenet is one of equity.[\[FN13\]](#) In

other words, both constructive and resulting trusts are remedial in the sense that they are devices to prevent wrongful taking or unlawful holding of property;[FN14] both are created by courts of equity in order to satisfy the demands of justice.[FN15]

[FN1] [Sieger v. Sieger](#), 162 Minn. 322, 202 N.W. 742, 42 A.L.R. 1 (1925); [Mills v. Gray](#), 147 Tex. 33, 210 S.W.2d 985 (1948).

- Resulting trusts, generally, see [§ § 135](#) et seq.
- Constructive trusts, generally, see [§ § 168](#) et seq.

[FN2] [Meagher v. Harrington](#), 78 Mont. 457, 254 P. 432 (1927); [Tolle v. Sawtelle](#), 246 S.W.2d 916 (Tex. Civ. App. Eastland 1952), writ refused; [Carkonen v. Alberts](#), 196 Wash. 575, 83 P.2d 899, 135 A.L.R. 209 (1938).

[FN3] [Loberg v. Alford](#), 372 N.W.2d 912 (N.D. 1985).

[FN4] [Martin v. Kehl](#), 145 Cal. App. 3d 228, 193 Cal. Rptr. 312 (2d Dist. 1983).

[FN5] [Martin v. Kehl](#), 145 Cal. App. 3d 228, 193 Cal. Rptr. 312 (2d Dist. 1983); [Gitto v. Gitto](#), 239 Mont. 47, 778 P.2d 906 (1989).

[FN6] [Martin v. Kehl](#), 145 Cal. App. 3d 228, 193 Cal. Rptr. 312 (2d Dist. 1983).

[FN7] [Martin v. Kehl](#), 145 Cal. App. 3d 228, 193 Cal. Rptr. 312 (2d Dist. 1983); [Gitto v. Gitto](#), 239 Mont. 47, 778 P.2d 906 (1989).

- A resulting trust must be distinguished from a constructive trust, in that a constructive trust is a device for preventing unjust enrichment, the effect of which is to require a person who has acquired property by fraud or other inequitable conduct to convey it to the true owner; a resulting trust, unlike a constructive trust, seeks to carry out donative intention rather than to thwart a wicked scheme. [American Nat. Bank and Trust Co. of Rockford, Ill. v. U.S.](#), 832 F.2d 1032 (7th Cir. 1987).

- A constructive trust may be implied by law when one, through some manner of wrongdoing—for example fraud, abuse of confidence, or trick—obtains title to property; a resulting trust, on the other hand, may be judicially imposed on one holding legal title to property if it was obtained under facts and circumstances disclosing an intention that the beneficial interest was not to be enjoyed by the legal titleholder. [Wootton v. Melton](#), 1981 OK CIV APP 24, 631 P.2d 1337 (Ct. App. Div. 2 1981).

[FN8] [Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.](#), 716 So. 2d 200 (Miss. 1998).

- Resulting trusts, generally, are imposed in accordance with the actual or assumed intention of the parties; constructive trusts are generally created or imposed without reference to any presumed intention of the parties. [Burlison v. McCrary](#), 753 S.W.2d 349 (Tenn. 1988).

- The most notable distinction between constructive trusts and other types of trusts, such as resulting trusts, is the intention element. [Parks v. Zions First Nat. Bank](#), 673 P.2d 590 (Utah 1983).

- Unlike resulting trusts, which are based on a presumed intent or inference of law deduced by the facts and circumstances, constructive trusts are also created by the law, but independently of the parties' intention, to prevent fraud or injustice. [Gifford v. Dennis](#), 230 Va. 193, 335 S.E.2d 371 (1985).

[\[FN9\] Adams v. Jankouskas, 452 A.2d 148 \(Del. 1982\).](#)

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[\[FN10\] Paulson v. Meinke, 389 N.W.2d 798 \(N.D. 1986\).](#)

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[\[FN11\] In re Shepherd Oil, Inc., 118 B.R. 741 \(Bankr. D. Ariz. 1990\).](#)

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[\[FN12\] Allgood v. Allgood, 473 So. 2d 416 \(Miss. 1985\).](#)

- Unlike a resulting trust, which arises only in certain narrowly defined circumstances, a constructive trust may be imposed in a wide variety of circumstances. [Gitto v. Gitto, 239 Mont. 47, 778 P.2d 906 \(1989\).](#)

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[\[FN13\] Bemis v. Estate of Bemis, 114 Nev. 1021, 967 P.2d 437 \(1998\).](#)

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[\[FN14\] Wootton v. Melton, 1981 OK CIV APP 24, 631 P.2d 1337 \(Ct. App. Div. 2 1981\).](#)

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[\[FN15\] Burselson v. McCrary, 753 S.W.2d 349 \(Tenn. 1988\).](#)

- Like a constructive trust, the resulting trust is a creature of equity. [Calistoga Civic Club v. City of Calistoga, 143 Cal. App. 3d 111, 191 Cal. Rptr. 571 \(1st Dist. 1983\).](#)

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§ 133. Application of statutes of uses

West's Key Number Digest

The general rule is that the statutes of uses apply only to express passive trusts and not to resulting or constructive trusts which arise by operation of law.^[FN1] Trusts by operation of law are not voided or executed by a statute of uses so that legal title passes automatically to the beneficiary.^[FN2]

^[FN1] [Greer v. U.S., 448 F.2d 937 \(4th Cir. 1971\)](#).

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^[FN2] [Greer v. U.S., 448 F.2d 937 \(4th Cir. 1971\)](#); [Rance v. Gaddis, 226 Iowa 531, 284 N.W. 468 \(1939\)](#).

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§ 134. Application of statutes of frauds; requirement of writing

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 63.5

Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds.^[FN1] Accordingly, statutes of frauds do not apply to involuntary trusts^[FN2] —whether resulting^[FN3] or constructive trusts^[FN4] —and statutory provisions sometimes expressly exempt such implied trusts from the effect of the statute of frauds.^[FN5]

Observation: The purpose of finding a trust implied by law out of the facts surrounding a transaction would be defeated if a writing manifesting the trust were required.[FN6]

Trusts by operation of law may be proved by parol evidence,[FN7] since they are not dependent upon an express agreement.[FN8] Neither constructive trusts nor resulting trusts need be evidenced by writing.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Because oral express trusts do not meet the requirements of a writing that complies with the statute of frauds, they will only be given effect in certain circumstances; in these instances, the constructive trusts are deemed to arise by operation of law and are not within the statute of frauds. [Rawlings v. Rawlings, 2010 UT 52, 240 P.3d 754 \(Utah 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Wait v. Cornette, 259 Neb. 850, 612 N.W.2d 905 \(2000\)](#).

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[FN2] [Gitto v. Gitto, 239 Mont. 47, 778 P.2d 906 \(1989\)](#) (stating that the statute of frauds plays no part in the findings of involuntary trust); [Matter of Hock's Estate, 655 P.2d 1111 \(Utah 1982\)](#).

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[FN3] [In re Wilder, 42 B.R. 6 \(Bankr. D. Or. 1983\)](#) (stating that resulting trusts were an exception to the requirements of the statute of frauds); [Jahnigen v. Smith, 143 Md. App. 547, 795 A.2d 234 \(2002\)](#), cert. denied, [369 Md. 660, 802 A.2d 439 \(2002\)](#); [Wait v. Cornette, 259 Neb. 850, 612 N.W.2d 905 \(2000\)](#); [Matter of Hock's Estate, 655 P.2d 1111 \(Utah 1982\)](#).

- Resulting trusts generally, see [§ § 135](#) et seq.

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[FN4] [Chisholm v. Western Reserves Oil Co., 655 F.2d 94 \(6th Cir. 1981\)](#); [Lombardo v. Santa Monica Young Men's Christian Assn., 169 Cal. App. 3d 529, 215 Cal. Rptr. 224 \(2d Dist. 1985\)](#); [Baizley v. Baizley, 1999 ME 115, 734 A.2d 1117 \(Me. 1999\)](#); [Jahnigen v. Smith, 143 Md. App. 547, 795 A.2d 234 \(2002\)](#), cert. denied, [369 Md. 660, 802 A.2d 439 \(2002\)](#); [Allred v. Fairchild, 785 So. 2d 1064 \(Miss. 2001\)](#); [Wait v. Cornette, 259 Neb. 850, 612 N.W.2d 905 \(2000\)](#); [Hopwood v. Pickett, 145 N.H. 207, 761 A.2d 436 \(2000\)](#); [Simpson v. Dailey, 496 A.2d 126 \(R.I. 1985\)](#); [Matter of Hock's Estate, 655 P.2d 1111 \(Utah 1982\)](#).

- Constructive trusts generally, see [§ § 168](#) et seq.

- The statute of frauds did not bar a former wife's claim for the imposition of a constructive trust with respect to a parcel of property purchased by the former husband and wife and titled in the names of the former husband's parents. [In re Marriage of Moss, 1999 MT 62, 293 Mont. 500, 977 P.2d 322 \(1999\)](#).

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[FN5] [Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\)](#) (holding that a constructive trust was within such exempting provisions); [Galford v. Burkhouse, 330 Pa. Super. 21, 478 A.2d 1328 \(1984\)](#) (statute of frauds specifically exempted resulting trusts from its operation); [Matter of Hock's Estate, 655 P.2d 1111 \(Utah 1982\)](#).

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[FN6] [In re Wilder, 42 B.R. 6 \(Bankr. D. Or. 1983\)](#).

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[FN7] [Hood v. Smoak](#), 271 Ga. 86, 516 S.E.2d 301 (1999) (constructive trust); [Jahnigen v. Smith](#), 143 Md. App. 547, 795 A.2d 234 (2002), cert. denied, 369 Md. 660, 802 A.2d 439 (2002) (resulting and constructive trusts); [In re Estate of Horrigan](#), 757 So. 2d 165 (Miss. 1999) (constructive trust); [Lollis v. Lollis](#), 291 S.C. 525, 354 S.E.2d 559 (1987) (applying rule to trusts by operation of law—resulting or constructive trusts); [In re Estate of McDermott](#), 2002 MT 164, 310 Mont. 435, 51 P.3d 486 (2002) (involuntary trusts); [Hopwood v. Pickett](#), 145 N.H. 207, 761 A.2d 436 (2000) (constructive trust); [Latshaw v. Latshaw](#), 787 S.W.2d 9 (Tenn. Ct. App. 1989) (applying statement to resulting trusts); [Ginther v. Taub](#), 675 S.W.2d 724 (Tex. 1984) (recognizing a constructive trust as an exception to the rule that land titles may not rest in parol).

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[FN8] [Gitto v. Gitto](#), 239 Mont. 47, 778 P.2d 906 (1989); [Ginther v. Taub](#), 675 S.W.2d 724 (Tex. 1984) (recognizing a constructive trust as an exception to the rule that land titles may not rest in parol).

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[FN9] [Calistoga Civic Club v. City of Calistoga](#), 143 Cal. App. 3d 111, 191 Cal. Rptr. 571 (1st Dist. 1983).
- A writing is not required in an action seeking to impress a constructive trust. [Matter of Lefton](#), 160 A.D.2d 702, 553 N.Y.S.2d 783 (2d Dep't 1990).

- No writing is required for the creation of a resulting trust. [Restatement Third, Trusts § 7](#), Comment g.

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§ 135. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [62](#) to [63](#), [63.9](#)

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[Imposition or declaration of constructive or resulting trust in United States savings bonds, 51 A.L.R.2d 163](#)

Under compelling circumstances, courts may impose a resulting trust.^[FN1] A resulting trust is not a trust at all, but rather it is an equitable remedy designed to prevent unjust enrichment and to ensure that legal formalities do not frustrate the original intent of the transacting parties.^[FN2] Such a trust is implied by law from the acts and conduct of the parties and the facts and circumstances which at the time exist and surround the transaction out of which it arises.^[FN3] Broadly speaking, a resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person becomes invested with a legal title but is obligated in equity to hold his or her legal title for the benefit of another,^[FN4] and there ordinarily being no fraud^[FN5] or constructive fraud involved.^[FN6]

While resulting trusts generally arise: (1) on a failure of an express trust^[FN7] or the purpose of such a trust;^[FN8] or (2) on a conveyance to one person on a consideration from another^[FN9] they may also be imposed in other circumstances, such that a court of equity, shaping its judgment in the most efficient form,^[FN10] will decree a resulting trust in order to prevent a failure of justice.^[FN11] In some jurisdictions, resulting trusts may arise only where one has purchased property with the funds of another and has taken title in himself or herself; thus, under this rule, where there has been no purchase of property, no resulting trust may be created.^[FN12] Also, in some jurisdictions, a resulting trust arises only where one person provides consideration for the transfer of property to another.^[FN13]

In other jurisdictions, a resulting trust may arise in four situations:

- (1) where an express trust fails in whole or in part;^[FN14]
- (2) where an express trust is fully performed without exhausting the trust estate;^[FN15]
- (3) where property is purchased and the purchase price is paid by one person and at his or her direction the vendor conveys the property to another person; or^[FN16]
- (4) from purchase-money trusts.^[FN17]

Practice Guide: The burden is upon one claiming the existence of a resulting trust^[FN18] to establish the facts upon which it is based by clear and convincing evidence.^[FN19]

The equitable power to establish a resulting trust applies with respect to both real or personal property.^[FN20]

A resulting trust does not arise if the policy against unjust enrichment is outweighed by the policy against giving relief to a person who has entered into an illegal transaction; a transaction that is against public policy

should be treated like an illegal transaction and thus, a resulting trust would not arise if recognition of the trust would be against public policy.[FN21] Additionally, fraud can defeat a resulting trust.[FN22]

Observation: The interest of the beneficiary of a resulting trust is an equitable interest and is cut off if the trustee transfers the property to a bona fide purchaser for value.[FN23]

CUMULATIVE SUPPLEMENT

Cases:

A "resulting trust" is one that the court of equity declares to exist where the legal estate in property is transferred or acquired by one under circumstances indicating that the beneficial interest is not intended to be enjoyed by the holder of the legal title. [Stevens v. Radey, 117 Ohio St. 3d 65, 2008-Ohio-291, 881 N.E.2d 855 \(2008\)](#).

[END OF SUPPLEMENT]

[FN1] [In re Estate of Nichols, 856 S.W.2d 397 \(Tenn. 1993\)](#).

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[FN2] [Hudak v. Procek, 806 A.2d 140 \(Del. 2002\)](#).

- The imposition of a resulting trust is an equitable remedy. [In re Foam Systems Co., 92 B.R. 406, 7 U.C.C. Rep. Serv. 2d 559 \(B.A.P. 9th Cir. 1988\)](#), decision aff'd, [893 F.2d 1338 \(9th Cir. 1990\)](#) and decision aff'd, [893 F.2d 1338 \(9th Cir. 1990\)](#).

- A resulting trust is a product of the application of equitable principles; it is a mere creature of equity. [American Hotel Management Associates, Inc. v. Jones, 768 F.2d 562 \(4th Cir. 1985\)](#) (interpreting North Carolina law).

- The remedy of a resulting trust is applied by operation of law where circumstances render it inequitable for the party holding title to retain it. [Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 \(1997\)](#).

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[FN3] [Prange v. Prange, 755 S.W.2d 581 \(Mo. Ct. App. E.D. 1987\)](#).

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[FN4] [Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So. 2d 200 \(Miss. 1998\)](#); [Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\)](#); [Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 \(1982\)](#); [First Nat. Bank of Cincinnati v. Tenney, 165 Ohio St. 513, 60 Ohio Op. 481, 138 N.E.2d 15, 61 A.L.R.2d 470 \(1956\)](#).

- A resulting trust is a reversionary, equitable interest implied by law in property that is held by a transferee, in whole or in part, as trustee for the transferor or the transferor's successors in interest. [Restatement Third, Trusts § 7](#).

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[FN5] [Lord v. Stavakis, 6 Conn. App. 161, 503 A.2d 629 \(1986\)](#); [Newell v. Tweed, 241 Iowa 90, 40 N.W.2d 20 \(1949\)](#); [Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So. 2d 200 \(Miss. 1998\)](#).

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[FN6] [Newell v. Tweed, 241 Iowa 90, 40 N.W.2d 20 \(1949\)](#); [Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So. 2d 200 \(Miss. 1998\)](#).

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[FN7] [McClure v. Moore, 565 So. 2d 8 \(Ala. 1990\)](#) (recognizing rule); [Hoffner v. Hoffner, 32 Tenn. App. 98, 221 S.W.2d 907 \(1949\)](#).

- Failure of an express trust, generally, see [§ § 142](#) et seq.

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[FN8] [Western Union Tel. Co. v. Shepard, 169 N.Y. 170, 62 N.E. 154 \(1901\)](#); [Hoffner v. Hoffner, 32 Tenn. App. 98, 221 S.W.2d 907 \(1949\)](#).

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[FN9] [McClure v. Moore, 565 So. 2d 8 \(Ala. 1990\)](#) (recognizing rule); [Hoffner v. Hoffner, 32 Tenn. App. 98, 221 S.W.2d 907 \(1949\)](#).

- Conveyance to one person on consideration from another, see [§ § 148](#) et seq.

- A resulting trust is implied in law when someone other than the person in whose name title is taken pays the purchase price, or when an express trust fails. [Nolana Development Ass'n v. Corsi, 682 S.W.2d 246 \(Tex. 1984\)](#).

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[FN10] [Western Union Tel. Co. v. Shepard, 169 N.Y. 170, 62 N.E. 154 \(1901\)](#); [Hoffner v. Hoffner, 32 Tenn. App. 98, 221 S.W.2d 907 \(1949\)](#).

- Other circumstances requiring a resulting trust, see [§ § 165](#) et seq.

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[FN11] [Western Union Tel. Co. v. Shepard, 169 N.Y. 170, 62 N.E. 154 \(1901\)](#); [Estate of Wardell ex rel. Wardell v. Dailey, 674 S.W.2d 293 \(Tenn. Ct. App. 1983\)](#).

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[FN12] [McClure v. Moore, 565 So. 2d 8 \(Ala. 1990\)](#).

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[FN13] [Gitto v. Gitto, 239 Mont. 47, 778 P.2d 906 \(1989\)](#).

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[FN14] [Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\)](#).

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[FN15] [Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\)](#).

- As to full performance of the trust, or completion of the trust purpose as giving rise to a resulting trust, generally, see [§ 165](#).

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[FN16] [In re Washburn & Roberts, Inc., 795 F.2d 870 \(9th Cir. 1986\)](#) (interpreting Washington law); [Watson Truck & Supply Co., Inc. v. Males, 111 N.M. 57, 801 P.2d 639 \(1990\)](#).

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[FN17] [Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\)](#).

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[FN18] [Brtek v. Cihal, 245 Neb. 756, 515 N.W.2d 628 \(1994\)](#).

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[FN19] [Edwards v. Edwards, 311 Ark. 339, 843 S.W.2d 846 \(1992\)](#); [Herman ex rel. Herman v. Herman, 136 Idaho 781, 41 P.3d 209 \(2002\)](#); [Brtek v. Cihal, 245 Neb. 756, 515 N.W.2d 628 \(1994\)](#); [Farley v. Farley, 196 W. Va. 434, 473 S.E.2d 149 \(1996\)](#).

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[FN20] [Perryman v. Pugh, 269 Ala. 487, 114 So. 2d 253 \(1959\)](#); [Shaw v. Addison, 239 Iowa 377, 28 N.W.2d 816 \(1947\)](#); [Estate of Wardell ex rel. Wardell v. Dailey, 674 S.W.2d 293 \(Tenn. Ct. App. 1983\)](#).

- A "resulting trust" arises when a person becomes invested with the title to real property under circumstances

that in equity obligate him to hold the title and to exercise his ownership for the benefit of another. [Patterson v. Strickland](#), 133 N.C. App. 510, 515 S.E.2d 915 (1999).

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[\[FN21\] Armendaris Water Development Co. v. Rainwater](#), 109 N.M. 71, 781 P.2d 799 (Ct. App. 1989).

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[\[FN22\] Hayne Federal Credit Union v. Bailey](#), 327 S.C. 242, 489 S.E.2d 472 (1997).

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[\[FN23\] Yates v. Taylor](#), 58 Wash. App. 187, 791 P.2d 924 (Div. 3 1990).

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§ 136. Consideration as element

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [62](#) to [63](#), [63.9](#)

It has been said that in determining whether a resulting trust is to be imposed, consideration is the foundation of a resulting trust.[\[FN1\]](#) However, a resulting trust does arise in some instances without consideration; where property is conveyed without consideration for a particular purpose and that purpose is either fulfilled or frustrated, a court may find a resulting trust.[\[FN2\]](#) In addition, a resulting trust will be imposed for the grantor upon a gratuitous conveyance where the beneficial interest to property was not intended to be vested in the grantee.[\[FN3\]](#)

[FN1] [Frame v. Wright, 233 Iowa 394, 9 N.W.2d 364, 147 A.L.R. 1154 \(1943\)](#); [Davis v. National Bank of Tulsa, 1960 OK 151, 353 P.2d 482 \(Okla. 1960\)](#).

- Consideration is the essential fact which determines equitable ownership. [Sieger v. Sieger, 162 Minn. 322, 202 N.W. 742, 42 A.L.R. 1 \(1925\)](#); [Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\)](#).

[FN2] [Rebillard v. Hagedorn, 6 Conn. App. 355, 505 A.2d 731 \(1986\)](#).

[FN3] [Frame v. Wright, 233 Iowa 394, 9 N.W.2d 364, 147 A.L.R. 1154 \(1943\)](#).

- A father, who deeded land to three children, orally engrafted a resulting trust on the deeds, reserved a life estate, and did not give land to the children as a gift, as claimed by a plaintiff daughter, where the father, two sons, and other family members said the father, in executing the deeds, stated he intended to convey the land to the three children on his death, and to retain the possession and use of, and the income from, the land during his life and the daughter was away and was not told the father's intention, because the father's intention is considered since no consideration passed, and although the deed was recorded, the father's retention of the land, and the payment of taxes and repairs, rebutted a delivery of a gift and the daughter's claim that the gift was consistent with the creation of a trust. [Savell v. Savell, 837 S.W.2d 836 \(Tex. App. Houston 14th Dist. 1992\)](#), writ denied, (Apr. 21, 1993).

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§ 137. Consideration as element—Time when consideration is advanced

West's Key Number Digest

Where consideration is required for the creation of a resulting trust, such trust is created by virtue of the consideration advanced before or at the time the legal title passes,[\[FN1\]](#) and not from consideration thereafter paid,[\[FN2\]](#) unless occurring or advanced immediately thereafter so as to be in fact part of the same transaction.[\[FN3\]](#) However, in this regard, there is no difference in principle between paying money toward the purchase price at the time of the delivery of a deed and contracting at that time to pay the same sum later and then paying it as promised,[\[FN4\]](#) and in this regard the view has been set forth that the incurring of an obligation before or at the time of the conveyance is not a prerequisite for the imposition of a resulting trust.[\[FN5\]](#)

[\[FN1\]](#) [Gregory v. Gregory, 248 Iowa 672, 82 N.W.2d 144 \(1957\); Brabham v. Brabham, 226 Miss. 165, 84 So. 2d 147 \(1955\); Ray v. Norris, 78 N.C. App. 379, 337 S.E.2d 137 \(1985\).](#)

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[\[FN2\]](#) [Leicht v. Quirin, 200 Ill. App. 3d 1057, 146 Ill. Dec. 752, 558 N.E.2d 715 \(5th Dist. 1990\); Gregory v. Gregory, 248 Iowa 672, 82 N.W.2d 144 \(1957\); Brabham v. Brabham, 226 Miss. 165, 84 So. 2d 147 \(1955\); Ray v. Norris, 78 N.C. App. 379, 337 S.E.2d 137 \(1985\).](#)

- Consideration furnished only after title has passed is not singularly sufficient to provide the consideration necessary to create a resulting trust. [Gragg v. Gragg, 94 N.C. App. 134, 379 S.E.2d 684 \(1989\).](#)

- No resulting trust, in favor of a woman living in meretricious relations with a man at the time land was purchased and taken in his name, would arise out of dealings between the parties after the vesting of title. [Faglie v. Williams, 569 S.W.2d 557 \(Tex. Civ. App. Austin 1978\)](#), writ refused n.r.e., (Nov. 1, 1978).

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[\[FN3\]](#) [Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 114 N.J. Eq. 391, 168 A. 733, 89 A.L.R. 697 \(Ct. Err. & App. 1933\); Green v. Green, 237 S.C. 424, 117 S.E.2d 583 \(1960\).](#)

- Where a beneficial owner of certain corporate stock furnished or paid no consideration at or before the time the title to the stock vested in the decedent and where consideration subsequently furnished or paid by the beneficial owner was not intended to help finance the original transaction by which the decedent acquired the stock in his name, the beneficial owner could claim no resulting trust in the shares of stock held by the decedent. [Leicht v. Quirin, 200 Ill. App. 3d 1057, 146 Ill. Dec. 752, 558 N.E.2d 715 \(5th Dist. 1990\).](#)

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[\[FN4\]](#) [Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 \(1979\)](#) (holding that a resulting trust arises where the person claiming it proves a payment on the purchase price made to the grantee or grantor after the delivery of the deed but pursuant to a promise made to the grantee before the deed was delivered).

- A resulting trust is not defeated by the fact that the beneficiary temporarily defers payment of the purchase price. [In re Gerlach's Estate, 364 Pa. 207, 72 A.2d 271, 16 A.L.R.2d 1397 \(1950\).](#)

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[\[FN5\]](#) [BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 \(1985\).](#)

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§ 138. Intent as element

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [70](#)

Intention, although only presumed, implied, or supposed by law from the nature of the transaction or from the facts and circumstances accompanying the transaction, particularly the source of consideration, is always an element of a resulting trust.^[FN1] In fact, a resulting trust is sometimes referred to as an "intention-enforcing" trust.^[FN2] Such a trust arises by operation of law, without an expressed intent;^[FN3] it arises by implication of law to enforce the intent of the parties,^[FN4] as presumed^[FN5] or inferred from the facts and circumstances surrounding the transaction.^[FN6] Thus, a resulting trust exists where the acts or expressions of the parties indicate an intent that a trust relation was to have resulted from their transaction.^[FN7] Likewise, as sometimes stated, a resulting trust is designed to give effect to the actual intention of a party although that intention was not directly expressed.^[FN8]

A resulting trust generally arises when the parties have used ambiguous language which the court construes as showing a trust intent, or where the parties have expressed no intent to create a trust by words, but have performed acts from which the court infers that a trust was intended.^[FN9] Such a trust attempts to give a vague or incomplete agreement substance that was originally intended by the parties.^[FN10] However, a resulting trust does not arise where the transfer of property is made to one person and the purchase price is paid by another if the person by whom the purchase price is paid manifests the intention that no resulting trust should arise.^[FN11] Additionally, where an alleged trust relationship is just as consistent with that of a gift or loan, courts will ordinarily not impress a resulting trust.^[FN12]

A resulting trust arises or may be judicially imposed on one holding legal title to property if it was obtained under facts and circumstances disclosing an intention that the beneficial interest was not to be enjoyed by the legal titleholder;^[FN13] in such instances, the courts infer that the holder of title holds it in trust for the beneficial owner, although there is no express intention to create a trust.^[FN14]

CUMULATIVE SUPPLEMENT

Cases:

Under Kansas law, the "lack of fraudulent intent" element required for establishing an implied or resulting trust refers to the intent of the intended beneficial owner with respect to his creditors. West's [K.S.A § 58–2408](#). [In re Kasparek, 426 B.R. 332 \(B.A.P. 10th Cir. 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\)](#); [Wait v. Cornette, 259 Neb. 850, 612 N.W.2d 905 \(2000\)](#); [Wisel v. Terhune, 1949 OK 22, 201 Okla. 231, 204 P.2d 286 \(1949\)](#).

[FN2] [Martin v. Kehl, 145 Cal. App. 3d 228, 193 Cal. Rptr. 312 \(2d Dist. 1983\)](#); [In re Administration of Estate of Abernathy, 778 So. 2d 123 \(Miss. 2001\)](#); [Gitto v. Gitto, 239 Mont. 47, 778 P.2d 906 \(1989\)](#).

[FN3] [In re Foam Systems Co., 92 B.R. 406, 7 U.C.C. Rep. Serv. 2d 559 \(B.A.P. 9th Cir. 1988\)](#), decision aff'd, [893 F.2d 1338 \(9th Cir. 1990\)](#) and decision aff'd, [893 F.2d 1338 \(9th Cir. 1990\)](#).

[FN4] [Leeks v. Leeks, 570 A.2d 271 \(D.C. 1989\)](#); [Granado v. Granado, 107 N.M. 456, 760 P.2d 148 \(1988\)](#); [Wright v. Wright, 305 N.C. 345, 289 S.E.2d 347 \(1982\)](#).

[FN5] [Lord v. Stavarakis, 6 Conn. App. 161, 503 A.2d 629 \(1986\)](#); [Hocking v. Hocking, 137 Ill. App. 3d 159, 91 Ill. Dec. 847, 484 N.E.2d 406 \(5th Dist. 1985\)](#); [Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\)](#).

- A resulting trust arises from the presumed intentions of the parties and upon the circumstances surrounding the particular transaction. [Adams v. Jankouskas, 452 A.2d 148 \(Del. 1982\)](#).

[FN6] [In re Foam Systems Co., 92 B.R. 406, 7 U.C.C. Rep. Serv. 2d 559 \(B.A.P. 9th Cir. 1988\)](#), decision aff'd, [893 F.2d 1338 \(9th Cir. 1990\)](#) and decision aff'd, [893 F.2d 1338 \(9th Cir. 1990\)](#); [Calistoga Civic Club v. City of Calistoga, 143 Cal. App. 3d 111, 191 Cal. Rptr. 571 \(1st Dist. 1983\)](#); [Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\)](#).

- A resulting trust is deemed to arise when, upon the transfer of legal title to real property, an intent may be inferred from the circumstances of the conveyance that the grantor's beneficial interest was not passed with legal title. [Boatright v. Perkins, 1995 OK 34, 894 P.2d 1091 \(Okla. 1995\)](#).

[FN7] [In re McKay, 110 B.R. 764 \(Bankr. W.D. Pa. 1990\)](#); [Bemis v. Estate of Bemis, 114 Nev. 1021, 967 P.2d 437 \(1998\)](#); [Spagnolia v. Monasky, 2003 ND 65, 660 N.W.2d 223 \(N.D. 2003\)](#).

- The creation of a resulting trust requires a finding of an intention to create a trust. [Hoheimer v. Hoheimer, 30 S.W.3d 176 \(Ky. 2000\)](#).

- A resulting trust involves a presumption of an intention to create a trust based on acts or conduct rather than on direct expression of conduct. [American Hotel Management Associates, Inc. v. Jones, 768 F.2d 562 \(4th Cir. 1985\)](#) (interpreting North Carolina law).

- A "resulting trust" is an indirect trust which arises from the intention of parties, or the nature of the transaction. [Tiller v. Owen, 243 Va. 176, 413 S.E.2d 51 \(1992\)](#).

[\[FN8\] In re Administration of Estate of Abernathy, 778 So. 2d 123 \(Miss. 2001\).](#)

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[\[FN9\] In re Marriage of Malquist, 234 Mont. 419, 763 P.2d 1116 \(1988\).](#)

- The intention of the resulting trust is to be found in the nature of their transaction, but not expressed in a deed or instrument of conveyance. [Wait v. Cornette, 259 Neb. 850, 612 N.W.2d 905 \(2000\).](#)

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[\[FN10\] Paulson v. Meinke, 389 N.W.2d 798 \(N.D. 1986\).](#)

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[\[FN11\] Lewis v. Poduska, 240 Neb. 312, 481 N.W.2d 898 \(1992\).](#)

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[\[FN12\] Lewis v. Poduska, 240 Neb. 312, 481 N.W.2d 898 \(1992\).](#)

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[\[FN13\] In re Washburn & Roberts, Inc., 795 F.2d 870 \(9th Cir. 1986\); Martin v. Kehl, 145 Cal. App. 3d 228, 193 Cal. Rptr. 312 \(2d Dist. 1983\); McClellan v. Pennington, 2004 WL 1475438 \(Ala. 2004\); Schmitz v. Smentowski, 109 N.M. 386, 785 P.2d 726 \(1990\); Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\); Yates v. Taylor, 58 Wash. App. 187, 791 P.2d 924 \(Div. 3 1990\).](#)

- A resulting trust arises where one disposes of property under circumstances which raise the inference that he/she does not intend that a putative grantee should have a beneficial interest in the property. [Edwards v. Edwards, 311 Ark. 339, 843 S.W.2d 846 \(1992\); Watson Truck & Supply Co., Inc. v. Males, 111 N.M. 57, 801 P.2d 639 \(1990\).](#)

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[\[FN14\] Schmitz v. Smentowski, 109 N.M. 386, 785 P.2d 726 \(1990\).](#)

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§ 139. Intent as element—Proof of intent

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 70

To prove intent in the absence of any contemporaneous documentation in an action seeking to impose a resulting trust, a party generally may offer two types of evidence: first, the parties themselves may testify about, or provide other extrinsic evidence of, their intent at the time of the transaction; and second, the parties' conduct after the transaction, in some cases, may shed light on the parties' contemporaneous understanding of the original agreement.^[FN1] The intent necessary to impose a resulting trust may be shown by circumstantial or parol evidence, even though such evidence directly contradicts legal warrant, patent, or deed.^[FN2] The presumption that a resulting trust was intended in favor of a party who actually paid the purchase price for real estate may be rebutted and the actual intention shown by parol evidence.^[FN3]

^[FN1] [Hudak v. Procek](#), 806 A.2d 140 (Del. 2002); [Ray v. Norris](#), 78 N.C. App. 379, 337 S.E.2d 137 (1985).

- Absent any evidence indicating an employer and employee intended a trust relation in forming an employment contract, there was no resulting trust on compensation allegedly owed the employee under that contract.

[Spagnolia v. Monasky](#), 2003 ND 65, 660 N.W.2d 223 (N.D. 2003).

- That parents, through a series of deeds, voluntarily conveyed to their daughter various undivided fee interests in their farm out of love and affection for her and for the purpose of reducing the amount of estate or inheritance taxes that could be payable upon their deaths did not give rise to a resulting trust in the farm in favor of the parents, absent any evidence in the documents indicating an agreement to create a trust, such as the designation of a trustee, a recitation of authority or powers, or limitations on the daughter's use of the property. [Hoheimer v. Hoheimer](#), 30 S.W.3d 176 (Ky. 2000).

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^[FN2] [Granado v. Granado](#), 107 N.M. 456, 760 P.2d 148 (1988).

- Proving trusts by operation of law with parol evidence, generally, see [§ 134](#).

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^[FN3] [Bowen v. Bowen](#), 352 S.C. 494, 575 S.E.2d 553 (2003).

- No resulting trust arose with respect to the conveyance of a farm; it was not established by clear and convincing evidence that when the conveyance was made to the grantees, the intention was that the farm was being purchased for the party seeking to impose a resulting trust. [Brtek v. Cihal](#), 245 Neb. 756, 515 N.W.2d 628 (1994).

- A grantor was not entitled to a resulting trust on two properties that he quitclaimed to a grantee; the trial court interpreted the grantor's transfers to the grantee as gifts, the inference of gifts arose as a matter of law, and the grantor's act of continuing to make the mortgage payments for the properties expressed the grantor's completions of his contractual obligations. [Rausch v. Devine](#), 80 P.3d 733 (Alaska 2003).

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§ 140. Necessity and effect of agreement; breach of contract

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 62 to 63, 63.9

A resulting trust does not depend on any expressed declaration of trust,[\[FN1\]](#) or any agreement between the parties.[\[FN2\]](#) A resulting trust is created by operation of law from the facts of the transaction and not from an agreement, from what the parties do and never from what they agree to do.[\[FN3\]](#) Even so, an express agreement to the same effect as a resulting trust does not preclude the existence of the resulting trust, where the essential elements of a resulting trust are present.[\[FN4\]](#)

A resulting trust cannot be predicated merely on the breach of a contract.[\[FN5\]](#)

[\[FN1\]](#) [Tiller v. Owen, 243 Va. 176, 413 S.E.2d 51 \(1992\).](#)

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[\[FN2\]](#) [Gragg v. Gragg, 94 N.C. App. 134, 379 S.E.2d 684 \(1989\).](#)

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[\[FN3\]](#) [Duncan v. Rayfield, 698 S.W.2d 876 \(Mo. Ct. App. S.D. 1985\).](#)

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[\[FN4\]](#) [Lewis v. Akerberg, 66 Ohio L. Abs. 545, 118 N.E.2d 166 \(C.P. 1953\), judgment aff'd, 100 Ohio App. 209, 60 Ohio Op. 192, 136 N.E.2d 372 \(2d Dist. Franklin County 1954\); Ott v. Duffy, 246 Pa. 211, 92 A. 201 \(1914\).](#)

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[\[FN5\]](#) [Jones v. Jones, 1969 OK 147, 459 P.2d 603 \(Okla. 1969\); Arnold v. Hall, 72 Wash. 50, 129 P. 914 \(1913\).](#)

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§ 141. Time when trust arises

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [62](#) to [63](#), [63.9](#)

The general rule has been said to be that a resulting trust is created, if at all, in the same transaction in which the legal title passes,^[FN1] at the time that legal title passes^[FN2] or vests,^[FN3] or from subsequent occurrences.^[FN4] Furthermore, it has been stated that a resulting trust must arise, if at all, at the instant the deed is taken.^[FN5] Unless the transaction is such that the moment the title passes the trust results from the transaction itself, then no trust results; but cannot be created by subsequent occurrences.^[FN6] The right to a resulting trust is not affected by the failure of the person purchasing the land to obtain a valid deed or title thereto at the date of the transaction, but the trust attaches when the title is obtained subsequently.^[FN7]

^[FN1] [Loggins v. Daves, 201 Ga. 628, 40 S.E.2d 520 \(1946\); Gregory v. Gregory, 248 Iowa 672, 82 N.W.2d 144 \(1957\); Brabham v. Brabham, 226 Miss. 165, 84 So. 2d 147 \(1955\); Ray v. Norris, 78 N.C. App. 379, 337 S.E.2d 137 \(1985\).](#)

^[FN2] [McClellan v. Pennington, 2004 WL 1475438 \(Ala. 2004\); Leicht v. Quirin, 200 Ill. App. 3d 1057, 146 Ill. Dec. 752, 558 N.E.2d 715 \(5th Dist. 1990\); Gregory v. Gregory, 248 Iowa 672, 82 N.W.2d 144 \(1957\); Brabham v. Brabham, 226 Miss. 165, 84 So. 2d 147 \(1955\).](#)

[\[FN3\] Socarras v. Yaque, 452 So. 2d 992 \(Fla. Dist. Ct. App. 3d Dist. 1984\); Leicht v. Quirin, 200 Ill. App. 3d 1057, 146 Ill. Dec. 752, 558 N.E.2d 715 \(5th Dist. 1990\).](#)

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[\[FN4\] Gregory v. Gregory, 248 Iowa 672, 82 N.W.2d 144 \(1957\); Brabham v. Brabham, 226 Miss. 165, 84 So. 2d 147 \(1955\); Ham v. Ham, 691 S.W.2d 944 \(Mo. Ct. App. W.D. 1985\).](#)

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[\[FN5\] Duncan v. Rayfield, 698 S.W.2d 876 \(Mo. Ct. App. S.D. 1985\).](#)

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[\[FN6\] Duncan v. Rayfield, 698 S.W.2d 876 \(Mo. Ct. App. S.D. 1985\).](#)

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[\[FN7\] Windham v. Windham, 218 Miss. 547, 67 So. 2d 467 \(1953\).](#)

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B. Resulting Trusts

2. Particular Circumstances as Basis for Creation of Resulting Trust

a. Failure of Express Trust or Purpose Thereof

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 142. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [64](#) to [68](#)

Forms

Complaint, petition, or declaration—By heirs of testator—Seeking declaration of resulting trust on failure of express testamentary trust. [Am. Jur. Pleading and Practice Forms, Trusts, Form 46](#)

In some jurisdictions, a resulting trust is implied in law when an express trust fails^[FN1] in whole or in part,^[FN2] or where the purpose of such a trust fails,^[FN3] and the settlor has not indicated how the property should be distributed upon such failure.^[FN4] Furthermore, where the beneficiary of an express trust disclaims his or her interest, the express trust fails and the trustee generally will be deemed to hold the property upon a resulting trust for the settlor or his or her estate.^[FN5]

A resulting trust will not arise, however, if the settlor intends a different disposition of the property upon failure of the express trust.^[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Under Illinois law, "resulting trusts" arise by operation of law and are generally created where express trust fails, or where express trust terminates prior to exhaustion of trust estate, or where one person pays for property and another takes title. [In re Porco, Inc., 447 B.R. 590 \(Bankr. S.D. Ill. 2011\)](#).

[END OF SUPPLEMENT]

^[FN1] [McClure v. Moore, 565 So. 2d 8 \(Ala. 1990\)](#) (recognizing rule); [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\)](#), cert. denied, [537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\)](#); [Bemis v. Estate of Bemis, 114 Nev. 1021, 967 P.2d 437 \(1998\)](#); [Bassett v. Bassett, 110 N.M. 559, 798 P.2d 160 \(1990\)](#); [Nolana Development Ass'n v. Corsi, 682 S.W.2d 246 \(Tex. 1984\)](#).

- Where an express trust fails, a resulting trust may be imposed by operation of law. [Galford v. Burkhouse, 330 Pa. Super. 21, 478 A.2d 1328 \(1984\)](#).

- One instance when resulting trusts are utilized occurs in a situation where there has been a declaration of an intent to create a trust and the trust, for some reason, has failed. [Burluson v. McCrary, 753 S.W.2d 349 \(Tenn. 1988\)](#).

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^[FN2] [Bassett v. Bassett, 110 N.M. 559, 798 P.2d 160 \(1990\)](#).

- A portion of a testamentary trust that was in violation of the rule against accumulations would be held in a resulting trust on behalf of the testator's heirs and disbursed according to the rules of intestacy, where the testator made no provision for the distribution of the trust corpus or the accumulated income. [White v. Fleet Bank of Maine, 1999 ME 148, 739 A.2d 373 \(Me. 1999\)](#).

- Where the owner of property makes a donative transfer and manifests an intention that the transferee is to hold the property in trust but the intended trust fails in whole or in part, the transferee holds the trust estate or the appropriate portion or interest therein on resulting trust for the transferor or the transferor's successors in interest [Restatement Third, Trusts § 8](#).

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^[FN3] [Western Union Tel. Co. v. Shepard, 169 N.Y. 170, 62 N.E. 154 \(1901\)](#); [Hoffner v. Hoffner, 32 Tenn. App. 98, 221 S.W.2d 907 \(1949\)](#).

- When an express trust fails because it has become impossible to accomplish its purpose, the trust assets are generally held in a resulting trust for the donor. [In re Professional Air Traffic Controllers Organization](#)

[\(PATCO\), 724 F.2d 205 \(D.C. Cir. 1984\).](#)

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[\[FN4\] First Nat. Bank in Mitchell v. Daggett, 242 Neb. 734, 497 N.W.2d 358 \(1993\).](#)

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[\[FN5\] Pate v. Ford, 293 S.C. 268, 360 S.E.2d 145 \(Ct. App. 1987\), decision rev'd on other grounds, 297 S.C. 294, 376 S.E.2d 775 \(1989\).](#)

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[\[FN6\] Pate v. Ford, 293 S.C. 268, 360 S.E.2d 145 \(Ct. App. 1987\), decision rev'd on other grounds, 297 S.C. 294, 376 S.E.2d 775 \(1989\).](#)

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2. Particular Circumstances as Basis for Creation of Resulting Trust

a. Failure of Express Trust or Purpose Thereof

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 143. Trusts founded on valuable consideration

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [64](#) to [68](#)

Where the owner of property transfers it upon a trust that fails or is fully performed, the usual presumption of the resulting trust is not applicable if the transferor received from the transferee consideration for the transfer as an agreed exchange.[\[FN1\]](#) The inference then is that the transferee holds the property free of trust.[\[FN2\]](#)

[\[FN1\] Restatement Third, Trusts § 8](#), Comment f.

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[\[FN2\] Restatement Third, Trusts § 8](#), Comment f.

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§ 144. Trusts founded on donation or will

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [64](#) to [68](#)

A.L.R. Library

[Disposition of property of inter vivos trust falling in after death of settlor, who left will making no express disposition of the trust property, 30 A.L.R.3d 1318](#)

As a general rule of equity jurisprudence, where a donor conveys, either by will or deed, property in trust or for a certain purpose, and the trust or purpose thereof fails, a resulting trust arises for the benefit of the donor if he or she is living, or, if the donor is dead, for the benefit of his or her heirs or next of kin,[\[FN1\]](#) or for the benefit of his or her residuary legatees or beneficiaries,[\[FN2\]](#) but such a resulting trust may be rebutted by manifestation in the will or deed of a contrary intention, or by parol evidence.[\[FN3\]](#)

Observation: Upon failure of an express trust, a resulting trust arises not because the settlor actually intended that it should arise, but because he or she did not intend that the trustee should have the beneficial interest and did not make any other disposition of the property in the event that the intended trust should fail.[FN4]

[FN1] [White v. Fleet Bank of Maine, 1999 ME 148, 739 A.2d 373 \(Me. 1999\)](#); [Platt v. Huegel, 326 Mo. 776, 32 S.W.2d 605 \(1930\)](#); [Rhode Island Hospital Trust Co. v. Votolato, 102 R.I. 467, 231 A.2d 491, 30 A.L.R.3d 1299 \(1967\)](#).

- A petition of the children of a deceased grantor of real estate stated a claim for impressing a resulting trust on property, if a valid express trust had not been established since, under a resulting trust theory, a beneficial interest would revert to those persons succeeding to the grantor's interest under her will or the laws of descent and distribution. [Orud v. Groth, 652 N.W.2d 447 \(Iowa 2002\)](#).

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[FN2] [White v. Fleet Bank of Maine, 1999 ME 148, 739 A.2d 373 \(Me. 1999\)](#); [Rhode Island Hospital Trust Co. v. Votolato, 102 R.I. 467, 231 A.2d 491, 30 A.L.R.3d 1299 \(1967\)](#).

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[FN3] [Washington Beneficial Endowment Ass'n v. Wood, 15 D.C. 19, 4 Mackey 19 \(D.C. 1885\)](#); [Easum v. Bohon, 180 Ky. 451, 202 S.W. 901 \(1918\)](#).

- Even in cases in which a resulting-trust presumption does arise, that inference may be overcome by a finding that the settlor intended that, in the circumstances presented, the trustee should hold the property beneficially and free of trust. [Restatement Third, Trusts § 8](#), Comment f.

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[FN4] [Industrial Nat. Bank v. Drysdale, 84 R.I. 385, 125 A.2d 87, 62 A.L.R.2d 756 \(1956\)](#).

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§ 145. Trusts founded on donation or will—Failure caused by uncertainty of express trust or purpose thereof

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 64 to 68

A.L.R. Library

[Disposition of property of inter vivos trust falling in after death of settlor, who left will making no express disposition of the trust property, 30 A.L.R.3d 1318](#)

Where a donor conveys property, either by will or deed, on a trust or for a purpose that fails because of its indefiniteness, uncertainty, or vagueness, a resulting trust arises in favor of the donor or his or her heirs or next of kin, unless the resulting trust is rebutted.^[FN1] In some instances, where an express inter vivos trust has failed because it is too uncertain in its declarations either as to its purposes or in the designation of beneficiaries, and the settlor has left a will making no express provision for the trust property, a resulting trust has arisen in favor of the settlor's estate and the beneficial interest in the resulting trust is to be transmitted by the residuary provisions of the settlor's will.^[FN2]

^[FN1] [Wagner v. Clauson, 399 Ill. 403, 78 N.E.2d 203, 3 A.L.R.2d 672 \(1948\); Wilcox v. Attorney General, 207 Mass. 198, 93 N.E. 599 \(1911\).](#)

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^[FN2] [Pavy v. Peoples Bank & Trust Co., 135 Ind. App. 647, 195 N.E.2d 862 \(Div. 1 1964\); Seran v. Davis, 1935 OK 717, 174 Okla. 433, 50 P.2d 662 \(1935\).](#)

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§ 146. Trusts founded on donation or will—Uncertainty or failure in respect to beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 64 to 68

A.L.R. Library

[Disposition of property of inter vivos trust falling in after death of settlor, who left will making no express disposition of the trust property, 30 A.L.R.3d 1318](#)

Where a trust fails for failure of designation of, or for uncertainty as to, beneficiaries, a resulting trust arises in favor of the donor or his or her heirs or next of kin.^[FN1] A resulting trust also arises due to the failure of an intended beneficiary to come into being.^[FN2]

^[FN1] [Wagner v. Wagner, 248 Iowa 353, 79 N.W.2d 319 \(1956\); Easum v. Bohon, 180 Ky. 451, 202 S.W. 901 \(1918\).](#)

- Trustees held real estate deeded to a purported trust in a resulting trust for the settlors, in light of the purported trust's failure to adequately identify its beneficiaries. [First Nat. Bank in Mitchell v. Daggett, 242 Neb. 734, 497 N.W.2d 358 \(1993\).](#)

- ^[FN2] [Dennis v. Omaha Nat. Bank, 153 Neb. 865, 46 N.W.2d 606, 27 A.L.R.2d 674 \(1951\)](#) (where the purpose of a testamentary trust was to provide for the testator's wife and children, and the latter's descendants per stirpes until 20 years after the death of the last survivor of the testator's wife and children, the property then to be distributed to the descendants of his children per stirpes, the trust was terminated by the death of the last of the testator's children, none of them having left issue, and the trustee held the property on a resulting trust for the testator's heirs at law, ascertained as of the date of the failure of the trust).

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§ 147. Creation based on illegality of trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 64 to 68

Where the owner of property transfers it inter vivos upon an intended trust which fails for illegality, a resulting trust does not arise if the policy against permitting unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction.[\[FN1\]](#)

[\[FN1\] Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 Mont. 45, 36 P.3d 408 \(2001\).](#)

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IV. Trusts by Operation of Law
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§ 148. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [72](#) to [74](#), [83](#)

Trial Strategy

[Purchase-Money Resulting Trust, 28 Am. Jur. Proof of Facts 2d 455](#)

Forms

Complaint, petition, or declaration—Property purchased by defendant with funds advanced by or borrowed from plaintiff. [Am. Jur. Pleading and Practice Forms, Trusts, §§ 47 to 49](#)

As a rule a resulting trust arises by operation of law where one person furnishes the consideration or payment for the property and conveyance is made to, or title is taken in another.^[FN1] Such a resulting trust arises in favor of the person who has paid the purchase price for the property,^[FN2] whether realty or personalty,^[FN3] where the parties are strangers to each other in the sense that there is no domestic relationship giving rise to a meritorious consideration.^[FN4]

Under the Restatement, except as otherwise stated by law, where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid unless the latter manifests an intention that no resulting trust should arise, or the transfer is made to accomplish an unlawful purpose, in which case a resulting trust does not arise if the policy against unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction. ^[FN5] Under such circumstances, the person furnishing the consideration for the purchase is said to have all the beneficial or equitable interest in the property, with the person into whose name the property was transferred having only bare, legal title.^[FN6]

When a transfer of property is made to one person and the purchase price is paid by another such trust is sometimes referred to as a purchase-money resulting trust.^[FN7] As a general rule, equity will presume, absent contrary evidence, that the person supplying the purchase money for property intends to retain a beneficial interest in the property and that title is placed in the name of another for some incidental reason, and a court therefore may impose a resulting trust requiring the person with legal title to hold that title for the benefit of the person supplying the purchase money.^[FN8] However, a purchase-money resulting trust does not arise if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise.^[FN9]

Cases:

Under Connecticut law, when purchase money for property is paid by one party and legal title is taken in name of another, resulting trust ordinarily arises at once, by operation of law, in favor of the one paying the money, unless it can be proven that intention of parties was otherwise. [In re Radcliffe, 317 B.R. 581 \(Bankr. D. Conn. 2004\)](#).

A "resulting trust" is a property relationship designed to effectuate the parties' intent when one party takes title to property for which another has furnished consideration. [In re Crossroad Health Ministry, Inc., 319 B.R. 778 \(Bankr. D. D.C. 2005\)](#).

Under Massachusetts law, when one person pays the purchase price of property and takes title in name of another, beneficial interest in property inures to person who paid purchase price by way of resulting trust. [In re Duda, 422 B.R. 339 \(Bankr. D. Mass. 2010\)](#).

Under Texas law, when one party pays purchase price for realty, but title is placed in name of another, purchase-money resulting trust will arise in favor of entity providing the purchase money. [In re Herman, 315 B.R. 381 \(Bankr. E.D. Tex. 2004\)](#).

A purchase money resulting trust is implied by operation of law when someone other than the person in whose name title is taken pays the purchase price of the property. [In re Estate of LaValle, 218 S.W.3d 834 \(Tex. App. Beaumont 2007\)](#), review denied, (June 29, 2007).

Legal title holder of real property that was purchased by another holds the property for the use and benefit of the person paying the money as a resulting trust. [Gregoire v. Gregoire, 2009 VT 87, 987 A.2d 909 \(Vt. 2009\)](#).

[END OF SUPPLEMENT]

[FN1] [McClellan v. Pennington, 2004 WL 1475438 \(Ala. 2004\)](#); [First Nat. Bank of Roland v. Rush, 30 Ark. App. 272, 785 S.W.2d 474 \(1990\)](#); [Leeks v. Leeks, 570 A.2d 271 \(D.C. 1989\)](#); [F.J. Holmes Equipment, Inc. v. Babcock Bldg. Supply, Inc., 553 So. 2d 748 \(Fla. Dist. Ct. App. 5th Dist. 1989\)](#); [Hettinga v. Sybrandy, 126 Idaho 467, 886 P.2d 772 \(1994\)](#); [Leicht v. Quirin, 200 Ill. App. 3d 1057, 146 Ill. Dec. 752, 558 N.E.2d 715 \(5th Dist. 1990\)](#); [Nessralla v. Peck, 403 Mass. 757, 532 N.E.2d 685 \(1989\)](#); [Armendaris Water Development Co. v. Rainwater, 109 N.M. 71, 781 P.2d 799 \(Ct. App. 1989\)](#).

- When property is purchased with the money of one person but the title is taken in the name of another, a resulting or presumptive trust arises; the titleholder becomes a trustee for the payor. [Rainey v. Rainey, 795 S.W.2d 139 \(Tenn. Ct. App. 1990\)](#).

- A resulting trust may arise when one person pays for property, or assumes payment therefore, but has title conveyed to another with no mention of a trust in the deed. [Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\)](#).

- Equity devised the theory of resulting trust where one party pays, in whole or in part, for property that for a different reason is titled in name of another. [Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 \(1997\)](#).

[FN2] [American Hotel Management Associates, Inc. v. Jones, 768 F.2d 562 \(4th Cir. 1985\)](#) (interpreting North Carolina law); [First Nat. Bank of Roland v. Rush, 30 Ark. App. 272, 785 S.W.2d 474 \(1990\)](#); [Leeks v. Leeks, 570 A.2d 271 \(D.C. 1989\)](#); [Wait v. Cornette, 259 Neb. 850, 612 N.W.2d 905 \(2000\)](#); [Armendaris Water Development Co. v. Rainwater, 109 N.M. 71, 781 P.2d 799 \(Ct. App. 1989\)](#); [Coney v. Coney, 207 N.J. Super. 63, 503 A.2d 912 \(Ch. Div. 1985\)](#); [BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 \(1985\)](#); [Campbell v. Campbell, 300 S.C. 68, 386 S.E.2d 305 \(Ct. App. 1989\)](#).

[FN3] [Hobart Estate Co. v. Douglass](#), 94 F.2d 954 (C.C.A. 9th Cir. 1938); [Smith v. Smith](#), 200 Va. 77, 104 S.E.2d 17 (1958); [Arneman v. Arneman](#), 43 Wash. 2d 787, 264 P.2d 256, 45 A.L.R.2d 370 (1953).

- A resulting trust results from the fact that one man's money has been invested in land and the conveyance taken in the name of another. [Patterson v. Strickland](#), 133 N.C. App. 510, 515 S.E.2d 915 (1999).

- A resulting trust ordinarily will be presumed in favor of one who provides the purchase money for land taken in the name of another. [Truett v. Johnson](#), 526 So. 2d 14 (Ala. 1988); [Estate of Kling](#), 736 S.W.2d 65 (Mo. Ct. App. E.D. 1987); [Gifford v. Dennis](#), 230 Va. 193, 335 S.E.2d 371 (1985).

- A resulting trust in real estate arises when one party furnishes consideration to purchase property, not intending a gift or advancement, yet title is taken in the name of another. [Fortin v. Roman Catholic Bishop of Worcester](#), 416 Mass. 781, 625 N.E.2d 1352 (1994).

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[FN4] [Hobart Estate Co. v. Douglass](#), 94 F.2d 954 (C.C.A. 9th Cir. 1938); [Smith v. Smith](#), 200 Va. 77, 104 S.E.2d 17 (1958); [Arneman v. Arneman](#), 43 Wash. 2d 787, 264 P.2d 256, 45 A.L.R.2d 370 (1953).

- Effect of domestic relationship between payor and grantee, see [§ 152](#).

- As between strangers, a purchase-money resulting trust arises against a grantee of real property in favor of the payor of the purchase money unless it was the payor's intent that no such trust should arise. [Duncan v. Rayfield](#), 698 S.W.2d 876 (Mo. Ct. App. S.D. 1985).

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[FN5] [Restatement Third, Trusts § 9\(1\)](#).

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[FN6] [First Nat. Bank of Roland v. Rush](#), 30 Ark. App. 272, 785 S.W.2d 474 (1990), noting that subject to certain exceptions, the trustee's interest is not sufficient to allow a personal creditor of the trustee to obtain satisfaction of his claim out of the trust property.

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[FN7] [McClellan v. Pennington](#), 2004 WL 1475438 (Ala. 2004); [Burt v. Skrzyniarz](#), 272 Ga. 35, 526 S.E.2d 848 (2000); [Prange v. Prange](#), 755 S.W.2d 581 (Mo. Ct. App. E.D. 1987); [Johnson v. Kenneth D. Collins Agency, Inc.](#), 263 Mont. 137, 865 P.2d 312 (1993); [Armendaris Water Development Co. v. Rainwater](#), 109 N.M. 71, 781 P.2d 799 (Ct. App. 1989); [Gragg v. Gragg](#), 94 N.C. App. 134, 379 S.E.2d 684 (1989); [Somer v. Bogart](#), 749 S.W.2d 202 (Tex. App. Dallas 1988), writ denied, (Sept. 14, 1988) and decision approved, [762 S.W.2d 577 \(Tex. 1988\)](#).

- The classic purchase-money resulting trust vests the legal fee and equitable fee in separate individuals, where the trustee holds the legal fee and the person paying the purchase price holds the equitable fee. [Leeks v. Leeks](#), 570 A.2d 271 (D.C. 1989).

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[FN8] [Hudak v. Procek](#), 806 A.2d 140 (Del. 2002).

- The general rule is that, when real estate is conveyed to one person and the consideration is paid by another, it is presumed that the party who paid the purchase money intended a benefit to himself; accordingly, a resulting trust is raised in his behalf. [Hayne Federal Credit Union v. Bailey](#), 327 S.C. 242, 489 S.E.2d 472 (1997).

- The general presumption of a resulting trust is based upon the sound principle that absent evidence to the contrary, it is not the intent of the payor to make a gift to the grantee. [Duncan v. Rayfield](#), 698 S.W.2d 876 (Mo. Ct. App. S.D. 1985).

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[FN9] [Armendaris Water Development Co. v. Rainwater](#), 109 N.M. 71, 781 P.2d 799 (Ct. App. 1989).

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§ 149. Consideration, generally; effect of form or purpose thereof

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To give rise to a purchase-money resulting trust, consideration must be furnished by the alleged beneficiary of the resulting trust.^[FN1] More specifically, in order for a resulting trust to arise, a would-be beneficiary must pay for the property, or assume payment of all or part of the purchase money, and have legal title conveyed to another without any mention of the trust in the conveyance,^[FN2] although, where the beneficiary has assumed payment, the obligation must be a binding one.^[FN3]

Observation: According to the Restatement, these rules regarding purchase-money resulting trusts apply regardless of whether the purchase price is paid with money or other property.^[FN4] However, this view has been rejected by some courts.^[FN5]

There is also authority for the view that it is not required that the consideration which triggers the presumption of a resulting trust must be a contribution to the purchase price of the property in which the resulting trust is claimed.^[FN6] In this regard, it has been reasoned that the only purpose of requiring consideration in the resulting trust setting is evidentiary, and that since people usually don't give up something of value without expecting something in return, an inference that the purchaser meant another person to own the thing purchased arises when the other person paid all or part of the purchase price or, what is the same thing, incurred a substantial cost necessary to make the purchase go through.^[FN7]

Practice guide: The party claiming a resulting trust in another's legal estate is required to show by clear, satisfactory, and convincing proof that he or she paid or secured payment of consideration at the time of

purchase[[FN8](#)] and that at the time of the conveyance it was the intention and understanding that the contributor was to have the beneficial ownership in the whole or in a definite fractional part of the property.[[FN9](#)]

[[FN1](#)] [Socarras v. Yaque, 452 So. 2d 992 \(Fla. Dist. Ct. App. 3d Dist. 1984\).](#)

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[[FN2](#)] [Tiller v. Owen, 243 Va. 176, 413 S.E.2d 51 \(1992\).](#)

- The alleged beneficiary must have paid the purchase price or bound himself by an absolute obligation to pay it. [Socarras v. Yaque, 452 So. 2d 992 \(Fla. Dist. Ct. App. 3d Dist. 1984\).](#)

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[[FN3](#)] [Harnish v. Peele, 386 So. 2d 8 \(Fla. Dist. Ct. App. 5th Dist. 1980\).](#)

- A resulting trust in favor of a purported beneficiary was not created when he gave down-payment money to a mortgagor for the purchase of a house and subsequently made mortgage payments; the purported beneficiary did not obligate himself to purchase all or part of the property in question, did not sign the sales contract or become obligated on the mortgage, and signed no other documents binding him to pay all or part of the purchase money. [Tiller v. Owen, 243 Va. 176, 413 S.E.2d 51 \(1992\).](#)

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[[FN4](#)] [Restatement Third, Trusts, § 9, Comment a.](#)

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[[FN5](#)] [Meskell v. Meskell, 355 Mass. 148, 243 N.E.2d 804 \(1969\)](#) (holding that no resulting trust arose where a person claiming a trust had voluntarily transferred an undivided interest in realty upon which the trust was sought, itself, rather than the money).

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[[FN6](#)] [American Nat. Bank and Trust Co. of Rockford, Ill. v. U.S., 832 F.2d 1032 \(7th Cir. 1987\).](#)

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[[FN7](#)] [American Nat. Bank and Trust Co. of Rockford, Ill. v. U.S., 832 F.2d 1032 \(7th Cir. 1987\).](#)

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[[FN8](#)] [Boatright v. Perkins, 1995 OK 34, 894 P.2d 1091 \(Okla. 1995\).](#)

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[[FN9](#)] [J. K. Social Club v. J. K. Realty Corp., 448 A.2d 130 \(R.I. 1982\).](#)

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§ 150. Time when trust arises; relationship between time of conveyance and furnishing of consideration

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [77](#)

Resulting trusts arise by operation of law at the time of a conveyance when the purchase money for property is paid by one party and the legal title is taken in the name of another.^[FN1] More specifically, to constitute a resulting trust, there must be a payment by the complainant or an absolute obligation to pay at or before the time of the conveyance.^[FN2] However, the view has also been expressed that it is not necessary in order for a purchase-money resulting trust to arise in favor of a plaintiff who has furnished the purchase price of property, that the plaintiff has incurred an obligation to pay the remainder of the purchase price of the property at or before the time of conveyance.^[FN3]

CUMULATIVE SUPPLEMENT

Cases:

A resulting trust can arise only at the time of the conveyance of the property, and the payor intention at that time determines whether a resulting trust may be found. [Avenaim v. Lubecke, 347 Ill. App. 3d 855, 283 Ill. Dec. 227, 807 N.E.2d 1068 \(1st Dist. 2004\)](#).

[END OF SUPPLEMENT]

^[FN1] [Lord v. Stavrakis, 6 Conn. App. 161, 503 A.2d 629 \(1986\)](#).

^[FN2] [McClellan v. Pennington, 2004 WL 1475438 \(Ala. 2004\)](#); [Socarras v. Yaque, 452 So. 2d 992 \(Fla. Dist. Ct. App. 3d Dist. 1984\)](#) (holding that the trial court erred in imposing a resulting trust where, inter alia, an alleged beneficiary had expended money on property only after legal title had vested in the titleholder, where expenditures by the beneficiaries were concurrent with and incident to their habitation and enjoyment of property); [Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 \(1982\)](#); [Tiller v. Owen, 243 Va. 176, 413 S.E.2d 51 \(1992\)](#).

- No resulting trust for real property arose, even though the purchaser's brother made installment payments for a land contract, in the absence of a showing that the brother contributed any money toward the down payment

made at the time of the conveyance. [Thompson v. Bearden, 265 Ga. 16, 453 S.E.2d 20 \(1995\).](#)

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[\[FN3\] BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 \(1985\).](#)

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§ 151. Necessity and effect of agreement

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A resulting trust based on the payment of consideration by one for a conveyance of property to another does not arise from or depend on any agreement between the parties.[\[FN1\]](#) If the transaction is an express oral agreement providing for the conveyance of land, it becomes at once an express trust, and not a resulting trust.[\[FN2\]](#) However, it has also been held that in order to establish the existence of a purchase-money resulting trust, one must show that such a trust was contemplated by both parties by way of an agreement that is either express or implied by the circumstances or conduct of the parties, and such an agreement must have existed at the time the transaction was consummated.[\[FN3\]](#) Resulting trusts arise from prior agreements, express though oral; the parties agree that the transfer of property will be made to one party with the purchase price being paid by the other.[\[FN4\]](#)

[FN1] [American Hotel Management Associates, Inc. v. Jones, 768 F.2d 562 \(4th Cir. 1985\)](#) (interpreting North Carolina law); [Gragg v. Gragg, 94 N.C. App. 134, 379 S.E.2d 684 \(1989\)](#).

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[FN2] [Duncan v. Rayfield, 698 S.W.2d 876 \(Mo. Ct. App. S.D. 1985\)](#).

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[FN3] [Burt v. Skrzyniarz, 272 Ga. 35, 526 S.E.2d 848 \(2000\)](#).

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[FN4] [Allgood v. Allgood, 473 So. 2d 416 \(Miss. 1985\)](#).

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§ 152. Effect of domestic or family relationship between payor and grantee

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West's Key Number Digest, [Trusts](#) [81](#)

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[Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285](#)

A conveyance on a consideration from a husband, parent, or other person, where title is taken in the name of the wife,[\[FN1\]](#) child,[\[FN2\]](#) or other natural object of the purchaser's bounty, generally raises a presumption of gift, rather than of a resulting trust for the grantor.[\[FN3\]](#) Similarly, under the Restatement, where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a descendant, or other natural object of the bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property.[\[FN4\]](#)

Despite the general rule, there is authority for the view that where the consideration comes from a child and the conveyance is to the child's parent, a resulting trust, and not a presumption of settlement or gift, is raised.[\[FN5\]](#) Thus, the rule has been stated as being that where a child furnishes purchase money for property and for reasons of convenience or minority of the title is taken in the parents, a presumption of a purchase-money resulting trust is created in the child as opposed to a gift.[\[FN6\]](#)

Where there is a presumption of a settlement or gift based on the payment of consideration for property conveyed to a relative of the payor, such presumption is rebuttable by proof[\[FN7\]](#) —which, according to some authorities, may be parol evidence[\[FN8\]](#) —or circumstances[\[FN9\]](#) of a contrary intention,[\[FN10\]](#) and on such rebuttal a resulting trust arises.[\[FN11\]](#)

[\[FN1\] Moore v. Moore, 9 Ill. 2d 556, 138 N.E.2d 562 \(1956\); Rakhman v. Zusstone, 957 S.W.2d 241 \(Ky. 1997\); Duncan v. Rayfield, 698 S.W.2d 876 \(Mo. Ct. App. S.D. 1985\); Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 \(1997\).](#)

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[\[FN2\] Hudak v. Procek, 806 A.2d 140 \(Del. 2002\); Rakhman v. Zusstone, 957 S.W.2d 241 \(Ky. 1997\); Prange v. Prange, 755 S.W.2d 581 \(Mo. Ct. App. E.D. 1987\); Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 \(1997\); Somer v. Bogart, 749 S.W.2d 202 \(Tex. App. Dallas 1988\), writ denied, \(Sept. 14, 1988\) and decision approved, 762 S.W.2d 577 \(Tex. 1988\).](#)

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[\[FN3\] Harrison v. Knott, 219 Ark. 565, 243 S.W.2d 642, 28 A.L.R.2d 405 \(1951\); Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\); Moore v. Moore, 9 Ill. 2d 556, 138 N.E.2d 562 \(1956\); Rakhman v. Zusstone, 957 S.W.2d 241 \(Ky. 1997\).](#)

- The donor of purchase money for real property manifested an intent to make a gift of the property to a donee nephew, so as to preclude the imposition of a resulting trust; on a number of occasions over several years the provider had informed the nephew, the donee's wife, and the donee's mother that he intended the donee to take the house after the donor died. [Lewis v. Poduska, 240 Neb. 312, 481 N.W.2d 898 \(1992\).](#)

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[\[FN4\] Restatement Third, Trusts § 9\(2\).](#)

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[\[FN5\] Gerace v. Gerace, 301 Mass. 14, 16 N.E.2d 6, 117 A.L.R. 1459 \(1938\); Davis v. Roberts, 365 Mo. 1195, 295 S.W.2d 152 \(1956\).](#)

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[\[FN6\] Ham v. Ham, 691 S.W.2d 944 \(Mo. Ct. App. W.D. 1985\).](#)

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[\[FN7\] Hudak v. Procek, 806 A.2d 140 \(Del. 2002\); Prange v. Prange, 755 S.W.2d 581 \(Mo. Ct. App. E.D. 1987\) \(proof required by clear and convincing evidence that a gift was not intended\); Brtek v. Cihal, 245 Neb. 756, 515 N.W.2d 628 \(1994\); Somer v. Bogart, 749 S.W.2d 202 \(Tex. App. Dallas 1988\), writ denied, \(Sept. 14, 1988\) and decision approved, 762 S.W.2d 577 \(Tex. 1988\).](#)

[\[FN8\] Prange v. Prange, 755 S.W.2d 581 \(Mo. Ct. App. E.D. 1987\); Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 \(1987\).](#)

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[\[FN9\] Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 \(1987\).](#)

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[\[FN10\] Warford v. Smoot, 361 Mo. 879, 237 S.W.2d 184 \(1951\); Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 \(1987\).](#)

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[\[FN11\] Warford v. Smoot, 361 Mo. 879, 237 S.W.2d 184 \(1951\).](#)

- A father, who purchased real property with \$10,000 in funds from an account he had established and placed the property in the name of a son and daughter-in-law, satisfied the statutory requirements for a purchase-money resulting trust, and rebutted the presumption of a gift by clear and convincing evidence; in Oregon the son and father had established a practice whereby the father placed his property in the son's name and the son quit claimed it back to him when the father sold the property, and the procedure in Montana was wholly consistent, the father testified that he located the property and negotiated for its purchase, and the father paid for the property and all improvements, including tire shop additions. [Hilliard v. Hilliard, 255 Mont. 487, 844 P.2d 54 \(1992\).](#)

- Clear and convincing evidence overcame the presumption that a grantee intended a gift to her son by putting his name on a deed as joint tenant with right of survivorship and established a resulting trust in favor of the son's sister who had a life tenancy pursuant to the grantee's will; the grantee supplied all the proceeds to purchase the property, the son knew of the grantee's intent for his sister to have the property as her home for her life, and the son testified that he intended for his sister to have the property as her home, but changed his mind after the sister declined certain demands and he learned of his name on the deed. [Edwards v. Edwards, 311 Ark. 339, 843 S.W.2d 846 \(1992\)](#)

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§ 153. Effect of domestic or family relationship between payor and grantee—Payments by spouse or cohabitant for property conveyed to spouse or cohabitant

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [81\(2\)](#), (3)

Forms

Complaint, petition, or declaration—To declare resulting trust in property purchased by husband with wife's separate funds. [Am. Jur. Pleading and Practice Forms, Trusts, §§ 51, 54](#)

Ordinarily, when property is purchased in the name of one person with money furnished by another, a resulting trust arises in favor of the person furnishing the purchase money, but, in the marital context, when one spouse buys property with separate funds and places it in a joint tenancy, there is a presumption that the spouse intended to make a gift to his or her spouse of one-half of the property.[\[FN1\]](#) Such presumption of gift also applies whether the husband or wife receives title to the property.[\[FN2\]](#)

Under the Restatement, where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a spouse of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property.[\[FN3\]](#)

Despite the rule that a presumption of gift arises where purchase money is furnished by a husband for property conveyed to his wife, the same presumption apparently does not apply where the couple, while living together, are not husband and wife; in this regard, for example, a resulting trust could be established in favor of a woman living in meretricious relations with a man at the time land was purchased and taken in his name, if the woman proved that she had contributed to the purchase price.[\[FN4\]](#) However, if, after resolving material issues of fact as to whether a boyfriend's down payment for a house titled in a girlfriend's name was a gift to the girlfriend, the finder of fact determines that a purchase-money resulting trust in favor of the boyfriend was created, it should then weigh the proper factors under the statutory provision prohibiting a resulting trust whenever the transfer is made in order to accomplish an illegal purpose and the policy against unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction, to determine whether the boyfriend's illegal purpose of evading his child support obligations should prohibit the imposition of a resulting trust.[\[FN5\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Under California law governing purchase money resulting trusts, where a wife provides the consideration and the property is taken in the husband's name, there is no gift presumption; the gift presumption is not "gender-neutral". [In re Cecconi, 366 B.R. 83 \(Bankr. N.D. Cal. 2007\)](#).

[END OF SUPPLEMENT]

[\[FN1\] *Toth v. Toth*, 190 Ariz. 218, 946 P.2d 900 \(1997\).](#)

- Evidence was insufficient to establish a prima facie case of existence of a resulting trust in favor of a husband with regard to a trailer purchased by a wife; although the husband claimed that the wife purchased the trailer with funds he provided, evidence indicated that the ownership of the trailer was vested in the wife rather than in the husband, and the bill of sale shed no light on the identity of the trailer's owner. [Farley v. Farley, 196 W. Va. 434, 473 S.E.2d 149 \(1996\).](#)

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[\[FN2\] *Leeks v. Leeks*, 570 A.2d 271 \(D.C. 1989\)](#) (holding that the presumption of a gift arises where the equitable or beneficial holder of the fee is the spouse of the person who paid the purchase price); [Lollis v. Lollis](#), 291 S.C. 525, 354 S.E.2d 559 (1987).

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[\[FN3\] Restatement Third, Trusts § 9\(2\).](#)

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[\[FN4\] *Faglie v. Williams*, 569 S.W.2d 557 \(Tex. Civ. App. Austin 1978\)](#), writ refused n.r.e., (Nov. 1, 1978).

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[\[FN5\] *Neset v. Fifer*, 283 Mont. 527, 942 P.2d 712 \(1997\).](#)

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§ 154. Proof, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [89](#)

The facts which must be proven in the case of a purchase-money resulting trust is that one party paid the purchase price for property and another party was given legal title.[\[FN1\]](#) Ordinarily, once a plaintiff proves that he or she paid the purchase price for a piece of property, a presumption ordinarily arises that it was the party's intention that the individual holding legal title was to hold the property in trust for the payor[\[FN2\]](#) and the burden of going forward shifts to the holder of title.[\[FN3\]](#) In other words, such a resulting trust is rebuttable by proof of a contrary intention of the person from whom the consideration comes,[\[FN4\]](#) by a showing that, in fact, no trust was intended.[\[FN5\]](#) Thus, the presumed intention to create a trust is rebutted where the title to the property being purchased is taken in the name of the payor and another person jointly; this kind of arrangement, absent evidence of a different intention, is an indication of a gift of half interest by the payor to the other person.[\[FN6\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Under California law, where the legal title rests in one person, to establish a resulting trust for the benefit of another against a presumption in favor of the legal title, the evidence must be clear and convincing, especially when an attempt is made to establish a resulting trust after the lapse of many years or where parol evidence alone is relied upon. [In re Cecconi, 366 B.R. 83 \(Bankr. N.D. Cal. 2007\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Matter of Hock's Estate, 655 P.2d 1111 \(Utah 1982\)](#).

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[\[FN2\] Boatright v. Perkins, 1995 OK 34, 894 P.2d 1091 \(Okla. 1995\); Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\)](#).

- When the plaintiff demonstrates that he or his predecessor has furnished the money for acquisition of property with the intent that the one who takes title hold it in trust for the one who advanced the purchase money, and that the money was so applied, a resulting trust is established. [Granado v. Granado, 107 N.M. 456, 760 P.2d 148 \(1988\)](#).

- Where one party furnishes the purchase price but has title placed in the name of another, these facts, standing alone, create a rebuttable presumption that a resulting trust was intended. [Wright v. Wright, 305 N.C. 345, 289 S.E.2d 347 \(1982\)](#).

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[\[FN3\] Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\); Boatright v. Perkins, 1995 OK 34, 894 P.2d 1091 \(Okla. 1995\)](#).

- Where the claimant supplied the consideration for the purchase, the probabilities shift and a rebuttable presumption of a resulting trust arises; unless a party can invoke this presumption, a resulting trust cannot

possibly be proven. [American Nat. Bank and Trust Co. of Rockford, Ill. v. U.S.](#), 832 F.2d 1032 (7th Cir. 1987).

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[FN4] [Lord v. Stavrakis](#), 6 Conn. App. 161, 503 A.2d 629 (1986); [Duncan v. Rayfield](#), 698 S.W.2d 876 (Mo. Ct. App. S.D. 1985); [Smith v. Smith](#), 200 Va. 77, 104 S.E.2d 17 (1958); [Arneman v. Arneman](#), 43 Wash. 2d 787, 264 P.2d 256, 45 A.L.R.2d 370 (1953).

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[FN5] [Wright v. Wright](#), 305 N.C. 345, 289 S.E.2d 347 (1982).

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[FN6] [Masgai v. Masgai](#), 460 Pa. 453, 333 A.2d 861 (1975).

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§ 155. Purchase for another with own funds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [78](#)

Where one purchases property, with consideration he or she furnishes, but takes the conveyance in the name of another, a resulting trust is raised in favor of the purchaser.[FN1] The rule rests on the presumption or implication of law of the intention of the purchaser that he or she intends the purchase for his or her own benefit

and the conveyance in the name of another as a matter of convenience or arrangement for collateral purposes.[\[FN2\]](#)

[\[FN1\] Whetstone v. Coslick, 117 Fla. 203, 157 So. 666, 96 A.L.R. 455 \(1934\); Howe v. Howe, 199 Mass. 598, 85 N.E. 945 \(1908\).](#)

- Where one sister paid the entire purchase price of realty, and she and her sister agreed prior to the purchase that the noncontributing sister was not to receive a present beneficial interest in the property as a result of being named in the deed as a joint tenant, a resulting trust arose in favor of the purchasing sister. [Seabury v. Costello, 209 Cal. App. 2d 640, 26 Cal. Rptr. 248 \(2d Dist. 1962\).](#)

- [\[FN2\] Smithsonian Institution v. Meech, 169 U.S. 398, 18 S. Ct. 396, 42 L. Ed. 793 \(1898\); Masterson v. Tomlinson, 244 Ark. 208, 424 S.W.2d 380 \(1968\).](#)

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§ 156. Purchase with another's property or means

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [78](#)

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[Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285](#)

Where a person purchases property with the money or means of another, but takes the conveyance in his or her own name, a resulting trust is raised in favor of the person who has supplied the money or means, whether a fiduciary relationship exists between the parties, and regardless of whether there is consent on the part of the person whose money or means have been employed.[FN1]

Under the Restatement, the rules pertaining to purchase-money resulting trusts apply not only where the purchase price is paid directly to the vendor by a person other than the transferee but also where the purchase price is paid by the transferee with funds belonging to another with the latter's consent.[FN2]

Where one has used funds of another to purchase property, but the conveyance has been made instead to the person supplying such funds, a resulting trust has been imposed for the person to whom the property was originally intended to be conveyed, under particular circumstances.[FN3]

[FN1] [Baker v. Applen, 181 Ark. 454, 26 S.W.2d 109 \(1930\)](#); [Crocker v. Crocker, 31 N.Y. 507, 1865 WL 3936 \(1865\)](#).

- A resulting trust upon residential real property, to which a claimant's parent held legal title, arose after the claimant submitted evidence that the claimant's earnings and monies which the claimant borrowed were used to pay the purchase price. [Boatright v. Perkins, 1995 OK 34, 894 P.2d 1091 \(Okla. 1995\)](#).

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[FN2] [Restatement Third, Trusts § 9](#), Comment a.

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[FN3] [Johnson v. Johnson, 192 Cal. App. 3d 551, 237 Cal. Rptr. 644 \(2d Dist. 1987\)](#), holding that in action for resulting trust by mother whose son had allowed her to use his veterans' benefits to buy home with GI loan financing, who had refused to transfer title to mother even though she had provided money for the loan payments, and then, after moving into the home with her, had sought to make her leave the home, a simple resulting trust in mother's favor was properly decreed where there was substantial evidence to support finding that son had made no payments into escrow from his own funds, and since, although son had lent his credit, it was not just to allow son to retain any share of title in recognition of his being the lender of record.

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§ 157. Purchase with borrowed or donated funds; trust in favor of lender or donor

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [78](#)

The general rule is that the use of borrowed money in making a purchase does not raise a resulting trust in favor of the lender,^[FN1] even where the money is loaned to enable the borrower to purchase the property in question.^[FN2] The rule that no resulting trust arises in favor of the lender when the grantee of land borrows money from a lender and uses it to pay the purchase price applies even though it was understood that the grantee's title should be held for the benefit of the lender as security for the money advanced by him or her or even where there is an agreement to share in the profits.^[FN3]

For a resulting trust to exist, the would-be beneficiary must have paid the purchase money as his or her own, and not as a loan to the title holder.^[FN4]

^[FN1] [Duncan v. Rayfield](#), 698 S.W.2d 876 (Mo. Ct. App. S.D. 1985); [Thompson v. Hunstad](#), 53 Wash. 2d 87, 330 P.2d 1007 (1958).

- Where the plaintiff advanced money in order that the grantee might purchase a lot upon which to build a house, the relationship created was that of creditor-debtor, and no resulting trust could arise in the funds as to plaintiff. [Noland v. Sanders](#), 273 Ala. 459, 142 So. 2d 883 (1962).

^[FN2] [Leary v. Corvin](#), 181 N.Y. 222, 73 N.E. 984 (1905); [Newman v. Newman](#), 103 Ohio St. 230, 103 Ohio St. 267, 133 N.E. 70, 18 A.L.R. 1089 (1921); [Szlatenyi v. Cleverley](#), 72 R.I. 253, 50 A.2d 185 (1946).

^[FN3] [Duncan v. Rayfield](#), 698 S.W.2d 876 (Mo. Ct. App. S.D. 1985), stating, in this regard, that a loan is wholly inconsistent with the theory of a resulting trust.

^[FN4] [Tiller v. Owen](#), 243 Va. 176, 413 S.E.2d 51 (1992).

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Where money is borrowed to purchase property, the lender taking legal title to the land in his or her own name to secure the loan, a resulting trust in the property, binding the lender in favor of the borrower, arises.^[FN1] In other words, the rule that a resulting trust will be found in favor of one who provides consideration for property, the title for which is given to another, applies even when all or part of the purchase price was borrowed from the titleholder.^[FN2] The person claiming the benefit of a resulting trust need not be obligated directly to the grantee's lender; it is sufficient if he or she is obligated to the grantee, pursuant to a promise made before title passes, to make payments to the grantee which will enable the grantee to pay the remainder of the purchase price; in such a case, the grantee is considered to have made a loan of credit to one who promises to, and actually does, provide the funds to pay the remainder of the purchase price.^[FN3]

^[FN1] [Gorenflo v. Brown](#), 233 Ark. 221, 343 S.W.2d 564 (1961); [Avery v. Stewart](#), 136 N.C. 426, 48 S.E. 775 (1904); [Carkonen v. Alberts](#), 196 Wash. 575, 83 P.2d 899, 135 A.L.R. 209 (1938).

^[FN2] [Simmons v. Smith](#), 20 Mass. App. Ct. 775, 482 N.E.2d 887 (1985).

- Where a transfer of property is made to one person and the purchase price is advanced by him as a loan to

another, a resulting trust arises in favor of the latter, but the transferee can hold the property as security for the loan. [Campbell v. Campbell, 300 S.C. 68, 386 S.E.2d 305 \(Ct. App. 1989\).](#)

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[\[FN3\] Ray v. Norris, 78 N.C. App. 379, 337 S.E.2d 137 \(1985\).](#)
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In some circumstances, a resulting trust may be based upon an agreement or agency to purchase, hold, or reconvey property to another, where the promisor or agent purchases for himself or herself or refuses to hold for or reconvey to the promisee or principal; where created by such an agency or promise, the resulting trust rests on the doctrine of equitable consideration.[\[FN1\]](#)

For a resulting trust to exist, a would-be beneficiary must have paid the purchase money as his or her own, and not as an agent of the title holder.[\[FN2\]](#)

[\[FN1\] Pollak v. Millsap, 219 Ala. 273, 122 So. 16, 65 A.L.R. 110 \(1928\).](#)

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[\[FN2\] Tiller v. Owen, 243 Va. 176, 413 S.E.2d 51 \(1992\).](#)

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§ 160. Where principal or promisee advances consideration

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Generally, where there is an agreement or agency to purchase for another and the promisee or principal furnishes the consideration for the conveyance, which the promisor or agent takes in his or her own name, whether with or without the consent of the promisee or principal, a resulting trust arises in favor of the promisee or principal.[\[FN1\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Female former domestic companion's claim that she and former male companion paid for real estate, but that only male companion took title, was sufficient to plead a claim for resulting trust in connection with claim for return of \$25,000 she contributed toward the purchase of the property. [Cury v. Mitchell, 688 S.E.2d 825 \(N.C. Ct. App. 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Brainard v. Buck, 184 U.S. 99, 22 S. Ct. 458, 46 L. Ed. 449 \(1902\)](#) (money used with, but title in name of the agent taken without, the assent of the principal); [Hunter v. Hunter, 216 Ark. 237, 224 S.W.2d 804 \(1949\)](#).

- In a dissolution proceeding, a wife was entitled to sole ownership of a house which had been transferred to her and her husband by her aunt, where a resulting trust arose as a consequence of the facts that she had provided the only monetary consideration for the acquisition, and that her husband breached an agreement to act on her behalf in transferring the title solely to her. [Bullard v. Bullard, 380 So. 2d 1090 \(Fla. Dist. Ct. App. 3d Dist. 1980\)](#).

- In order to claim the benefit of a resulting trust it is sufficient if the claimant is obligated to the grantee, pursuant to a promise made before title passes, to make payments to the grantee which will enable the grantee to pay the remainder of the purchase price; in such a case, the grantee is considered to have made a loan of credit to one who promises to, and actually does, provide the funds to pay the remainder of the purchase price. [Ray v. Norris, 78 N.C. App. 379, 337 S.E.2d 137 \(1985\)](#).

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§ 161. Joint purchases or tenancies

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The creation of a resulting trust is not a means to avoid the law with regard to joint tenancies with right of survivorship.[FN1] Joint purchasers of property cannot intend to simultaneously create both a tenancy in common and a purchase-money resulting trust, as the two cannot co-exist.[FN2]

[FN1] [In re Estate of Nichols, 856 S.W.2d 397 \(Tenn. 1993\).](#)

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[FN2] [Burt v. Skrzyniarz, 272 Ga. 35, 526 S.E.2d 848 \(2000\).](#)

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§ 162. Agreement relating to judicial, foreclosure, partition, or similar sale, or redemption therefrom

West's Key Number Digest

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[Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285](#)

A resulting trust may exist in connection with an agreement to bid in or purchase for a person having an interest in or lien on property sold at a judicial, partition, or similar sale,[\[FN1\]](#) or in connection with an agreement to redeem and hold property for the owner.[\[FN2\]](#)

[\[FN1\] Loften v. Witboard, 92 Ill. 461, 1879 WL 8548 \(1879\); Butler v. Carpenter, 163 Mo. 597, 63 S.W. 823 \(1901\).](#)

- A resulting trust in the plaintiff's favor grew out of an oral agreement between the plaintiff and two others that the plaintiff would receive a one-third interest in land purchased at a tax sale, where the evidence indicated that valuable consideration resulted from the plaintiff's obligation to pay a portion of the purchase money and share equally in the maintenance of the property, and that the plaintiff did pay for taxes, insurance, improvements, and other costs, as well as part of the purchase price. [Criss v. Bitzegaio, 420 N.E.2d 1221 \(Ind. 1981\).](#)

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[\[FN2\] Delkin v. McDuffie, 134 Ga. 517, 68 S.E. 93 \(1910\).](#)

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Forms

Complaint, petition, or declaration—To establish resulting trust pro tanto in real property—Part of consideration paid by plaintiff—Title taken in name of defendant. [Am. Jur. Pleading and Practice Forms, Trusts, § 52](#)

Where a transfer of property is made to one person, and only a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made in such proportion as the part paid by him or her bears to the total purchase price,[\[FN1\]](#) unless he or she manifests an intention that no resulting trust should arise or that a resulting trust to that extent should not arise.[\[FN2\]](#) Stated somewhat differently, the rule is that where one person pays part of the purchase price and title is taken in another's name, the payor cannot secure a greater interest in the property by way of a resulting trust than the proportion of the amount he or she paid bears to the total purchase price.[\[FN3\]](#)

A pro tanto resulting trust is created in the same manner as any other resulting trust.[\[FN4\]](#) In this regard, where less than the full amount of the purchase price is paid at the time of purchase, the party seeking imposition of the trust must have furnished that portion which has been paid, and must have incurred an absolute obligation to pay the remainder as part of the original transaction of purchase at or before the time of conveyance.[\[FN5\]](#)

In some instances, the view has been taken that where property is conveyed to one person on a part consideration furnished by another, and the purchaser gives back to the seller a mortgage for the balance of the purchase money, there is no resulting trust in favor of the person furnishing the part consideration.[\[FN6\]](#)

Observation: If, as part of the purchase price, a note is given by the grantee at the time the deed is passed, and the resulting trust claimant thereafter makes payments on the note, a resulting trust arises only if at the time the note was given there was an understanding that the claimant would pay it.[\[FN7\]](#)

[\[FN1\]](#) [Lloyds Bank California v. Wells Fargo Bank](#), 187 Cal. App. 3d 1038, 232 Cal. Rptr. 339 (1st Dist. 1986); [Jahnigen v. Smith](#), 143 Md. App. 547, 795 A.2d 234 (2002), cert. denied, 369 Md. 660, 802 A.2d 439 (2002); [Estate of Kling](#), 736 S.W.2d 65 (Mo. Ct. App. E.D. 1987).

- There may be a resulting trust of a partial interest in property; in order for a partial resulting trust to arise, both parties must have contributed toward the purchase of the property. [Leeks v. Leeks](#), 570 A.2d 271 (D.C. 1989).

- Payment for part of the consideration carries with it a proportional interest in the property and the party taking title to the whole becomes the trustee for the other party pro tanto. [Towerhouse Condominium, Inc. v. Millman](#), 475 So. 2d 674 (Fla. 1985).

- A pro tanto resulting trust allows one who has advanced only part of the funds to recover up to the amount of his payment; if a pro tanto resulting trust is found, then a trust arises in favor of the one making part payment commensurate with his interest. [Ray v. Norris](#), 78 N.C. App. 379, 337 S.E.2d 137 (1985).

- Equity devises the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, if, for different reasons, it is titled in the name of another.

[McDowell v. South Carolina Dept. of Social Services, 296 S.C. 89, 370 S.E.2d 878 \(Ct. App. 1987\).](#)

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[FN2] [Jahnigen v. Smith, 143 Md. App. 547, 795 A.2d 234 \(2002\)](#), cert. denied, [369 Md. 660, 802 A.2d 439 \(2002\)](#).

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[FN3] [Martin v. Kehl, 145 Cal. App. 3d 228, 193 Cal. Rptr. 312 \(2d Dist. 1983\)](#).

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[FN4] [Ray v. Norris, 78 N.C. App. 379, 337 S.E.2d 137 \(1985\)](#).

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[FN5] [Ray v. Norris, 78 N.C. App. 379, 337 S.E.2d 137 \(1985\)](#).

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[FN6] [Staton v. Moody, 1952 OK 455, 208 Okla. 372, 256 P.2d 409 \(1952\)](#).

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[FN7] [Duncan v. Rayfield, 698 S.W.2d 876 \(Mo. Ct. App. S.D. 1985\)](#).

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§ 164. Necessity that payment be for specified part of or interest in property

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A trust will result in favor of one paying a part of the purchase money for property conveyed to another, where the sum contributed is for some special fractional interest or for a particular estate or interest therein.[\[FN1\]](#) Under this view, any contribution for a distinct interest is sufficient so long as it constitutes a definite portion of the entire consideration to be paid and is not merely a general contribution.[\[FN2\]](#)

[\[FN1\]](#) [Byers v. Doheny, 105 Cal. App. 484, 287 P. 988 \(3d Dist. 1930\)](#); [Ellis v. Williams, 312 S.W.2d 97 \(Mo. 1958\)](#); [Leary v. Corvin, 181 N.Y. 222, 73 N.E. 984 \(1905\)](#).

[\[FN2\]](#) [Cassity v. Cassity, 240 S.W. 486 \(Mo. Ct. App. 1922\)](#); [Rhodes v. Raxter, 242 N.C. 206, 87 S.E.2d 265 \(1955\)](#).

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§ 165. Full performance of trust; accomplishment of trust purpose

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 63.9

In some jurisdictions, a resulting trust may arise where an express trust is fully performed without exhausting the trust estate.^[FN1] As phrased by the Restatement, where the owner of property makes a donative transfer and manifests an intention that the transferee is to hold the property in trust but the trust is or will be fully performed without exhausting or fully utilizing the trust estate, the transferee holds the trust estate or the appropriate portion or interest therein on resulting trust for the transferor or the transferor's successors in interest.^[FN2] In this regard, there is a resulting trust as to a part of property transferred to a trustee by will or deed without a consideration, where the trust or purpose thereof has been accomplished^[FN3] or may be accomplished without use or appropriation of the part of the property in question.^[FN4]

^[FN1] [In re Washburn & Roberts, Inc., 795 F.2d 870 \(9th Cir. 1986\)](#) (interpreting Washington law); [Watson Truck & Supply Co., Inc. v. Males, 111 N.M. 57, 801 P.2d 639 \(1990\)](#).

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^[FN2] [Restatement Third, Trusts § 8](#).

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^[FN3] [Easum v. Bohon, 180 Ky. 451, 202 S.W. 901 \(1918\)](#).

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^[FN4] [Moses v. Moses, 140 N.J. Eq. 575, 53 A.2d 805, 173 A.L.R. 273 \(Ct. Err. & App. 1947\)](#).

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§ 166. Conveyance without consideration

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When there is nothing in the deeds from which an intention to create a trust can be ascertained, the law should not imply such an intention from the fact that the conveyance is without monetary consideration.[\[FN1\]](#) However, a resulting trust can arise in certain real estate contexts or where legal title to property is transferred by gift or devise, with an apparent intent that the donee or devisee is to hold legal title as a trustee in order for the beneficiary of the trust to enjoy the beneficial interest in that property.[\[FN2\]](#)

Practice guide: Parol evidence is inadmissible to prove an absence of consideration and that the conveyance was intended not to be for the benefit of the grantee, at least where the document of conveyance or transfer recites or mentions consideration, although the consideration recited is merely nominal.[\[FN3\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Under Kansas law, the presence of a resulting trust depends upon an agreement to hold property for the person paying the consideration and lack of fraudulent intent. West's [K.S.A. 58-2405](#), [58-2408](#). [In re Harrison](#), [430 B.R. 679 \(Bankr. D. Kan. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Hoheimer v. Hoheimer, 30 S.W.3d 176 \(Ky. 2000\)](#).

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[\[FN2\] Herman ex rel. Herman v. Herman, 136 Idaho 781, 41 P.3d 209 \(2002\)](#).

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[\[FN3\] Mills v. Mills, 112 So. 2d 298 \(Fla. Dist. Ct. App. 2d Dist. 1959\)](#).

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§ 167. Consideration given for improvements to another's property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [69](#)

The general rule that consideration given by one for property conveyed to another gives rise to a resulting trust for the person who has paid the consideration, absent evidence of a contrary intent by the person furnishing the consideration, does not apply to money paid by one for improvements in another's property.[\[FN1\]](#) If the improvement paid for by the first party comes after the second party has obtained a deed, there is no resulting trust presumed for the first person; the price of the land has already been paid for by the second party and the first party is merely adding to the value of realty which is owned by the second in fee simple absolute.[\[FN2\]](#)

[\[FN1\] Gitto v. Gitto, 239 Mont. 47, 778 P.2d 906 \(1989\).](#)

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[\[FN2\] Gitto v. Gitto, 239 Mont. 47, 778 P.2d 906 \(1989\).](#)

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1. In General

a. Nature, Bases, Effects, and Factors Affecting Trust

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§ 168. Generally

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A "constructive trust" is an implied trust[[FN1](#)] arising by operation of law[[FN2](#)] to satisfy the demands of justice[[FN3](#)] or to prevent a failure of justice.[[FN4](#)]

A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest thereto.[[FN5](#)]

A constructive trust arises when equity so demands;[[FN6](#)] it is an equitable remedy imposed by the courts.[[FN7](#)] In other words, a constructive trust arises to service equitable needs.[[FN8](#)] A constructive trust is one of equity's most powerful fraud-rectifying devices[[FN9](#)] and is appropriately imposed to avoid or prevent the unjust enrichment of a party,[[FN10](#)] which arises when a party receives a benefit the retention of which is unjust to another party[[FN11](#)] and whereby one unfairly holding a property interest may be compelled to convey that interest to whom it justly belongs.[[FN12](#)] The object of a constructive trust is to restore to a rightful owner property wrongfully withheld by a defendant.[[FN13](#)]

A constructive trust may not be imposed unless relief at law would be inadequate.[[FN14](#)] Also, although a constructive trust may be used in variety of situations,[[FN15](#)] the doctrine of constructive trust does not allow a court to disregard existing legal rights merely to fashion a result that it deems fairer than that created by the parties.[[FN16](#)] "Unfairness" is not reason enough to impose a constructive trust.[[FN17](#)]

Practice Guide: A constructive trust is not, in itself, construed as a lien on or as affecting title to property; it does not exist so as to effect the property held by the wrongdoer until it is declared by a court as a means of affording relief.[[FN18](#)]

CUMULATIVE SUPPLEMENT

Cases:

In New York, a constructive trust is a remedy, not a cause of action, and is to be imposed only in the absence of an adequate remedy at law. [Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372 \(S.D. N.Y. 2010\)](#).

A "constructive trust" is a judicial construct imposed to remediate an inequity to a beneficiary. [In re Magna Entertainment Corp., 438 B.R. 380 \(Bankr. D. Del. 2010\)](#).

A claim for the imposition of a constructive trust is not an independent cause of action. [Morrison v. Morrison, 284 Ga. 112, 663 S.E.2d 714 \(2008\)](#).

A constructive trust is a remedy created by a court in equity to prevent unjust enrichment; equity will not allow one with a legal interest in a piece of property a windfall recovery when the beneficial interest should flow to another. [Troutman v. Troutman, 297 Ga. App. 62, 676 S.E.2d 787 \(2009\)](#).

Constructive trust is available as a remedy where there is standard fraud, e.g., misrepresentation or reliance, or where there is a breach of duty arising out of a confidential or fiduciary relationship. [Zoeller v. East Chicago Second Century, Inc., 904 N.E.2d 213 \(Ind. 2009\)](#).

The concept of constructive trust does not stand on its own as a substantive claim, but exists solely as an equitable remedy, available to divest an individual who has been unjustly enriched of property that he or she ought not, in equity and good conscience, hold and enjoy. [Tupper v. Roan, 349 Or. 211, 243 P.3d 50 \(2010\)](#).

A constructive trust may arise where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. [Restatement of Restitution § 160. Rawlings v. Rawlings, 2010 UT 52, 240 P.3d 754 \(Utah 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [J.W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 836 S.W.2d 853, 20 U.C.C. Rep. Serv. 2d 542 \(1992\);](#) [Petition of Shiflett, 200 W. Va. 813, 490 S.E.2d 902 \(1997\)](#).

[FN2] [J.W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 836 S.W.2d 853, 20 U.C.C. Rep. Serv. 2d 542 \(1992\);](#) [Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024, 11 U.C.C. Rep. Serv. 2d 251 \(Miss. 1990\);](#) [Schultz v. Schultz, 637 S.W.2d 1, 34 U.C.C. Rep. Serv. 1350 \(Mo. 1982\);](#) [Gottsch v. Bank of Stapleton, 235 Neb. 816, 458 N.W.2d 443, 14 U.C.C. Rep. Serv. 2d 150 \(1990\);](#) [SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 \(1990\);](#) [Ashton v. Ashton, 733 P.2d 147 \(Utah 1987\);](#) [Greenspan v. Osheroff, 232 Va. 388, 351 S.E.2d 28 \(1986\);](#) [Petition of Shiflett, 200 W. Va. 813, 490 S.E.2d 902 \(1997\)](#).

- A "constructive trust" is not an actual trust but is simply a legal construct. [Orud v. Groth, 652 N.W.2d 447 \(Iowa 2002\)](#).

[FN3] [J.W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 836 S.W.2d 853, 20 U.C.C. Rep. Serv. 2d 542 \(1992\);](#) [Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024, 11 U.C.C. Rep. Serv. 2d 251 \(Miss. 1990\);](#) [Mattera v. Mattera, 125 A.D.2d 555, 509 N.Y.S.2d 831 \(2d Dep't 1986\);](#) [Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\);](#) [Burlison v. McCrary, 753 S.W.2d 349 \(Tenn. 1988\)](#).

[FN4] [Faulknier v. Shafer, 264 Va. 210, 563 S.E.2d 755 \(2002\)](#).

[FN5] [Gottsch v. Bank of Stapleton, 235 Neb. 816, 458 N.W.2d 443, 14 U.C.C. Rep. Serv. 2d 150 \(1990\);](#) [Lester v. Zimmer, 147 A.D.2d 340, 542 N.Y.S.2d 855 \(3d Dep't 1989\);](#) [Lollis v. Lollis, 291 S.C. 525, 354](#)

[S.E.2d 559 \(1987\)](#); [Sulzer v. Diedrich, 263 Wis. 2d 496, 2003 WI 90, 664 N.W.2d 641 \(2003\)](#).

- A constructive trust may be imposed when so required by equity and good conscience. [In re Estate of Muhammad, 165 Ill. App. 3d 890, 117 Ill. Dec. 444, 520 N.E.2d 795 \(1st Dist. 1987\)](#).

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[FN6] [Petition of Shiflett, 200 W. Va. 813, 490 S.E.2d 902 \(1997\)](#); [Rossel v. Miller, 2001 WY 60, 26 P.3d 1025 \(Wyo. 2001\)](#).

- A constructive trust is an operation of equity. [Allred v. Fairchild, 785 So. 2d 1064 \(Miss. 2001\)](#).

- An action to impose a constructive trust sounds in equity. [Anderson v. Bellino, 265 Neb. 577, 658 N.W.2d 645 \(2003\)](#).

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[FN7] [In re Seneca Oil Co., 906 F.2d 1445, 106 A.L.R. Fed. 795 \(10th Cir. 1990\)](#); [Radenhausen v. Doss, 819 So. 2d 616 \(Ala. 2001\)](#); [Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 216 Cal. App. 3d 1139, 265 Cal. Rptr. 330 \(4th Dist. 1989\)](#), reh'g denied and opinion modified on other grounds, (Jan. 18, 1990); [People v. 21020 Colorado Highway 74, Jefferson County, 791 P.2d 1189 \(Colo. Ct. App. 1989\)](#); [Wing v. White, 14 Conn. App. 642, 542 A.2d 748 \(1988\)](#); [Ross v. Hacienda Co-op., Inc., 686 A.2d 186 \(D.C. 1996\)](#); [In re Liquidation of Sec. Cas. Co., 127 Ill. 2d 434, 130 Ill. Dec. 446, 537 N.E.2d 775 \(1989\)](#); [In re Marriage of Jones, 451 N.W.2d 25 \(Iowa Ct. App. 1989\)](#); [Schultz v. Schultz, 637 S.W.2d 1, 34 U.C.C. Rep. Serv. 1350 \(Mo. 1982\)](#); [Trustees of Clients' Sec. Fund of Bar of New Jersey v. Yucht, 243 N.J. Super. 97, 578 A.2d 900 \(Ch. Div. 1989\)](#); [Mattera v. Mattera, 125 A.D.2d 555, 509 N.Y.S.2d 831 \(2d Dep't 1986\)](#); [Heinzman v. Howard, 366 N.W.2d 500 \(S.D. 1985\)](#); [Tripp Village Joint Venture v. MBank Lincoln Centre, N.A., 774 S.W.2d 746 \(Tex. App. Dallas 1989\)](#), writ denied, (Dec. 13, 1989); [Goodman v. Goodman, 128 Wash. 2d 366, 907 P.2d 290 \(1995\)](#).

- A constructive trust is a flexible equitable remedy whose enforcement is subject to the equitable discretion of a trial court. [Wendell Corp. Trustee v. Thurston, 239 Conn. 109, 680 A.2d 1314 \(1996\)](#).

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[FN8] [Carter v. Four Seasons Funding Corp., 351 Ark. 637, 97 S.W.3d 387 \(2003\)](#).

- A "constructive trust" is the formula through which the conscience of equity finds expression. [Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 \(1999\)](#).

- A constructive trust is raised by equity. [Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\)](#).

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[FN9] [Martin v. Kehl, 145 Cal. App. 3d 228, 193 Cal. Rptr. 312 \(2d Dist. 1983\)](#); [Villarreal v. Glacken, 63 Md. App. 114, 492 A.2d 328 \(1985\)](#); [Gottsch v. Bank of Stapleton, 235 Neb. 816, 458 N.W.2d 443, 14 U.C.C. Rep. Serv. 2d 150 \(1990\)](#); [Delk v. Markel American Ins. Co., 2003 OK 88, 81 P.3d 629 \(Okla. 2003\)](#).

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[FN10] [Beasley v. Mellon Financial Services Corp., 569 So. 2d 389 \(Ala. 1990\)](#); [Carter v. Four Seasons Funding Corp., 351 Ark. 637, 97 S.W.3d 387 \(2003\)](#); [In re Estate of Peck, 497 N.W.2d 889 \(Iowa 1993\)](#); [DeMyers v. DeMyers, 742 So. 2d 1157 \(Miss. 1999\)](#); [Clark v. Bowler, 623 A.2d 27 \(R.I. 1993\)](#); [Meyer v. Kneip, 457 N.W.2d 463 \(S.D. 1990\)](#); [Cooper v. Cooper, 249 Va. 511, 457 S.E.2d 88 \(1995\)](#); [Sulzer v. Diedrich, 263 Wis. 2d 496, 2003 WI 90, 664 N.W.2d 641 \(2003\)](#).

- A constructive trust is not an independent cause of action but a device by which property may be recovered if person holding property was unjustly enriched. [St. Paul Mercury Ins. Co. v. Meeks, 270 Ga. 136, 508 S.E.2d 646 \(1998\)](#).

- A "constructive trust," like its counterpart remedies "at law," is a remedy for unjust enrichment. [Washington Suburban Sanitary Com'n v. Utilities, Inc. of Maryland, 365 Md. 1, 775 A.2d 1178 \(2001\)](#).

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[FN11] [Sulzer v. Diedrich, 263 Wis. 2d 496, 2003 WI 90, 664 N.W.2d 641 \(2003\)](#).

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[FN12] [Kite v. Kite](#), 444 So. 2d 863 (Ala. Civ. App. 1983); [Pioneer Real Estate, Inc. v. Larese](#), 762 P.2d 720 (Colo. Ct. App. 1988); [DeMello v. Home Escrow, Inc.](#), 4 Haw. App. 41, 659 P.2d 759 (1983); [Klein v. Shaw](#), 109 Idaho 237, 706 P.2d 1348 (Ct. App. 1985); [Mannix v. Donnewald](#), 187 Ill. App. 3d 472, 135 Ill. Dec. 94, 543 N.E.2d 329 (1st Dist. 1989); [DeMyers v. DeMyers](#), 742 So. 2d 1157 (Miss. 1999); [Loberg v. Alford](#), 372 N.W.2d 912 (N.D. 1985).

- A constructive trust is an equitable remedy applied for the purposes of restitution. [In re Estate of Peck](#), 497 N.W.2d 889 (Iowa 1993).

[FN13] [Fix v. Fix](#), 847 S.W.2d 762 (Mo. 1993).

[FN14] [Interstate Truck Leasing, Inc. v. Bender](#), 608 So. 2d 716 (Ala. 1992) (overruled on other grounds by, [State Farm Fire and Cas. Co. v. Owen](#), 729 So. 2d 834 (Ala. 1998)).

[FN15] [Krueger v. Rodenberg](#), 190 Wis. 2d 367, 527 N.W.2d 381 (Ct. App. 1994).

[FN16] [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002).

[FN17] [Matter of Estate of Ingram](#), 1994 OK 51, 874 P.2d 1282 (Okla. 1994).

[FN18] [Sullivan v. Rooney](#), 404 Mass. 160, 533 N.E.2d 1372 (1989).

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AMJUR TRUSTS § 168

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Trusts

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IV. Trusts by Operation of Law

C. Constructive Trusts

1. In General

a. Nature, Bases, Effects, and Factors Affecting Trust

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 169. Types of conduct or circumstances as basis for imposing trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 93 to 94.5

A constructive trust may be created by equity as the result of fraud[FN1] —either actual[FN2] or constructive.[FN3]

Constructive trusts may also be imposed based on other conduct or circumstances, including bad faith,[FN4] duress,[FN5] coercion,[FN6] undue influence,[FN7] abuse of confidence or violation of a fiduciary relationship,[FN8] mistake in the transaction that originates the problem,[FN9] by commission of a wrong,[FN10] or by any form of unconscionable conduct,[FN11] artifice,[FN12] concealment,[FN13] misrepresentation,[FN14] questionable means,[FN15] or other misconduct[FN16] by which one, in any way, either obtained or holds the legal right to property which he or she ought not hold and enjoy.[FN17]

While fraud, misrepresentation, bad faith, or overreaching generally provide a rationale for the imposition of constructive trusts, constructive trusts are also imposed in broader circumstances.[FN18] A constructive trust may also be imposed in cases where a title holder innocently obtained title to property but would be unjustly enriched if he or she were allowed to retain the title.[FN19] A constructive trust arises with respect to property originally acquired without fraud, where it is against equity that the title should be retained by the one who holds it,[FN20] such as where a transfer was made by the transferor in anticipation of death.[FN21]

Observation: A constructive trust, even in the absence of the trustee's participation in fraud, is available on the basis of the principle that one who accepts the product of fraud, knowing the means by which the fraud-caused product was achieved, is liable to the defrauded party, although the recipient of the product did not personally participate in the fraud.[FN22]

CUMULATIVE SUPPLEMENT

Cases:

Absence of any transfer of warehouse based on promises that purchaser failed to keep, or showing of unjust enrichment on part of purchaser, precluded claim under Florida law, that constructive trust should be imposed on warehouse, in hands of purchaser, for benefit of vendor. [Padron Warehouse Corp. v. Realty Associates Fund III, L.P.](#), 377 F. Supp. 2d 1259 (S.D. Fla. 2005).

Under Maryland law, a constructive trust may be imposed only where property has been acquired by fraud, misrepresentation, or other improper method and it is necessary to prevent the unjust enrichment of the title holder. [In re Magna Entertainment Corp.](#), 438 B.R. 380 (Bankr. D. Del. 2010).

Constructive trusts are used to prevent a party from being unjustly enriched through abuse of confidence, duress, or fraud. [Bank of America v. Bank of Salem](#), 48 So. 3d 155 (Fla. Dist. Ct. App. 1st Dist. 2010).

A duty to convey property, such as is necessary for imposition of constructive trust, may arise if property was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property. [Morfin v. Estate of Martinez](#), 831 N.E.2d 791 (Ind. Ct. App. 2005).

[END OF SUPPLEMENT]

[FN1] [In re General Coffee Corp.](#), 828 F.2d 699, 96 A.L.R. Fed. 85 (11th Cir. 1987); [Rausch v. Devine](#), 80 P.3d 733 (Alaska 2003); [People v. 21020 Colorado Highway 74, Jefferson County](#), 791 P.2d 1189 (Colo. Ct. App. 1989); [Williams v. Department of Health and Rehabilitative Services](#), 522 So. 2d 951 (Fla. Dist. Ct. App. 1st Dist. 1988); [Georgia Dist. Council of Assemblies of God, Inc. v. Atlanta Faith Memorial Church, Inc.](#), 267 Ga. 59, 472 S.E.2d 66 (1996); [Benson v. Richardson](#), 537 N.W.2d 748 (Iowa 1995); [Rakhman v. Zusstone](#), 957 S.W.2d 241 (Ky. 1997); [Baizley v. Baizley](#), 1999 ME 115, 734 A.2d 1117 (Me. 1999); [Collins v. Guggenheim](#), 417 Mass. 615, 631 N.E.2d 1016 (1994); [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [In re Estate of McDermott](#), 2002 MT 164, 310 Mont. 435, 51 P.3d 486 (2002); [Anderson v. Bellino](#), 265 Neb. 577, 658 N.W.2d 645 (2003); [The Cadle Co. v. Bourgeois](#), 149 N.H. 410, 821 A.2d 1001 (2003); [Sara Lee Corp. v. Carter](#), 351 N.C. 27, 519 S.E.2d 308 (1999); [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002); [Roberson v. Davis](#), 397 Pa. Super. 292, 580 A.2d 39 (1990); [Curato v. Brain](#), 715 A.2d 631 (R.I. 1998); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990); [Faulknier v. Shafer](#), 264 Va. 210, 563 S.E.2d 755 (2002).

- Fraud or wrongdoing resulting in imposing a constructive trust, generally, see [§ 179](#).

[FN2] [Suttles v. Vogel](#), 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 (1988); [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [Sara Lee Corp. v. Carter](#), 351 N.C. 27, 519 S.E.2d 308 (1999); [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002); [Easterling v. Ferris](#), 1982 OK 99, 651 P.2d 677 (Okla. 1982); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990); [Greenspan v. Osheroff](#), 232 Va. 388, 351 S.E.2d 28 (1986).

[FN3] [Edwards v. Edwards](#), 311 Ark. 339, 843 S.W.2d 846 (1992); [Suttles v. Vogel](#), 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 (1988); [Benson v. Richardson](#), 537 N.W.2d 748 (Iowa 1995); [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

- A finding of a fiduciary, or confidential relationship is not always a prerequisite to a finding of constructive fraud for the purpose of imposing a constructive trust. [Fix v. Fix](#), 847 S.W.2d 762 (Mo. 1993).

[FN4] [Griffin v. Armana](#), 687 So. 2d 1188 (Miss. 1996); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

[FN5] [Rausch v. Devine](#), 80 P.3d 733 (Alaska 2003); [People v. 21020 Colorado Highway 74, Jefferson County](#), 791 P.2d 1189 (Colo. Ct. App. 1989); [Suttles v. Vogel](#), 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 (1988); [Baizley v. Baizley](#), 1999 ME 115, 734 A.2d 1117 (Me. 1999); [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [The Cadle Co. v. Bourgeois](#), 149 N.H. 410, 821 A.2d 1001 (2003); [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002); [Roberson v. Davis](#), 397 Pa. Super. 292, 580 A.2d 39 (1990); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

[FN6] [Suttles v. Vogel](#), 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 (1988).

[FN7] [Rausch v. Devine](#), 80 P.3d 733 (Alaska 2003); [Williams v. Department of Health and Rehabilitative Services](#), 522 So. 2d 951 (Fla. Dist. Ct. App. 1st Dist. 1988); [Baizley v. Baizley](#), 1999 ME 115, 734 A.2d 1117 (Me. 1999); [In re Estate of McDermott](#), 2002 MT 164, 310 Mont. 435, 51 P.3d 486 (2002); [The Cadle Co. v. Bourgeois](#), 149 N.H. 410, 821 A.2d 1001 (2003); [Roberson v. Davis](#), 397 Pa. Super. 292, 580 A.2d 39 (1990); [Meyer v. Kneip](#), 457 N.W.2d 463 (S.D. 1990); [Gifford v. Dennis](#), 230 Va. 193, 335 S.E.2d 371 (1985).

[FN8] [Rausch v. Devine](#), 80 P.3d 733 (Alaska 2003); [Edwards v. Edwards](#), 311 Ark. 339, 843 S.W.2d 846 (1992); [People v. 21020 Colorado Highway 74, Jefferson County](#), 791 P.2d 1189 (Colo. Ct. App. 1989); [In re Liquidation of Sec. Cas. Co.](#), 127 Ill. 2d 434, 130 Ill. Dec. 446, 537 N.E.2d 775 (1989); [Collins v. Guggenheim](#), 417 Mass. 615, 631 N.E.2d 1016 (1994); [Thomas v. Fales](#), 577 A.2d 1181 (Me. 1990); [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [Anderson v. Bellino](#), 265 Neb. 577, 658 N.W.2d 645 (2003); [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002); [Roberson v. Davis](#), 397 Pa. Super. 292, 580 A.2d 39 (1990); [Curato v. Brain](#), 715 A.2d 631 (R.I. 1998); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

- Confidential or fiduciary relationship resulting in imposition of a constructive trust, see [§ 177](#).

- A "constructive trust" is a method by which a court exercises its equitable powers to remedy the situation where a party has been wrongfully deprived of some right, title, benefit, or interest in property as a result of a violation of the confidence or faith reposed in another. [Fix v. Fix](#), 847 S.W.2d 762 (Mo. 1993)

- A constructive trust may arise from constructive fraud such as appropriation of property by fiduciaries or others in confidential relationships. [In re Estate of Peck](#), 497 N.W.2d 889 (Iowa 1993).

- A "constructive trust" ordinarily arises out of the existence of fraud, actual or presumptive, usually involving the violation of a confidential or fiduciary relation. [Sara Lee Corp. v. Carter](#), 351 N.C. 27, 519 S.E.2d 308 (1999).

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[FN9] [Williams v. Department of Health and Rehabilitative Services](#), 522 So. 2d 951 (Fla. Dist. Ct. App. 1st Dist. 1988); [Suttles v. Vogel](#), 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 (1988); [Corey v. Corey](#), 2002 ME 132, 803 A.2d 1014 (Me. 2002); [Massicotte v. Matuzas](#), 143 N.H. 711, 738 A.2d 1260 (1999); [Roberson v. Davis](#), 397 Pa. Super. 292, 580 A.2d 39 (1990); [Sulzer v. Diedrich](#), 263 Wis. 2d 496, 2003 WI 90, 664 N.W.2d 641 (2003).

- A constructive trust is imposed by law because the person holding title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. [Welder v. Welder](#), 794 S.W.2d 420 (Tex. App. Corpus Christi 1990).

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[FN10] [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [In re Marriage of Malquist](#), 234 Mont. 419, 763 P.2d 1116 (1988); [Easterling v. Ferris](#), 1982 OK 99, 651 P.2d 677 (Okla. 1982); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

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[FN11] [Beasley v. Mellon Financial Services Corp.](#), 569 So. 2d 389 (Ala. 1990); [Edwards v. Edwards](#), 311 Ark. 339, 843 S.W.2d 846 (1992); [DeMello v. Home Escrow, Inc.](#), 4 Haw. App. 41, 659 P.2d 759 (1983); [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

- A constructive trust may be imposed to restore beneficial ownership when legal title has been lost due to illegal, deceptive, or unconscionable behavior by the titleholder. [Bjorkman v. Protestant Episcopal Church in U.S. of America of Diocese of Lexington](#), 759 S.W.2d 583 (Ky. 1988).

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[FN12] [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002); [Easterling v. Ferris](#), 1982 OK 99, 651 P.2d 677 (Okla. 1982); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

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[FN13] [Union National Life Ins. Co. v. Crosby](#), 870 So. 2d 1175 (Miss. 2004); [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002); [Easterling v. Ferris](#), 1982 OK 99, 651 P.2d 677 (Okla. 1982); [Halbersberg v. Berry](#), 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990).

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[\[FN14\] Anderson v. Bellino, 265 Neb. 577, 658 N.W.2d 645 \(2003\).](#)

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[\[FN15\] Union National Life Ins. Co. v. Crosby, 870 So. 2d 1175 \(Miss. 2004\); Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\); Easterling v. Ferris, 1982 OK 99, 651 P.2d 677 \(Okla. 1982\); Halbersberg v. Berry, 302 S.C. 97, 394 S.E.2d 7 \(Ct. App. 1990\).](#)

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[\[FN16\] Collins v. Guggenheim, 417 Mass. 615, 631 N.E.2d 1016 \(1994\).](#)

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[\[FN17\] Small v. Badenhop, 67 Haw. 626, 701 P.2d 647 \(1985\); Union National Life Ins. Co. v. Crosby, 870 So. 2d 1175 \(Miss. 2004\); Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\); SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 \(1990\).](#)

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[\[FN18\] Benson v. Richardson, 537 N.W.2d 748 \(Iowa 1995\); Baker v. Leonard, 120 Wash. 2d 538, 843 P.2d 1050 \(1993\).](#)

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[\[FN19\] In re Estate of McDermott, 2002 MT 164, 310 Mont. 435, 51 P.3d 486 \(2002\).](#)

- A constructive trust can apply to a case where it would be morally wrong for the property holder to retain funds. [Spiess v. Schumm, 448 N.W.2d 106 \(Minn. Ct. App. 1989\).](#)

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[\[FN20\] Brothers v. Fuller, 607 So. 2d 135 \(Ala. 1992\); Georgia Dist. Council of Assemblies of God, Inc. v. Atlanta Faith Memorial Church, Inc., 267 Ga. 59, 472 S.E.2d 66 \(1996\); Kaplon v. Chase, 690 S.W.2d 761 \(Ky. Ct. App. 1985\).](#)

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[\[FN21\] Rausch v. Devine, 80 P.3d 733 \(Alaska 2003\).](#)

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[\[FN22\] Gottsch v. Bank of Stapleton, 235 Neb. 816, 458 N.W.2d 443, 14 U.C.C. Rep. Serv. 2d 150 \(1990\).](#)

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AMJUR TRUSTS § 169

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Trusts

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IV. Trusts by Operation of Law
C. Constructive Trusts
1. In General
a. Nature, Bases, Effects, and Factors Affecting Trust

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§ 170. Effect of spousal relationship between parties

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [103\(3\)](#)

Before a trial court may properly impress a constructive trust on the property titled in the name of one spouse for the benefit of the other, the spouse seeking the trust must by a preponderance of the evidence: (1) overcome the presumption that there was a gift between the parties; and (2) show that he or she is otherwise entitled to the declaration of a constructive trust.[\[FN1\]](#)

Constructive trusts are appropriate remedies where one spouse has transferred property in fraud of the rights of another.[\[FN2\]](#)

In divorce proceedings, legal title is not dispositive and equitable interests may prevail, and thus a third party's legal title cannot be permitted to extinguish all or part of a spouse's equitable interests, which may be enforced by imposing on the titleholder a constructive trust.[\[FN3\]](#)

The imposition of a constructive trust on a surviving spouse's statutory allowances and share is impermissible only when the surviving spouse's unconscionable conduct neither caused an invalid marriage nor otherwise caused or helped to cause the statutory benefits arising from that marriage to vest.[\[FN4\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Under Oklahoma law, pursuant to constructive trust imposed by state court on individual retirement account (IRA) held by widow in the sum of \$94,698.70, representing equitable interest held by former wife of widow's deceased husband in husband's retirement benefits at the moment he received them, prior to his death, former wife was equitable owner of such funds from and after date on which retirement benefits were distributed to husband, and widow, while owner of record of IRA, held bare legal title to funds in trust for former wife. [In re Pardee, 433 B.R. 377 \(Bankr. N.D. Okla. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Greeson v. Greeson, 178 W. Va. 189, 358 S.E.2d 448 \(1987\).](#)

- Confidential relationship sufficient to support a constructive trust as particularly likely to exist where there is a family relationship, see [§ 177](#).

- Evidence was insufficient to support the imposition of a constructive trust on a one-half interest in a home and business which a wife transferred to a husband shortly after marriage. [Tedesco v. Tedesco, 111 Md. App. 648, 683 A.2d 1133 \(1996\)](#).

[\[FN2\] Smithberg v. Illinois Mun. Retirement Fund, 192 Ill. 2d 291, 248 Ill. Dec. 909, 735 N.E.2d 560 \(2000\).](#)

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[\[FN3\] Gore v. Gore, 638 A.2d 672 \(D.C. 1994\).](#)

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[\[FN4\] Riddell v. Edwards, 76 P.3d 847 \(Alaska 2003\).](#)

- A wife's estate was not entitled to the imposition of a constructive trust on her husband's assets, despite the claim that the husband was unjustly enriched by the wife's death prior to the entry of a dissolution decree; the husband's continued ownership of marital assets was not "unjust," but rather, it was what the law had provided to him. [In re Estate of Peck, 497 N.W.2d 889 \(Iowa 1993\).](#)

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§ 171. Trustee; interests, duties, and liabilities

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [91](#), [92](#)

By the imposition of a constructive trust, the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest.[\[FN1\]](#) If a constructive trust is imposed, a defendant must ultimately reconvey the property to the plaintiff.[\[FN2\]](#) More specifically, where one party has acquired a legal right to property to which another has the better right, a court will convert that person into the trustee of the true owner, and subject him or her to the equitable duty to convey legal title to the person to

whom the court has determined that duty is owed.[FN3] Additionally, along with being compelled to convey or assign the corpus of a trust property, a constructive trustee may be compelled to account for and pay over rents, profits, issues, and income which the constructive trustee has actually received or, in general, which he or she might by the exercise of reasonable care and diligence have received.[FN4] However, it has also been held that a constructive trust is not a trust in which the trustee is to have duties of administration lasting for a period of time, but rather a passive, temporary trust in which the trustee's sole duty is to transfer the title and possession of the property to the beneficiary.[FN5]

Observation: A person against whom a constructive trust is imposed is not a "trustee," and, thus, is not estopped from asserting a claim of complete personal ownership; the person is not a real trustee.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Under Texas law, constructive trust subjects person holding legal title to property to equitable duty to convey it to another, on ground that his acquisition or retention of property is wrongful. [In re Reichmann Petroleum Corp.](#), 434 B.R. 790 (Bankr. S.D. Tex. 2010).

[END OF SUPPLEMENT]

[FN1] [Estate of Farrell](#), 461 N.W.2d 360 (Iowa Ct. App. 1990); [DeLee v. Roggen](#), 111 Nev. 1453, 907 P.2d 168 (1995).

- Where the court sitting in equity imposes a constructive trust, it constitutes an individual as trustee of the legal title for the property subject to such trust. [In re Estate of Lienemann](#), 222 Neb. 169, 382 N.W.2d 595 (1986).

[FN2] [Klein v. Shaw](#), 109 Idaho 237, 706 P.2d 1348 (Ct. App. 1985); [Schroeder v. Buchholz](#), 2001 ND 36, 622 N.W.2d 202 (N.D. 2001).

[FN3] [Hogg v. Walker](#), 622 A.2d 648 (Del. 1993); [Chalupa v. Chalupa](#), 254 Neb. 59, 574 N.W.2d 509 (1998); [In re Estate of Duran](#), 2003-NMSC-008, 133 N.M. 553, 66 P.3d 326 (2003); [Buchanan v. Buchanan](#), 266 Va. 207, 585 S.E.2d 533 (2003).

[FN4] [Anderson v. Bellino](#), 265 Neb. 577, 658 N.W.2d 645 (2003).

[FN5] [Simpson v. Dailey](#), 496 A.2d 126 (R.I. 1985).

[FN6] [Brasel v. Brasel](#), 313 Ark. 337, 854 S.W.2d 346 (1993).

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§ 172. Time when trust becomes effective

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [91](#), [92](#)

A constructive trust relates back to the date of the wrong.^[FN1] That is, such a trust takes effect at the time of the wrongful act,^[FN2] as, for example, the wrongful holding^[FN3] or acquisition of property.^[FN4] As sometimes stated, the duty of a trustee to transfer property relates back to the date of the wrongful act that created the constructive trust.^[FN5]

However, it has also been held that a constructive trust is created when a court declares the party in possession of wrongfully acquired property the constructive trustee of that property because it would be inequitable for that party to retain possession of it.^[FN6] The notion that title is ultimately passed when a constructive trust is declared is accurate both factually and theoretically.^[FN7]

^[FN1] [Pioneer Annuity Life Ins. Co. by Childers v. National Equity Life Ins. Co., 159 Ariz. 148, 765 P.2d 550 \(Ct. App. Div. 1 1988\).](#)

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^[FN2] [Andre v. Morrow, 106 Idaho 455, 680 P.2d 1355 \(1984\).](#)

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^[FN3] [Klein v. Shaw, 109 Idaho 237, 706 P.2d 1348 \(Ct. App. 1985\).](#)

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^[FN4] [Meyer v. Kneip, 457 N.W.2d 463 \(S.D. 1990\).](#)

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[\[FN5\] Hogg v. Walker, 622 A.2d 648 \(Del. 1993\).](#)

- Duties of a trustee of a constructive trust, generally, see [§ 171](#).

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[\[FN6\] Smithberg v. Illinois Mun. Retirement Fund, 192 Ill. 2d 291, 248 Ill. Dec. 909, 735 N.E.2d 560 \(2000\).](#)

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[\[FN7\] Schroeder v. Buchholz, 2001 ND 36, 622 N.W.2d 202 \(N.D. 2001\).](#)

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§ 173. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [91](#), [92](#)

No rigid requirements exist for imposing a constructive trust.[\[FN1\]](#) A constructive trust is an equitable remedy requiring a court to consider all relevant circumstances.[\[FN2\]](#) It has been said that a constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled.[\[FN3\]](#) The requisite elements are not rigid, but are flexible considerations for the court to apply in determining whether to impose a constructive trust, so that the absence of one of these elements will not defeat the establishment of a constructive trust.[\[FN4\]](#)

Of the elements necessary to impose a constructive trust, it has been said that the principal requirement is that unjust enrichment would result from continual possession of the property by one who holds it.[\[FN5\]](#)

A constructive trust may be imposed when the elements necessary for constructive fraud are not present.[\[FN6\]](#)

Practice guide: The burden of proving a constructive trust is on the person or persons asserting it[\[FN7\]](#) by clear and convincing evidence[\[FN8\]](#) leaving no doubt with respect to the necessary facts.[\[FN9\]](#) The mere preponderance of the evidence is insufficient to prove a constructive trust; the evidence must lead to but one conclusion and leave no reasonable doubt as to the existence of the trust.[\[FN10\]](#)

CUMULATIVE SUPPLEMENT

Cases:

To impose a constructive trust, under Florida law, there must be (1) a promise, express or implied, (2) transfer of the property and reliance thereon, (3) a confidential relationship, and (4) unjust enrichment. [Padron Warehouse Corp. v. Realty Associates Fund III, L.P., 377 F. Supp. 2d 1259 \(S.D. Fla. 2005\).](#)

A constructive trust may be imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. [Morfin v. Estate of Martinez, 831 N.E.2d 791 \(Ind. Ct. App. 2005\).](#)

[END OF SUPPLEMENT]

[\[FN1\] In re Estate of Cass, 143 N.H. 57, 719 A.2d 595 \(1998\).](#)

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[\[FN2\] Starleper v. Hamilton, 106 Md. App. 632, 666 A.2d 867 \(1995\).](#)

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[\[FN3\] Taylor v. Fields, 178 Cal. App. 3d 653, 224 Cal. Rptr. 186 \(2d Dist. 1986\).](#)

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[\[FN4\] Mendel v. Hewitt, 161 A.D.2d 849, 555 N.Y.S.2d 899 \(3d Dep't 1990\).](#)

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[\[FN5\] Bush v. Taylor, 893 F.2d 962 \(8th Cir. 1990\), on reh'g, 912 F.2d 989 \(8th Cir. 1990\); Lines v. Bank of America Nat. Trust & Sav. Ass'n, 743 F. Supp. 176 \(S.D. N.Y. 1990\); Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\); Maria v. Freitas, 73 Haw. 266, 832 P.2d 259 \(1992\); Mendel v. Hewitt, 161 A.D.2d 849, 555 N.Y.S.2d 899 \(3d Dep't 1990\); Paulson v. Meinke, 389 N.W.2d 798 \(N.D. 1986\); Watts v. Watts, 137 Wis. 2d 506, 405 N.W.2d 303 \(1987\).](#)

- A constructive trust is appropriate where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. [Baizley v. Baizley, 1999 ME 115, 734 A.2d 1117 \(Me. 1999\).](#)

- One of the prerequisites for the imposition of the constructive trust is the potential for unjust enrichment if equitable relief is not granted. [Carroll v. Daigle, 123 N.H. 495, 463 A.2d 885 \(1983\).](#)

- A constructive trust may be imposed only when the putative trustee holds property which rightfully belongs to another and is thereby unjustly enriched. [McDonald v. McDonald, 57 Or. App. 6, 643 P.2d 1280 \(1982\).](#)

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[\[FN6\] Scollard v. Scollard, 329 Ark. 83, 947 S.W.2d 345 \(1997\).](#)

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[\[FN7\] Kammer Asphalt Paving Co., Inc. v. East China Tp. Schools, 443 Mich. 176, 504 N.W.2d 635, 85 Ed. Law Rep. 257 \(1993\); Brtek v. Cihal, 245 Neb. 756, 515 N.W.2d 628 \(1994\); Univ. Hosps. of Cleveland, Inc. v.](#)

[Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\)](#); [Matter of Estate of Ingram, 1994 OK 51, 874 P.2d 1282 \(Okla. 1994\)](#); [Clark v. Bowler, 623 A.2d 27 \(R.I. 1993\)](#).

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[FN8] [Nichols v. Wray, 325 Ark. 326, 925 S.W.2d 785 \(1996\)](#); [Maria v. Freitas, 73 Haw. 266, 832 P.2d 259 \(1992\)](#); [Benson v. Richardson, 537 N.W.2d 748 \(Iowa 1995\)](#); [Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So. 2d 200 \(Miss. 1998\)](#); [ProData Computer Services, Inc. v. Ponec, 256 Neb. 228, 590 N.W.2d 176 \(1999\)](#); [Hopwood v. Pickett, 145 N.H. 207, 761 A.2d 436 \(2000\)](#); [Schroeder v. Buchholz, 2001 ND 36, 622 N.W.2d 202 \(N.D. 2001\)](#); [Univ. Hosps. of Cleveland, Inc. v. Lynch, 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 \(2002\)](#); [Clark v. Bowler, 623 A.2d 27 \(R.I. 1993\)](#); [Crestar Bank v. Williams, 250 Va. 198, 462 S.E.2d 333 \(1995\)](#); [Pitzer v. Union Bank of California, 141 Wash. 2d 539, 9 P.3d 805 \(2000\)](#).

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[FN9] [Nichols v. Wray, 325 Ark. 326, 925 S.W.2d 785 \(1996\)](#); [Johnson v. Kenneth D. Collins Agency, Inc., 263 Mont. 137, 865 P.2d 312 \(1993\)](#) (evidence practically free from doubt).

- To establish a constructive trust, the evidence must be unquestionable in character; it must be so clear, cogent, and convincing as to exclude every reasonable doubt in the mind of a trial court. [Fix v. Fix, 847 S.W.2d 762 \(Mo. 1993\)](#)

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[FN10] [Matter of Estate of Ingram, 1994 OK 51, 874 P.2d 1282 \(Okla. 1994\)](#).

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§ 174. Intent

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 91, 92

A constructive trust is not designed to effectuate the presumed intent of a party, but to redress a wrong.[FN1] Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property[FN2] and accordingly, the imposition of a constructive trust does not require the intent[FN3] — either actual[FN4] or express,[FN5] presumed,[FN6] supposed,[FN7] or implied—of the parties, to create a trust.[FN8] In fact, the lack of any intention to fulfill an agreement is strong evidence that a constructive trust would be appropriate.[FN9]

[FN1] [Hogg v. Walker](#), 622 A.2d 648 (Del. 1993).

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[FN2] [Scollard v. Scollard](#), 329 Ark. 83, 947 S.W.2d 345 (1997); [Corey v. Corey](#), 2002 ME 132, 803 A.2d 1014 (Me. 2002).

- A constructive trust is not based on the intention of the parties. [Univ. Hosps. of Cleveland, Inc. v. Lynch](#), 96 Ohio St. 3d 118, 2002-Ohio-3748, 772 N.E.2d 105 (2002).

- Constructive trusts arise independently of the intention of the parties. [Faulknier v. Shafer](#), 264 Va. 210, 563 S.E.2d 755 (2002).

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[FN3] [Suttles v. Vogel](#), 160 Ill. App. 3d 464, 112 Ill. Dec. 149, 513 N.E.2d 563 (4th Dist. 1987), judgment rev'd on other grounds, 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 (1988); [Cox v. Waudby](#), 433 N.W.2d 716 (Iowa 1988); [Schultz v. Schultz](#), 637 S.W.2d 1, 34 U.C.C. Rep. Serv. 1350 (Mo. 1982); [In re Marriage of Malquist](#), 234 Mont. 419, 763 P.2d 1116 (1988); [Simpson v. Dailey](#), 496 A.2d 126 (R.I. 1985); [SSI Medical Services, Inc. v. Cox](#), 301 S.C. 493, 392 S.E.2d 789 (1990); [Mattes v. Olearain](#), 759 P.2d 1177 (Utah Ct. App. 1988); [Gifford v. Dennis](#), 230 Va. 193, 335 S.E.2d 371 (1985).

- A constructive trust bears much the same relation to an express trust that a quasi-contractual obligation bears to a contract; an obligation is imposed not because of the intention of the parties but to prevent unjust enrichment. [Beasley v. Mellon Financial Services Corp.](#), 569 So. 2d 389 (Ala. 1990).

- The controlling factor is not the specific intent between the parties to create a constructive trust, but whether imposition of a constructive trust is necessary to prevent unjust enrichment. [Roberson v. Davis](#), 397 Pa. Super. 292, 580 A.2d 39 (1990).

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[FN4] [Schultz v. Schultz](#), 637 S.W.2d 1, 34 U.C.C. Rep. Serv. 1350 (Mo. 1982); [In re Marriage of Malquist](#), 234 Mont. 419, 763 P.2d 1116 (1988); [Coney v. Coney](#), 207 N.J. Super. 63, 503 A.2d 912 (Ch. Div. 1985); [SSI Medical Services, Inc. v. Cox](#), 301 S.C. 493, 392 S.E.2d 789 (1990).

- A constructive trust arises by implication from the relationship and conduct of the parties. [Allgood v. Allgood](#), 473 So. 2d 416 (Miss. 1985).

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[FN5] [Suttles v. Vogel](#), 160 Ill. App. 3d 464, 112 Ill. Dec. 149, 513 N.E.2d 563 (4th Dist. 1987), judgment rev'd on other grounds, 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 (1988); [Mattes v. Olearain](#), 759 P.2d 1177 (Utah Ct. App. 1988).

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[FN6] [Adams v. Jankouskas](#), 452 A.2d 148 (Del. 1982); [Schultz v. Schultz](#), 637 S.W.2d 1, 34 U.C.C. Rep. Serv. 1350 (Mo. 1982); [In re Marriage of Malquist](#), 234 Mont. 419, 763 P.2d 1116 (1988); [Burlson v. McCrary](#), 753

[S.W.2d 349 \(Tenn. 1988\).](#)

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[\[FN7\] SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 \(1990\).](#)

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[\[FN8\] Suttles v. Vogel, 160 Ill. App. 3d 464, 112 Ill. Dec. 149, 513 N.E.2d 563 \(4th Dist. 1987\), judgment rev'd on other grounds, 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 \(1988\); Schultz v. Schultz, 637 S.W.2d 1, 34 U.C.C. Rep. Serv. 1350 \(Mo. 1982\); Mattes v. Olearain, 759 P.2d 1177 \(Utah Ct. App. 1988\).](#)

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[\[FN9\] Allred v. Fairchild, 785 So. 2d 1064 \(Miss. 2001\).](#)

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§ 175. Specific, identifiable res and possession thereof

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [91](#), [92](#)

Real property may be the subject of a constructive trust,[\[FN1\]](#) as may personal property.[\[FN2\]](#) Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust.[\[FN3\]](#)

Two essential elements of a constructive trust action have been said to be the existence of identifiable property to serve as the res[\[FN4\]](#) upon which a trust can be imposed and possession of that res or its product by

the person who is to be charged as the constructive trustee.[FN5] In this regard, a constructive trust is a remedy that relates to specific property or the identifiable proceeds of specific property.[FN6] A constructive trust requires money or property identified as belonging in good conscience to the plaintiff which can clearly be traced to particular funds or property in the defendant's possession.[FN7]

Practice guide: The successful proponent of a constructive trust bears the initial burden of tracing the trust's assets; however, to the extent that defendants have commingled their own property with the trust's assets and sought recovery of such property, the defendants have the burden of proving how much of the commingled funds they own personally.[FN8]

There is some authority for the view that a court cannot judicially impose by means of constructive trust a lien on homestead property without strict compliance with the requirements of state statutes and constitutions; in this regard the court, to judicially impose a lien upon homestead property in the form of a constructive trust based merely upon an oral promise to comply with the statutory requirements, would totally undermine the homestead protection provided by the homestead provisions of state statutes and constitutional provisions.[FN9]

[FN1] [Manker v. Manker, 263 Neb. 944, 644 N.W.2d 522 \(2002\)](#); [Nedrich v. Jones, 245 Va. 465, 429 S.E.2d 201 \(1993\)](#).

[FN2] [Nedrich v. Jones, 245 Va. 465, 429 S.E.2d 201 \(1993\)](#).

[FN3] [Anderson v. Bellino, 265 Neb. 577, 658 N.W.2d 645 \(2003\)](#).

[FN4] [People ex rel. Hartigan v. Candy Club, 149 Ill. App. 3d 498, 103 Ill. Dec. 167, 501 N.E.2d 188 \(1st Dist. 1986\)](#).

- It is essential to the establishment of a constructive trust that an identifiable res is present. [U.S. Through Farmers Home Admin. v. Redland, 695 P.2d 1031 \(Wyo. 1985\)](#).

[FN5] [People ex rel. Hartigan v. Candy Club, 149 Ill. App. 3d 498, 103 Ill. Dec. 167, 501 N.E.2d 188 \(1st Dist. 1986\)](#).

- There must exist particular property upon which the constructive trust may be imposed. [Rollins by Rollins v. Metropolitan Life Ins. Co., 912 F.2d 911 \(7th Cir. 1990\)](#).

- Where only a money judgment is sought and there is no specific property identified as belonging to plaintiffs, it is improper to impose a constructive trust. [Bugge v. Far West Federal Bank, S.B., 100 Or. App. 133, 785 P.2d 1058 \(1990\)](#).

[FN6] [Hogg v. Walker, 622 A.2d 648 \(Del. 1993\)](#); [Trend Setter Villas of Deer Creek v. Villas on the Green, Inc., 569 So. 2d 766 \(Fla. Dist. Ct. App. 4th Dist. 1990\)](#).

- A prerequisite to the imposition of a constructive trust is the identification of a specific property belonging to the claimant. [Burch & Cracchiolo, P.A. v. Pugliani, 144 Ariz. 281, 697 P.2d 674 \(1985\)](#).

[FN7] [Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937 \(2003\)](#); [Trend Setter Villas of Deer Creek v. Villas on the Green, Inc., 569 So. 2d 766 \(Fla. Dist. Ct. App. 4th Dist. 1990\)](#).

- In order to compose a constructive trust as a matter of law, specific funds must be ascertained as traceable to fraudulent or wrongful conduct. [Baltimore & Ohio R. Co. v. Equitable Bank, N.A., 77 Md. App. 320, 550 A.2d 407 \(1988\)](#).

- A constructive trust is an equitable remedy that may be imposed to redress unjust enrichment caused by a

party's wrongful conduct; the proceeds of the alleged wrongful conduct must exist as an identifiable fund traceable to that conduct, such that it can become the res of the proposed trust. [Eychaner v. Gross, 202 Ill. 2d 228, 269 Ill. Dec. 80, 779 N.E.2d 1115, 172 Ed. Law Rep. 363 \(2002\)](#).

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[FN8] [Tauber v. Com. ex rel. Kilgore, 263 Va. 520, 562 S.E.2d 118 \(2002\)](#), cert. denied, [537 U.S. 1002, 123 S. Ct. 496, 154 L. Ed. 2d 398 \(2002\)](#).

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[FN9] [Matter of Daves, 770 F.2d 1363 \(5th Cir. 1985\)](#).

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§ 176. Confidential or fiduciary relationship

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [102](#)

Although the view is sometimes followed that the existence of a fiduciary relationship is not necessary for the imposition of a constructive trust,[FN1] in some jurisdictions, in order to establish a constructive trust, a confidential[FN2] or fiduciary relationship between the parties must be established.[FN3] However, the mere existence of a confidential or fiduciary relationship between the parties is insufficient to warrant the imposition of a constructive trust.[FN4]

It has been said that a confidential relationship for purposes of the imposition of a constructive trust is generally synonymous with a fiduciary relationship.[FN5] Even so, there is authority for the view that a confidential relation may exist although there is no fiduciary duty[FN6] or express fiduciary relationship,[FN7] and although there is no promise for the benefit of another.[FN8] A confidential relationship exists, for purposes of a constructive trust, whenever trust and confidence is reposed by one person in the integrity and fidelity of another.[FN9] Such a relationship is usually found when the person in whom confidence is reposed had either control or influence over at least a portion of the transferor's property, finances, or business affairs.[FN10] However, trust among businessmen will not establish a fiduciary relationship.[FN11]

Observation: There are no hard-and-fast rules about when a confidential relationship will be found; the court may consider a variety of factors, including the reliance of one party upon the other, the relationship of the parties prior to the incidents complained of, the relative business capacities or lack thereof between the parties, and the readiness of one party to follow the other's guidance in complicated transactions.[FN12]

The relationship of the parties may be moral, social, domestic,[FN13] or merely personal[FN14] in order to constitute the requisite confidential relationship.[FN15]

A "confidential," or "fiduciary" relationship exists in the context of the law of constructive trusts when a special confidence is reposed in one party and there is a resulting domination of or influence on other party,[FN16] or a great disparity of position and influence between the parties to the relation.[FN17] However, there is also authority for the view that there is no requirement that a defendant must occupy a position of dominance over a plaintiff in order to establish a confidential relationship for purposes of imposing a constructive trust.[FN18]

Practice guide: A party claiming a constructive trust must prove the existence of a fiduciary relationship[FN19] or confidential relationship by a preponderance of the evidence; then the burden shifts to the benefitted party to show the fairness of the transaction.[FN20] A confidential relationship is a fact to be established in the same manner and by the same kind of evidence as any other fact is proven.[FN21] Whether a confidential or fiduciary relationship exists to meet the requirement in establishing a constructive trust is a factual issue which can be resolved only upon a plenary trial.[FN22]

Debt is not a trust and involves no fiduciary relationship or duty between the parties involved.[FN23]

[FN1] [In re Seneca Oil Co., 906 F.2d 1445, 106 A.L.R. Fed. 795 \(10th Cir. 1990\)](#) (interpreting Oklahoma law).
- Conduct in breach of confidence or violation of a fiduciary relationship giving rise to a constructive trust, generally, see §§ [181](#) to [186](#).

[FN2] [Lines v. Bank of America Nat. Trust & Sav. Ass'n, 743 F. Supp. 176 \(S.D. N.Y. 1990\)](#); [Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\)](#); [Mendel v. Hewitt, 161 A.D.2d 849, 555 N.Y.S.2d 899 \(3d Dep't 1990\)](#); [Paulson v. Meinke, 389 N.W.2d 798 \(N.D. 1986\)](#).

- To state a claim on the theory of constructive trust the complaint must state, inter alia, facts sufficient to show abuse of a confidential relationship or some other form of unconscionable conduct. [Watts v. Watts, 137 Wis. 2d 506, 405 N.W.2d 303 \(1987\)](#).

[FN3] [Rollins by Rollins v. Metropolitan Life Ins. Co., 912 F.2d 911 \(7th Cir. 1990\)](#); [Lines v. Bank of America Nat. Trust & Sav. Ass'n, 743 F. Supp. 176 \(S.D. N.Y. 1990\)](#); [Mendel v. Hewitt, 161 A.D.2d 849, 555 N.Y.S.2d 899 \(3d Dep't 1990\)](#); [Cielo Vista Bank v. McCutcheon, 719 S.W.2d 658 \(Tex. App. El Paso 1986\)](#), writ refused n.r.e., (Feb. 11, 1987).

[FN4] [J.W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 836 S.W.2d 853, 20 U.C.C. Rep. Serv. 2d 542 \(1992\)](#); [Tarpoff v. Karandjeff, 51 Ill. App. 2d 454, 201 N.E.2d 549 \(5th Dist. 1964\)](#); [McNeil v.](#)

[Hester, 753 So. 2d 1057 \(Miss. 2000\).](#)

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[FN5] [Kay v. Kay, 763 S.W.2d 712 \(Mo. Ct. App. E.D. 1989\).](#)

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[FN6] [Paulson v. Meinke, 389 N.W.2d 798 \(N.D. 1986\).](#)

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[FN7] [Sunflower Farms, Inc. v. McLean, 233 Miss. 72, 101 So. 2d 355 \(1958\); McDonald v. Miller, 73 N.D. 474, 16 N.W.2d 270, 156 A.L.R. 1328 \(1944\); Jackson v. Timmins, 733 S.W.2d 355 \(Tex. App. Texarkana 1987\).](#)

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[FN8] [Sunflower Farms, Inc. v. McLean, 233 Miss. 72, 101 So. 2d 355 \(1958\); McDonald v. Miller, 73 N.D. 474, 16 N.W.2d 270, 156 A.L.R. 1328 \(1944\).](#)

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[FN9] [Spagnolia v. Monasky, 2003 ND 65, 660 N.W.2d 223 \(N.D. 2003\).](#)

- A confidential relationship, in this regard, exists when there is a special trust allowing one side to influence the other. [Kay v. Kay, 763 S.W.2d 712 \(Mo. Ct. App. E.D. 1989\).](#)

- A confidential or fiduciary relationship exists when one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. [SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 \(1990\).](#)

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[FN10] [Kay v. Kay, 763 S.W.2d 712 \(Mo. Ct. App. E.D. 1989\).](#)

- For purposes of an equity action to impose a constructive trust, the judgment creditors' financial advisor, who was also their accountant and attorney, had a fiduciary relationship with them. [Hanigan v. Trumble, 252 Neb. 376, 562 N.W.2d 526 \(1997\).](#)

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[FN11] [Cielo Vista Bank v. McCutcheon, 719 S.W.2d 658 \(Tex. App. El Paso 1986\), writ refused n.r.e., \(Feb. 11, 1987\).](#)

- Evidence that the purchaser of a property in which a barbershop was located had rented a chair in the barbershop, had a business relationship with the barbershop operator over a prolonged period of time, and was largely responsible for the day-to-day operation of the shop, did not demonstrate a confidential relationship between the parties as would support the imposition of a constructive trust in favor of the operator, especially given the operator's testimony that he retained control over the real estate transaction and that the purchaser was never authorized to act on his behalf. [Parello v. Maio, 268 Ga. 852, 494 S.E.2d 331 \(1998\).](#)

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[FN12] [Simpson v. Dailey, 496 A.2d 126 \(R.I. 1985\).](#)

- The following factors are to be considered by a court in making its determination as to whether a confidential relationship exists warranting imposition of a constructive trust on the proceeds from the sale of property: the degree of kinship of the parties; the disparity in age; health and mental condition; education and business experience between the parties; and the degree of trust placed in the dominant party. [In re Estate of Kaminski, 200 Ill. App. 3d 309, 146 Ill. Dec. 179, 558 N.E.2d 142 \(1st Dist. 1990\).](#)

- Certificates of deposit, held jointly by the testator and co-executors of a testator's estate, were not subject to a constructive trust for the benefit of the devisees, as there was no proof of a confidential relationship or of any conduct influential in testator having placed the certificates of deposit in the names of the executors; the testator managed his own financial affairs until his death, the executors never advised the testator in any financial affairs and never handled any business affairs for him, and the executors did not know they were the joint owners of certificates of deposit or that they were named as co-executors of estate until after the testator's death. [McNeil v.](#)

[Hester, 753 So. 2d 1057 \(Miss. 2000\).](#)

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[FN13] [Taino v. Sanchez, 147 Ill. App. 3d 871, 101 Ill. Dec. 247, 498 N.E.2d 571 \(1st Dist. 1986\); Allred v. Fairchild, 785 So. 2d 1064 \(Miss. 2001\); Jackson v. Timmins, 733 S.W.2d 355 \(Tex. App. Texarkana 1987\).](#)

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[FN14] [Taino v. Sanchez, 147 Ill. App. 3d 871, 101 Ill. Dec. 247, 498 N.E.2d 571 \(1st Dist. 1986\); Allred v. Fairchild, 785 So. 2d 1064 \(Miss. 2001\); Weaver v. Stewart, 825 S.W.2d 183 \(Tex. App. Houston 14th Dist. 1992\), writ denied, \(June 10, 1992\).](#)

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[FN15] [Consolidated Bearing and Supply Co., Inc. v. First Nat. Bank at Lubbock, 720 S.W.2d 647 \(Tex. App. Amarillo 1986\).](#)

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[FN16] [Fix v. Fix, 847 S.W.2d 762 \(Mo. 1993\).](#)

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[FN17] [Sylvester v. Benjamin, 2001 ME 48, 767 A.2d 297 \(Me. 2001\).](#)

- The proof of a confidential relationship requires a showing that one party has reposed trust and confidence in another who thereby gains an influence and superiority over the other. [Taino v. Sanchez, 147 Ill. App. 3d 871, 101 Ill. Dec. 247, 498 N.E.2d 571 \(1st Dist. 1986\).](#)

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[FN18] [Simpson v. Dailey, 496 A.2d 126 \(R.I. 1985\).](#)

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[FN19] [Connor v. Sullivan, 826 A.2d 953 \(R.I. 2003\).](#)

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[FN20] [Estate of Campbell, 1997 ME 212, 704 A.2d 329 \(Me. 1997\).](#)

- Although a constructive trust must be proven by clear and convincing evidence, whether a relationship of personal confidence exists need be proven only by a preponderance of the evidence. [Schroeder v. Buchholz, 2001 ND 36, 622 N.W.2d 202 \(N.D. 2001\).](#)

- The terms "confidence" and "confidential relationship" are construed liberally in favor of a confider and against a confidant for the purposes of raising a constructive trust. [Alvarez v. Coleman, 642 So. 2d 361 \(Miss. 1994\).](#)

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[FN21] [Schroeder v. Buchholz, 2001 ND 36, 622 N.W.2d 202 \(N.D. 2001\).](#)

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[FN22] [Mendel v. Hewitt, 161 A.D.2d 849, 555 N.Y.S.2d 899 \(3d Dep't 1990\).](#)

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[FN23] [State v. Larson, 605 N.W.2d 706 \(Minn. 2000\).](#)

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Trusts

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IV. Trusts by Operation of Law
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§ 177. Confidential or fiduciary relationship—Family relationship

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [103\(2\)](#)

A confidential relationship sufficient to support a constructive trust is particularly likely to exist where there is a family relationship.^[FN1] More specifically, a confidential relationship exists, as required for imposition of constructive trust, if there is evidence of a family relationship in which one person justifiably believes that the other will act in his or her interest.^[FN2] The relationship between a parent and child will support the requirement of a confidential relationship.^[FN3] Custodial parents who receive child support funds are trustees who hold the funds for the use and benefit of the child; the custodial parent, as a constructive trustee, may not contract away the benefits of the trust.^[FN4]

However, in some jurisdictions a familial relationship is not intrinsically one of confidence for purposes of establishing a constructive trust.^[FN5] The existence of a family relationship is not decisive on the issue whether a confidential relationship requisite to the imposition of a constructive trust has been established.^[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Siblings of son to whom father conveyed parcel of real property, so that father could qualify for social security benefits to care for his sick wife, were not entitled to impose a constructive trust on the property, even if father intended the property to go to all of his children and son promised to hold the parcel in trust for his siblings; there was no evidence son made such a promise with the intention of later breaking it so he could retain sole ownership of the property, and son farmed the property for 18 years and paid substantially more than his siblings to maintain the property and pay the debt on it, such that giving siblings an interest in the property would be inequitable. [Troutman v. Troutman, 297 Ga. App. 62, 676 S.E.2d 787 \(2009\)](#).

[END OF SUPPLEMENT]

[FN1] [Schroeder v. Buchholz, 2001 ND 36, 622 N.W.2d 202 \(N.D. 2001\).](#)

- Effect of spousal relationship, generally, see [§ 170](#).

- A family relationship may be considered as evidence of the confidential relationship. [Kay v. Kay, 763 S.W.2d 712 \(Mo. Ct. App. E.D. 1989\).](#)

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[FN2] [In re Estate of Cass, 143 N.H. 57, 719 A.2d 595 \(1998\).](#)

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[FN3] [Djamoos v. Djamoos, 153 A.D.2d 871, 545 N.Y.S.2d 596 \(2d Dep't 1989\).](#)

- A finding that a confidential relationship existed between mother and son, and that the son abused the relationship, warranting the imposition of a constructive trust on property transferred to him, was supported by evidence that the mother was 85 years old and in failing health when she transferred the property to the son, that the son was responsible for the mother's finances, that the son initiated a plan to transfer property, that the son informed the mother that the property would stay in the family and be available to pay bills at the nursing home, and that the son did not inform his siblings of the transfer for several years and acted in a manner consistent with the fact that he was holding properties for the family. [Estate of Campbell, 1997 ME 212, 704 A.2d 329 \(Me. 1997\).](#)

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[FN4] [Nill v. Martin, 686 N.E.2d 116 \(Ind. 1997\).](#)

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[FN5] [McNeil v. Hester, 753 So. 2d 1057 \(Miss. 2000\).](#)

- For purposes of imposing a constructive trust, a family relationship, of itself, does not create a fiduciary relationship, although further facts may show one. [Simpson v. Dailey, 496 A.2d 126 \(R.I. 1985\).](#)

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[FN6] [Kay v. Kay, 763 S.W.2d 712 \(Mo. Ct. App. E.D. 1989\).](#)

- The existence of a family relationship without more is not sufficient to warrant imposition of a constructive trust. [Golleher v. Horton, 148 Ariz. 537, 715 P.2d 1225 \(Ct. App. Div. 1 1985\).](#)

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§ 178. Promise or agreement

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [91](#), [92](#)

While in some jurisdictions, for a constructive trust, there must be a promise,[\[FN1\]](#) either express or implied,[\[FN2\]](#) and a transfer made in reliance of that promise, and unjust enrichment,[\[FN3\]](#) generally speaking a constructive trust does not require any agreement between the parties[\[FN4\]](#) —either actual[\[FN5\]](#) or express,[\[FN6\]](#) or implied—to create a trust.[\[FN7\]](#) However, the existence of some agreement may serve as a factor in determining whether to impose a constructive trust.[\[FN8\]](#) A constructive trust will be raised where at the time the promise is made the grantee does not intend to perform it.[\[FN9\]](#)

[\[FN1\] Lines v. Bank of America Nat. Trust & Sav. Ass'n, 743 F. Supp. 176 \(S.D. N.Y. 1990\); Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\); Mendel v. Hewitt, 161 A.D.2d 849, 555 N.Y.S.2d 899 \(3d Dep't 1990\); Rossel v. Miller, 2001 WY 60, 26 P.3d 1025 \(Wyo. 2001\).](#)

[\[FN2\] Lines v. Bank of America Nat. Trust & Sav. Ass'n, 743 F. Supp. 176 \(S.D. N.Y. 1990\); Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\); Rossel v. Miller, 2001 WY 60, 26 P.3d 1025 \(Wyo. 2001\).](#)

- Where a promise, express or implied, is required to impose a constructive trust, in the context of confidential family relationships, mutual understanding does not always depend upon words expressly uttered, and silence in the presence of conditional assertions may constitute tacit consent and a promise to comply with the conditions so as to meet the requirement. [Djamoos v. Djamoos, 153 A.D.2d 871, 545 N.Y.S.2d 596 \(2d Dep't 1989\).](#)

[\[FN3\] Rossel v. Miller, 2001 WY 60, 26 P.3d 1025 \(Wyo. 2001\).](#)

- A court properly denied a live-in lover's claim for a constructive trust on property purchased by the partner, since: (1) the contention that the lover and partner had agreed to become joint venturers in the real estate was disproved by evidence that the partner had a history of investing in real estate, and that the lover did not earn enough to have funds available for real estate investments, whereas the partner had been the recipient of a significant insurance settlement and had a substantial amount of stock; and (2) the lover failed to prove the promise and transfer in reliance on the promise. [Barnes v. Byrnes, 153 A.D.2d 831, 545 N.Y.S.2d 342 \(2d Dep't 1989\).](#)

[\[FN4\] Suttles v. Vogel, 160 Ill. App. 3d 464, 112 Ill. Dec. 149, 513 N.E.2d 563 \(4th Dist. 1987\), judgment rev'd on other grounds, 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 \(1988\); Schultz v. Schultz, 637 S.W.2d 1, 34 U.C.C. Rep. Serv. 1350 \(Mo. 1982\); Paulson v. Meinke, 389 N.W.2d 798 \(N.D. 1986\).](#)

[\[FN5\] Schultz v. Schultz, 637 S.W.2d 1, 34 U.C.C. Rep. Serv. 1350 \(Mo. 1982\).](#)

[FN6] [Suttles v. Vogel](#), 160 Ill. App. 3d 464, 112 Ill. Dec. 149, 513 N.E.2d 563 (4th Dist. 1987), judgment rev'd on other grounds, [126 Ill. 2d 186](#), [127 Ill. Dec. 819](#), [533 N.E.2d 901](#) (1988); [Russell v. Douglas](#), [243 Miss. 497](#), [138 So. 2d 730](#) (1962); [Paulson v. Meinke](#), [389 N.W.2d 798](#) (N.D. 1986).

[FN7] [Suttles v. Vogel](#), 160 Ill. App. 3d 464, 112 Ill. Dec. 149, 513 N.E.2d 563 (4th Dist. 1987), judgment rev'd on other grounds, [126 Ill. 2d 186](#), [127 Ill. Dec. 819](#), [533 N.E.2d 901](#) (1988); [Schultz v. Schultz](#), [637 S.W.2d 1](#), [34 U.C.C. Rep. Serv. 1350](#) (Mo. 1982); [Paulson v. Meinke](#), [389 N.W.2d 798](#) (N.D. 1986).

[FN8] [Paulson v. Meinke](#), [389 N.W.2d 798](#) (N.D. 1986).

- Breach of contract as resulting in a constructive trust, see [§ 198](#).

[FN9] [Allred v. Fairchild](#), [785 So. 2d 1064](#) (Miss. 2001).

- An insured's estate, which was the secondary beneficiary of a life insurance policy, failed to establish, in a suit to determine the disposition of proceeds after the insured's death, that the insured's female friend, whom the insured named as a primary beneficiary, had falsely represented to the insured her intent to marry him, or that the insured later relied on this alleged promise, and thus the imposition of constructive trust was not warranted in favor of the estate. [Tatum v. Barrentine](#), [797 So. 2d 223](#) (Miss. 2001).

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§ 179. Fraud; wrongful or unconscionable conduct

West's Key Number Digest

Although some form of wrongdoing is generally required for the imposition of a constructive trust, wrongdoing is not always a necessary element.[\[FN1\]](#) A party seeking a constructive trust need not show affirmative wrongdoing;[\[FN2\]](#) nor is fraud[\[FN3\]](#) —at least not actual fraud[\[FN4\]](#) —or intentional misrepresentation required for a constructive trust to be imposed, in most instances.[\[FN5\]](#)

Even so, it has sometimes been stated that whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same.[\[FN6\]](#) In other words, in some jurisdictions, there must be some element of wrongdoing in order to impose a constructive trust.[\[FN7\]](#) Substantial overreaching[\[FN8\]](#) or unconscionable conduct may be a prerequisite to the imposition of a constructive trust.[\[FN9\]](#)

Where fraud is an essential element of a constructive trust,[\[FN10\]](#) the fraud generally may be either actual or constructive fraud.[\[FN11\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Complaint failed to state federal common law claim for imposition of constructive trust to avoid unjust enrichment; plaintiffs were not entitled to demutualization consideration, and consequently funds could not have been used to unjustly enrich plan resulting in the creation of constructive trust for plaintiffs' benefit. [Stewart v. National Educ. Ass'n, 404 F. Supp. 2d 122 \(D.D.C. 2005\)](#).

As a general rule, a mere promise of future conduct will not serve as a predicate for a claim of fraud sufficient to support the imposition of a constructive trust. [Bank of America v. Bank of Salem, 48 So. 3d 155 \(Fla. Dist. Ct. App. 1st Dist. 2010\)](#).

Bank's allegations that \$400,000 unsecured loan that it made to borrower who died shortly thereafter was contingent on borrower's use of the funds to acquire a condominium, and that borrower promised to provide a mortgage on the condominium after he acquired it, were insufficient to support the imposition of a constructive trust on \$400,000 of the proceeds from the sale of the condominium; bank failed to demonstrate that the loan was used, or even intended to be used, to purchase the condominium, and borrower's alleged promise to provide a mortgage could not serve as the predicate for a fraud claim sufficient to warrant a constructive trust. [Bank of America v. Bank of Salem, 48 So. 3d 155 \(Fla. Dist. Ct. App. 1st Dist. 2010\)](#).

Circumstances that may be deemed wrongful, as element for imposing a constructive trust as equitable remedy for unjust enrichment, include mistake, fraud, coercion, undue influence, duress, taking advantage of weakness, and violation of a duty imposed by a confidential or fiduciary relationship. [Tupper v. Roan, 349 Or. 211, 243 P.3d 50 \(2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Smithberg v. Illinois Mun. Retirement Fund, 192 Ill. 2d 291, 248 Ill. Dec. 909, 735 N.E.2d 560 \(2000\)](#).
- A constructive trust may be imposed upon the proceeds of a life insurance policy paid to a substituted beneficiary in derogation of the insured's contractual obligation to maintain insurance for the benefit of a designated person, even in the absence of any evidence of wrongdoing by the substituted beneficiary. [Starleper v. Hamilton, 106 Md. App. 632, 666 A.2d 867 \(1995\)](#).

[FN2] [Estate of Campbell, 1997 ME 212, 704 A.2d 329 \(Me. 1997\)](#).

- Ordinarily, it is not strictly necessary that the holder of the property have acquired it through some wrongful act. [Bush v. Taylor, 893 F.2d 962 \(8th Cir. 1990\)](#), on reh'g, [912 F.2d 989 \(8th Cir. 1990\)](#).

[FN3] [GHK Associates v. Mayer Group, Inc., 224 Cal. App. 3d 856, 274 Cal. Rptr. 168 \(2d Dist. 1990\)](#); [In re Estate of Muhammad, 165 Ill. App. 3d 890, 117 Ill. Dec. 444, 520 N.E.2d 795 \(1st Dist. 1987\)](#); [Russell v. Douglas, 243 Miss. 497, 138 So. 2d 730 \(1962\)](#).

- A fraudulent transfer on its own will not support the imposition of a constructive trust on the transferred property. [Hanigan v. Trumble, 252 Neb. 376, 562 N.W.2d 526 \(1997\)](#).

- While a constructive trust is usually invoked when property has been acquired by fraud, such a trust may also be imposed where it is against the principles of equity that the property be retained by a certain person even though the property was acquired without fraud. [Ferguson v. Owens, 9 Ohio St. 3d 223, 459 N.E.2d 1293 \(1984\)](#).

[FN4] [In re Seneca Oil Co., 906 F.2d 1445, 106 A.L.R. Fed. 795 \(10th Cir. 1990\)](#) (interpreting Oklahoma law); [Kaplon v. Chase, 690 S.W.2d 761 \(Ky. Ct. App. 1985\)](#); [Halbersberg v. Berry, 302 S.C. 97, 394 S.E.2d 7 \(Ct. App. 1990\)](#).

[FN5] [GHK Associates v. Mayer Group, Inc., 224 Cal. App. 3d 856, 274 Cal. Rptr. 168 \(2d Dist. 1990\)](#).

[FN6] [Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 120 S. Ct. 2180, 147 L. Ed. 2d 187 \(2000\)](#).

[FN7] [Wendell Corp. Trustee v. Thurston, 239 Conn. 109, 680 A.2d 1314 \(1996\)](#); [Suttles v. Vogel, 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 \(1988\)](#); [Baker v. Leonard, 120 Wash. 2d 538, 843 P.2d 1050 \(1993\)](#).

- A bank that obeyed a fiduciary's instruction to transfer funds from a fiduciary's general trust account in payment of the fiduciary's personal obligation to the bank without notice that the funds belonged to another did not act wrongfully and was not unjustly enriched by receiving the funds, and thus imposition of a constructive trust was not warranted. [Aetna Life and Cas. Co. v. Union Trust Co., 230 Conn. 779, 646 A.2d 799 \(1994\)](#).

[FN8] [In re Estate of Horrigan, 757 So. 2d 165 \(Miss. 1999\)](#).

[FN9] [Riddell v. Edwards, 76 P.3d 847 \(Alaska 2003\)](#); [Hendricks v. M.C.I., Inc., 152 Wis. 2d 363, 448 N.W.2d 289 \(Ct. App. 1989\)](#).

- The remedy of imposing a constructive trust upon proceeds of a brother's life insurance policy in favor of the sister, the alternate beneficiary, was an inappropriate remedy to keep the proceeds from the brother's former wife, the named beneficiary, where there was no evidence that the former wife acquired her right to the insurance proceeds by guile, deceit, or subterfuge. [Bolle v. Hume, 619 A.2d 1192 \(D.C. 1993\)](#).

[FN10] [Kopis v. Savage, 498 N.E.2d 1266 \(Ind. Ct. App. 4th Dist. 1986\)](#); [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 \(2002\)](#), cert. denied, [537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 \(2003\)](#); [In re Estate of Horrigan, 757 So. 2d 165 \(Miss. 1999\)](#); [Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 \(1999\)](#); [Halbersberg v. Berry, 302 S.C. 97, 394 S.E.2d 7 \(Ct. App. 1990\)](#); [Teve Holdings Ltd. v. Jackson, 763 S.W.2d 905 \(Tex. App. Houston 1st Dist. 1988\)](#).

- A constructive trust arises by operation of law to prevent what otherwise would result in a fraud. [Tauber v. Com. ex rel. Kilgore, 263 Va. 520, 562 S.E.2d 118 \(2002\)](#), cert. denied, [537 U.S. 1002, 123 S. Ct. 496, 154 L. Ed. 2d 398 \(2002\)](#).

- With respect to real property there must be some element of fraudulent conduct by the person in possession of the property in procuring a conveyance in order for a constructive trust to arise. [Curato v. Brain, 715 A.2d 631 \(R.I. 1998\)](#).

- Evidence that, during a fiduciary relationship arising from a son's having a general power of attorney over his father's affairs, the father deeded to the son real property worth approximately \$300,000, and that the son obtained from the father an automobile, \$100,000 in proceeds from certificates of deposit, and annuity proceeds of \$146,671.65, raised a presumption of fraud, shifting the burden to the son to present evidence to overcome the presumption, in an action by the other children seeking a constructive trust. [Napier v. Compton, 210 W. Va. 594, 558 S.E.2d 593 \(2001\)](#).

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[\[FN11\] Kopis v. Savage, 498 N.E.2d 1266 \(Ind. Ct. App. 4th Dist. 1986\)](#); [Fix v. Fix, 847 S.W.2d 762 \(Mo. 1993\)](#); [Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 \(1999\)](#); [Halbersberg v. Berry, 302 S.C. 97, 394 S.E.2d 7 \(Ct. App. 1990\)](#); [Teve Holdings Ltd. v. Jackson, 763 S.W.2d 905 \(Tex. App. Houston 1st Dist. 1988\)](#).

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AMJUR TRUSTS § 179

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1. In General

b. Elements Required to Impose Trust

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§ 180. Writing or express declaration

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [92.5](#)

Forms

Answer—Statute of frauds and statute of limitations. [Am. Jur. Pleading and Practice Forms, Trusts, § 77](#)

Constructive trusts need not be evidenced by writing[[FN1](#)] or even by an express declaration.[[FN2](#)]

Under the Restatement, where the owner of an interest in land transfers it inter vivos to another upon an oral trust in favor of a third person or upon an oral agreement to convey the land to a third person, and the trust or agreement is unenforceable because of the Statute of Frauds, and the transferee refuses to perform the trust or agreement, he or she holds the interest upon a constructive trust for the third person, if, but only if, the transferee by fraud, duress, or undue influence induced the transferor not to create an enforceable interest in the third person, or the transferee at the time of the transfer was in a confidential relation to the transferor, or the transfer was made by the transferor in contemplation of death.[[FN3](#)]

The constructive trust exception to the rule that land titles may not rest in parol applies when an abuse of an existing confidential relationship is established by strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer.[[FN4](#)] In other words, while the statute of frauds prohibits title to a real property interest from resting in parol, a constructive trust based on a prior confidential relationship and unfair conduct or unjust enrichment escapes this rule; the same rule applies in imposing the trust on a knowing or unknowing beneficiary of fraud, even though he or she is not the actual wrongdoer.[[FN5](#)]

[\[FN1\] § 134.](#)

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[\[FN2\] Calistoga Civic Club v. City of Calistoga, 143 Cal. App. 3d 111, 191 Cal. Rptr. 571 \(1st Dist. 1983\).](#)

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[\[FN3\] Restatement, Restitution § 183.](#)

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[\[FN4\] Ginther v. Taub, 675 S.W.2d 724 \(Tex. 1984\).](#)

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[\[FN5\] Ginther v. Taub, 675 S.W.2d 724 \(Tex. 1984\).](#)

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§ 181. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [102](#), [103](#)

Trial Strategy

[Constructive Trust Formed Because of Abuse of Confidential Relationship Between Transferee and Transferor of Property, 79 Am. Jur. Proof of Facts 3d 269](#)

[Constructive Trust Based on Confidential Relationship Between Parties to Transfer of Property, 31 Am. Jur. Proof of Facts 2d 229](#)

A relationship plus an abuse of confidence justifies the imposition of a constructive trust for the benefit of the party whose confidence has been abused.[[FN1](#)]

Constructive trusts have been recognized as a proper remedy where a public official has breached his or her fiduciary responsibilities.[[FN2](#)] In this regard, a constructive trust may be imposed upon benefits obtained by a third person to that person's knowledge of or involvement in a public official's breach of a fiduciary duty.[[FN3](#)]

CUMULATIVE SUPPLEMENT

Cases:

Claim for breach of fiduciary duty alleged by decedent's sons against executor of decedent's estate, based on executor's alleged failure to transfer property to sons in accordance with decedent's directions, was a sufficient supporting cause of action predicate to sons' request for imposition of constructive trust on decedent's estate; intentional breach of fiduciary duty constituted actual fraud, which could form the basis for a constructive trust. [Morrison v. Morrison, 284 Ga. 112, 663 S.E.2d 714 \(2008\)](#).

If a confidential relationship is breached or abused, with the result that property was transferred from the trusting party to the dominant party, a constructive trust may be ordered. [Figgins v. Cochrane, 403 Md. 392, 942 A.2d 736 \(2008\)](#).

[END OF SUPPLEMENT]

[[FN1](#)] [Griffin v. Armana, 687 So. 2d 1188 \(Miss. 1996\)](#).

[\[FN2\] People ex rel. Daley v. Warren Motors, Inc., 114 Ill. 2d 305, 102 Ill. Dec. 400, 500 N.E.2d 22 \(1986\).](#)

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[\[FN3\] People ex rel. Daley v. Warren Motors, Inc., 114 Ill. 2d 305, 102 Ill. Dec. 400, 500 N.E.2d 22 \(1986\).](#)

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§ 182. Acquisition or retention of property, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [102](#), [103](#)

A constructive trust may be imposed by the courts to do equity and prevent unjust enrichment when title to property is acquired[\[FN1\]](#) or retained[\[FN2\]](#) in violation of a fiduciary duty[\[FN3\]](#) or confidential relationship.[\[FN4\]](#) That is, a constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits; where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title.[\[FN5\]](#)

Practice guide: A constructive trust may only be imposed when clear and convincing evidence demonstrates a confidential relationship existed between two people, that one of them transferred property to the other, and that the person receiving the property would be unjustly enriched by retaining the property, regardless of whether the person obtained the property honestly.[\[FN6\]](#)

[FN1] [Ralston Oil and Gas Co. v. July Corp.](#), 719 P.2d 334 (Colo. Ct. App. 1985); [Baizley v. Baizley](#), 1999 ME 115, 734 A.2d 1117 (Me. 1999); [Allred v. Fairchild](#), 785 So. 2d 1064 (Miss. 2001); [Napoleon Livestock Auction, Inc. v. Rohrich](#), 406 N.W.2d 346 (N.D. 1987); [Simpson v. Dailey](#), 496 A.2d 126 (R.I. 1985); [Consolidated Bearing and Supply Co., Inc. v. First Nat. Bank at Lubbock](#), 720 S.W.2d 647 (Tex. App. Amarillo 1986).

- Where a fiduciary obtains property or money by means of an agreement or promise which he does not realistically intend to perform, a constructive trust may be imposed. [Pioneer Annuity Life Ins. Co. by Childers v. National Equity Life Ins. Co.](#), 159 Ariz. 148, 765 P.2d 550 (Ct. App. Div. 1 1988).

- Constructive trusts arise and may be imposed in favor of persons entitled to a beneficial interest against one who secured legal title by violating a confidential or fiduciary duty. [Waller v. Waller](#), 15 Ark. App. 336, 693 S.W.2d 61 (1985).

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[FN2] [Baizley v. Baizley](#), 1999 ME 115, 734 A.2d 1117 (Me. 1999); [Allred v. Fairchild](#), 785 So. 2d 1064 (Miss. 2001); [Napoleon Livestock Auction, Inc. v. Rohrich](#), 406 N.W.2d 346 (N.D. 1987).

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[FN3] [Edwards v. Edwards](#), 311 Ark. 339, 843 S.W.2d 846 (1992); [Baizley v. Baizley](#), 1999 ME 115, 734 A.2d 1117 (Me. 1999); [The Cadle Co. v. Bourgeois](#), 149 N.H. 410, 821 A.2d 1001 (2003); [Napoleon Livestock Auction, Inc. v. Rohrich](#), 406 N.W.2d 346 (N.D. 1987); [Simpson v. Dailey](#), 496 A.2d 126 (R.I. 1985).

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[FN4] [Radenhausen v. Doss](#), 819 So. 2d 616 (Ala. 2001) (abuse of a confidential relationship); [Edwards v. Edwards](#), 311 Ark. 339, 843 S.W.2d 846 (1992); [Ralston Oil and Gas Co. v. July Corp.](#), 719 P.2d 334 (Colo. Ct. App. 1985); [Allred v. Fairchild](#), 785 So. 2d 1064 (Miss. 2001)(abuse of confidence); [Napoleon Livestock Auction, Inc. v. Rohrich](#), 406 N.W.2d 346 (N.D. 1987); [Consolidated Bearing and Supply Co., Inc. v. First Nat. Bank at Lubbock](#), 720 S.W.2d 647 (Tex. App. Amarillo 1986).

- Confidential or fiduciary relationship as an element required to impose a trust, generally, see [§ 176](#).

- Imposition of a constructive trust in a judgment creditors' favor, resulting from loans fraudulently obtained from them by their financial advisor, was not barred by the judgment creditors' lack of self-protection; the transaction arose in the course of a confidential and fiduciary relationship in which the financial advisor was entrusted to give the judgment creditors financial and legal advice. [Hanigan v. Trumble](#), 252 Neb. 376, 562 N.W.2d 526 (1997).

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[FN5] [Wait v. Cornette](#), 259 Neb. 850, 612 N.W.2d 905 (2000).

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[FN6] [The Cadle Co. v. Bourgeois](#), 149 N.H. 410, 821 A.2d 1001 (2003).

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§ 183. Acquisition or retention of property, generally—Acquisition of interest in subject matter of confidence or trust relationship

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [102](#), [103](#)

Where one person sustains a fiduciary relation to another he or she cannot acquire an interest in the subject matter of the relationship adverse to such other party; if he or she does so equity will regard him or her as a constructive trustee and compel him or her to convey to his or her associate a proper interest in the property or to account to him or her for the profits derived therefrom.^[FN1] The rule is not confined to a particular class of persons, such as guardians, trustees, or solicitors, but is a rule of universal application to all persons coming within its principle.^[FN2]

The traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property.^[FN3]

^[FN1] [Greenspan v. Osheroff, 232 Va. 388, 351 S.E.2d 28 \(1986\).](#)

- Ordering the imposition of a constructive trust over assets located in Virginia held by trustees in dissolution of a foreign charitable health care corporation was not an abuse of discretion, as the evidence showed that the trustees had failed and refused to execute the trust; the trustees were able to acquire interests in the former charity's real estate, equipment and lease, and were able to use tax benefits belonging to the former charity to enhance the gain of a for-profit corporation, deals were convoluted and complex with off-record real estate transactions conflicting with the state of title as shown on-record, the charity did not merge with the for-profit corporation, and the charity's assets remained with it until its dissolution, at which time they passed to the trustees. [Tauber v. Com., 255 Va. 445, 499 S.E.2d 839 \(1998\).](#)

- ^[FN2] [Preston v. Ross, 1949 OK 130, 201 Okla. 455, 207 P.2d 297 \(1949\); Stephens v. Dubois, 31 R.I. 138, 76 A. 656 \(1910\); Fitz-Gerald v. Hull, 150 Tex. 39, 237 S.W.2d 256 \(1951\).](#)

- ^[FN3] [Anderson v. Bellino, 265 Neb. 577, 658 N.W.2d 645 \(2003\).](#)

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§ 184. Abuse of confidential knowledge or interest

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [102](#), [103](#)

The abuse of a confidential relationship by acquiring property through the employment of knowledge or an interest obtained in such relationship constitutes a sufficient basis for the declaration and enforcement of a constructive trust in respect of such property and in favor of the person wronged.[\[FN1\]](#)

CUMULATIVE SUPPLEMENT

Cases:

"Abuse" of confidential relationship may occur, of kind sufficient under Wisconsin law to support imposition of constructive trust, even if no wrongful intent was initially present. [In re LaLonde, 431 B.R. 199 \(Bankr. W.D. Wis. 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Trice v. Comstock, 121 F. 620 \(C.C.A. 8th Cir. 1903\)](#) (where an agent to procure purchasers used the information obtained in the agency to buy and sell land to the prospect); [Vallette v. Tedens, 122 Ill. 607, 14 N.E. 52 \(1887\)](#) (where a title examiner took advantage of information learned in the search to purchase for himself); [Page v. Harper, 73 Kan. 229, 84 P. 1024 \(1906\)](#) (use of security held in trust to acquire property for self); [City of Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 \(1913\)](#) (purchase of property by a member of a governmental committee to sell it to the government through a third person, incidental to the plan being formulated by the committee).

- One who violates his contract of employment and the fiduciary relation with his employer by entering the employment of another and using information concerning his former employer's business holds whatever profits he makes with the latter employer as constructive trustee for the former. [State ex rel. Duggan v. Kirkwood, 357 Mo. 325, 208 S.W.2d 257, 2 A.L.R.2d 216 \(1948\)](#) (overruled on other grounds by, [State ex rel. Reser v. Martin, 576 S.W.2d 289 \(Mo. 1978\)](#)).

- Where a former Central Intelligence Agency agent's publication of a book about the Agency was in breach of his fiduciary obligation to submit all writings about the Agency for prepublication review by the Agency, a constructive trust was properly imposed for the benefit of the United States Government. [Snepp v. U.S., 444 U.S. 507, 100 S. Ct. 763, 62 L. Ed. 2d 704 \(1980\)](#).

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§ 185. Taking commission or profit

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [102](#), [103](#)

Where a fiduciary in violation of his or her duty to the beneficiary receives a bonus or commission or other profit, he or she holds what he or she receives upon a constructive trust for the beneficiary.[FN1]

[FN1] [Hunter v. Shell Oil Co., 198 F.2d 485 \(5th Cir. 1952\)](#); [Leavy v. American Federal Sav. Bank, 136 Md. App. 181, 764 A.2d 366 \(2000\)](#).

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§ 186. Failure to use property for specified purpose; failure to purchase for or convey to another

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [102](#), [103](#)

A breach of the confidence to apply property to its specified purpose may give rise to a constructive trust enforceable against the money or property in question.[FN1]

Where one party has offered to purchase property for another, and in so doing was, in fact, acting as the first party's agent in procuring land, the failure of the second party to convey the property to the first party is a breach of the fiduciary relationship, so that a constructive trust will be established.[FN2] A constructive trust also arises where there is a confidential relationship between the transferor and the transferee, and the transferor relies upon the transferee's promise to reconvey the property;[FN3] a constructive trust will be impressed when an unfulfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment.[FN4] A constructive trust arises where a

conveyance is induced on the agreement of a fiduciary or confidant to hold property in trust for a reconveyance or other purpose, where the fiduciary or confidential relationship is one upon which the grantor justifiably can and does rely and where the agreement is breached, since the breach of the agreement is an abuse of the confidence, and to establish such a trust it is not necessary to show fraud or intent not to perform the agreement when it was made.[FN5] In this regard, while courts have refused to impose a constructive trust where land is conveyed by absolute deed upon an oral agreement that the transferee will reconvey to the transferor, an exception to this rule has been recognized, such that where the owner of an interest in land transfers it inter vivos to another upon an oral agreement to reconvey the land to the transferor, and such an agreement is unenforceable due to the statute of frauds, equity will impose a constructive trust for the benefit of the transferor if, at the time of the transfer, the transferee was in a confidential relationship to the transferor.[FN6]

Under the law of agency, an agent who receives funds for a principal, a part of which belongs to a third party, is a constructive trustee for the third party.[FN7]

[FN1] [In re Interborough Consol. Corp.](#), 288 F. 334, 32 A.L.R. 932 (C.C.A. 2d Cir. 1923); [Baldwin v. Adkerson](#), 156 Va. 447, 158 S.E. 864, 103 A.L.R. 644 (1931).

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[FN2] [Whewell v. Cox](#), 54 Ill. App. 3d 179, 11 Ill. Dec. 876, 369 N.E.2d 330 (4th Dist. 1977).

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[FN3] [DeMello v. Home Escrow, Inc.](#), 4 Haw. App. 41, 659 P.2d 759 (1983).

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[FN4] [Spodek v. Riskin](#), 150 A.D.2d 358, 540 N.Y.S.2d 879 (2d Dep't 1989).

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[FN5] [Voelkel v. Tohulka](#), 236 Ind. 588, 141 N.E.2d 344, 70 A.L.R.2d 1349 (1957); [Swon v. Huddleston](#), 282 S.W.2d 18, 55 A.L.R.2d 205 (Mo. 1955); [Barker v. Barker](#), 75 N.D. 253, 27 N.W.2d 576, 171 A.L.R. 447 (1947).

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[FN6] [Klein v. Shaw](#), 109 Idaho 237, 706 P.2d 1348 (Ct. App. 1985).

- Where a confidential relationship exists between a grantor and a grantee and a conveyance is induced by the grantee's oral promise to convey to a third party, the court will decree a constructive trust in favor of the intended beneficiary of the oral trust if the grantee refuses to convey the property as promised. [Muhm v. Davis](#), 580 S.W.2d 98 (Tex. Civ. App. Houston 1st Dist. 1979), writ refused n.r.e., (Sept. 12, 1979).

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[FN7] [State ex rel. Oklahoma Bar Ass'n v. Taylor](#), 2000 OK 35, 4 P.3d 1242 (Okla. 2000).

- As to agency law, generally, see Am. Jur. 2d, Agency.

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§ 187. Breach of agreement to hold property in trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [96](#)

Trial Strategy

[Proof of Grantor's Intent that Grantee Hold Property in Trust, 74 Am. Jur. Proof of Facts 3d 353](#)

While a "constructive trust" may arise in favor of persons entitled to a beneficial interest against one who secured legal title by an intentional, false, oral promise to hold title for a specified purpose,^[FN1] the general rule is that a constructive trust does not arise merely from a breach of an agreement by a grantee to hold property conveyed to him or her in trust for the benefit of the grantor or for a third person, or for some other purpose.^[FN2]

However, some courts hold that a constructive trust may be imposed on the basis of constructive fraud where there is clear and convincing evidence of an agreement between the grantor and the grantee to benefit another party.^[FN3]

^[FN1] [Edwards v. Edwards, 311 Ark. 339, 843 S.W.2d 846 \(1992\).](#)

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^[FN2] [DeMyers v. DeMyers, 742 So. 2d 1157 \(Miss. 1999\); Strype v. Lewis, 352 Mo. 1004, 180 S.W.2d 688, 155 A.L.R. 99 \(1944\); Thigpen v. Locke, 363 S.W.2d 247 \(Tex. 1962\).](#)

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^[FN3] [Baizley v. Baizley, 1999 ME 115, 734 A.2d 1117 \(Me. 1999\).](#)

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§ 188. Breach of agreement to hold property in trust—Effect of fraud, duress, or undue influence

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [96](#)

Where the breach of an agreement by a grantee to hold property in trust for a specified purpose involves fraud, duress, or undue influence on the part of the grantee in obtaining the conveyance, a constructive trust generally does arise.^[FN1] There must be conduct influential in producing the result,^[FN2] especially where there is a fiduciary or confidential relationship between the grantee and the grantor, and the grantee's subsequent failure to carry out his or her agreement or promise to hold in trust for reconveyance, tend to show fraud or bad faith on the part of the grantee, so as to raise a constructive trust.^[FN3]

^[FN1] [Voelkel v. Tohulka, 236 Ind. 588, 141 N.E.2d 344, 70 A.L.R.2d 1349 \(1957\); Henderson v. Murray, 108 Minn. 76, 121 N.W. 214 \(1909\); All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741, 159 A.L.R. 981 \(1942\).](#)

- Where the owner of property transfers it inter vivos to another in trust for the transferor, but without a signed writing as required by an applicable statute of frauds, the transferee will be compelled to hold the property on constructive trust for the transferor if the transfer was procured by fraud, undue influence, or duress.
[Restatement Third, Trusts § 24](#), Comment e.

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^[FN2] [DeMyers v. DeMyers, 742 So. 2d 1157 \(Miss. 1999\).](#)

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^[FN3] [Lipp v. Lipp, 158 Md. 207, 148 A. 531 \(1930\); Coleman v. Kierbow, 212 Miss. 541, 54 So. 2d 915 \(1951\).](#)

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§ 189. Breach of oral agreement to reconvey property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [96](#)

The view has been expressed that a constructive trust does not arise merely from breach of an oral agreement by a grantee to reconvey property,[\[FN1\]](#) and, accordingly, courts have refused to impose a constructive trust where land is conveyed by absolute deed upon an oral agreement that the transferee will reconvey to the transferor, the theory being that to do so would circumvent the Statute of Frauds.[\[FN2\]](#) It has been stated that to impose a constructive trust based on an oral agreement to reconvey property, it must appear that the agreement was not reduced to writing because of that confidential relationship.[\[FN3\]](#)

CUMULATIVE SUPPLEMENT

Cases:

A broken verbal promise may be the basis of a constructive trust if it was fraudulently made with the intention of being broken and for the purpose of thereby obtaining title; in other words, there must be positive fraud accompanying the promise. [Troutman v. Troutman, 297 Ga. App. 62, 676 S.E.2d 787 \(2009\).](#)

With regard to interests in real property, a constructive trust generally may not be imposed based solely on a broken verbal promise to hold or transfer the land for the benefit of another; to hold otherwise would wholly undermine the Statute of Frauds. [Troutman v. Troutman, 297 Ga. App. 62, 676 S.E.2d 787 \(2009\).](#)

Evidence was sufficient to support the imposition of a constructive trust on property titled solely in former boyfriend's name; former boyfriend testified that he told former girlfriend that he intended to put her on the title of the property, but that privately he never intended to do so, and former girlfriend's monetary and nonmonetary investments in the property demonstrated that she relied on former boyfriend's representations that she would be co-owner of the house. [Porter v. Zuromski, 195 Md. App. 361, 6 A.3d 372 \(2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Mills v. Mills, 112 So. 2d 298 \(Fla. Dist. Ct. App. 2d Dist. 1959\)](#).

- An oral promise to convey a tract of land is not, by itself, such fraud as is sufficient to support the imposition of a constructive trust. [Nessralla v. Peck, 403 Mass. 757, 532 N.E.2d 685 \(1989\)](#).

[FN2] [Klein v. Shaw, 109 Idaho 237, 706 P.2d 1348 \(Ct. App. 1985\)](#).

[FN3] [Ralston Oil and Gas Co. v. July Corp., 719 P.2d 334 \(Colo. Ct. App. 1985\)](#).

- Clear and convincing evidence existed that a constructive trust ought to have been imposed upon shares transferred from a former shareholder of a close corporation to the father of the former shareholder's wife, even though the transfer document and testimony of numerous witnesses indicated the transfer was for consideration; the former shareholder had testified at trial that the transfer was made for no consideration, with an implicit promise of the father to reconvey the stock at a later time, and the trial court had determined that the former shareholder's testimony was credible. [Salisbury v. Lowe, 140 N.H. 82, 663 A.2d 611 \(1995\)](#).

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§ 190. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 91, 92

Where one having an oral agreement to buy land for another, who furnishes the consideration, takes title to the land in his or her own name, he or she will be regarded as holding the land in trust for the person for whom he or she was to purchase the land.[FN1] In addition, there is authority for the view that where one person buys land under a parol agreement to do so and to hold it for another until he or she repays the purchase money, the purchaser becomes a trustee for the party for whom he or she purchased the land, and equity will enforce such an agreement.[FN2] It has also been stated that where one furnishes money to another with instructions to buy land and take title therein, but, in violation of the instruction, title is wrongfully taken in the name of another, there is a constructive trust.[FN3] However, there is also some authority for the view that the breach of an agreement by one to purchase property in his or her own name, with his or her own money, and to let another have the property upon paying for it, does not in itself constitute such fraud or breach of confidence as to raise a constructive trust.[FN4]

[FN1] [Murphy v. McKenzie, 1 Mass. App. Ct. 553, 303 N.E.2d 744 \(1973\).](#)

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[FN2] [Brown v. Vick, 23 N.C. App. 404, 209 S.E.2d 342 \(1974\).](#)

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[FN3] [Bostic v. Bryan, 263 Ala. 673, 83 So. 2d 796 \(1955\).](#)

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[FN4] [Tolle v. Sawtelle, 246 S.W.2d 916 \(Tex. Civ. App. Eastland 1952\),](#) writ refused.

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§ 191. Effect of agency relationship between parties

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [91](#), [92](#)

A.L.R. Library

[Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285](#)

[Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 A.L.R.2d 1140](#)

If an agent, during the continuance of the agency, purchases for himself or herself the property he or she was to have purchased for his or her principal he or she becomes in equity, a constructive trustee notwithstanding the price paid was supplied from his or her own funds,^[FN1] and without regard to whether he or she had agreed with his or her principal to advance the purchase money.^[FN2] As a general matter, constructive trusts are ordinarily not within the statute of frauds, and the breach of such an oral agreement is a breach of confidence by the agent, giving rise to a constructive trust.^[FN3]

When a broker procures legal title to property, in violation of a fiduciary duty owed to the owner, equity constructs a trust out of the transaction and the property owner is entitled to profits wrongfully received by the broker; construction of such a trust is without regard to whether the principal received a fair price for conveyance of the property.^[FN4]

^[FN1] [B. J. McAdams, Inc. v. Boggs, 439 F. Supp. 738 \(E.D. Pa. 1977\) \(applying Pennsylvania law\).](#)

- Evidence that the defendant undertook to purchase property for the plaintiff, that the plaintiff had an interest in the property prior to the parties' arrangement, and that the defendant subsequently decided to keep the property for himself established that a relationship of principal and agent was created and that the defendant breached his fiduciary duty toward the plaintiff when he decided to keep the property for himself, notwithstanding the plaintiff permitted the defendant to purchase the property in his own name and with his own funds; accordingly, the defendant's subsequent breach of his fiduciary relationship with the plaintiff gave rise to a constructive trust. [Ray v. Winter, 67 Ill. 2d 296, 10 Ill. Dec. 225, 367 N.E.2d 678 \(1977\).](#)

- Where one employed to act as an agent for another in the purchase of real estate becomes a purchaser himself, he will be considered in equity as holding the property in trust for his principal, even though he purchased the property with his own money. [Fleury v. Chrisman, 200 Neb. 584, 264 N.W.2d 839 \(1978\).](#)

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^[FN2] [B. J. McAdams, Inc. v. Boggs, 439 F. Supp. 738 \(E.D. Pa. 1977\) \(applying Pennsylvania law\).](#)

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[\[FN3\] Oetken v. Shell, 168 Kan. 244, 212 P.2d 329 \(1949\)](#), opinion adhered to on reh'g, [169 Kan. 109, 217 P.2d 906 \(1950\)](#); [Appleby v. Buck, 351 S.W.2d 494 \(Ky. 1961\)](#); [Berenson v. Nirenstein, 326 Mass. 285, 93 N.E.2d 610, 20 A.L.R.2d 1136 \(1950\)](#).

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[\[FN4\] Ellison v. Alley, 842 S.W.2d 605 \(Tenn. 1992\)](#).

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§ 192. Joint purchase

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West's Key Number Digest, [Trusts](#) [91](#), [92](#)

A.L.R. Library

[Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285](#)

A constructive trust may arise based on an agreement between parties to jointly purchase property,[\[FN1\]](#) and, in this regard, the view has been followed that the fact that such an agreement does not conform with the Statute of Frauds does not defeat such trust.[\[FN2\]](#) However, fraud or a confidential relationship are sometimes required to impose a constructive trust and, in this regard, there is some authority for the position that, by itself,

an oral agreement to join in the purchase of land, or a breach of such agreement, does not constitute such a fraud or abuse of confidence as to give rise to a constructive trust.[FN3]

[FN1] [O'Bryan v. Bickett, 419 S.W.2d 726 \(Ky. 1967\)](#).

- A defendant development company was entitled to summary judgment dismissing an action to impose a constructive trust on real property purchased by it pursuant to an executory contract assigned to it by individual defendants, notwithstanding the plaintiffs' contentions that they had entered into a joint venture with individual defendants to purchase and develop the property and that they had given \$11,000 to individual defendants toward the closing costs, since the record was devoid of evidence of a triable issue of fact regarding the development company's notice of the plaintiffs' interest in the property. [Espie v. Budai, 154 A.D.2d 575, 546 N.Y.S.2d 403 \(2d Dep't 1989\)](#).

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[FN2] [O'Bryan v. Bickett, 419 S.W.2d 726 \(Ky. 1967\)](#).

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[FN3] [Powell v. Chastain, 1957 OK 298, 318 P.2d 859 \(Okla. 1957\)](#); [Scheuer v. Cochem, 126 Wis. 209, 105 N.W. 573 \(1905\)](#).

- Mere breach of an agreement that a complainant share in the benefit of a purchase is not fraud in obtaining title so as to give rise to a constructive trust. [McIlwain v. Doby, 238 Miss. 839, 120 So. 2d 553 \(1960\)](#).

- The fact that a real-estate dealer and a physician had dealings with each other prior to their joint interests in bidding on an option to purchase property did not establish a confidential relationship upon which to create a constructive trust in the property for the benefit of the physician upon surviving the realty agent. [Barnett v. Matz, 483 S.W.2d 315 \(Tex. Civ. App. Austin 1972\)](#).

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§ 193. Sale of public character or involving bidding

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 91, 92

A.L.R. Library

[Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285](#)

In general, an oral agreement to bid in real property at a public, judicial, tax, or similar sale for another who is not the owner and who has no existing interest in the property sold is not enforceable as a constructive trust, in the absence of fraud, agency, confidence, or circumstances giving rise to an estoppel.[FN1] A constructive trust, based on such circumstances, usually arises where there is some special relation of trust and confidence between the parties,[FN2] such as that of attorney and client, parent and child, business adviser, and client, and a religious society and a member thereof.[FN3]

A constructive trust will be declared where it appears that the promisee or principal refrained from bidding by reason of the agreement, promise, or agency;[FN4] relaxed his or her efforts to save the property from being sold;[FN5] or that the agreement was known to other possible bidders and as a consequence chilled their bidding.[FN6]

[FN1] [McIlwain v. Doby, 238 Miss. 839, 120 So. 2d 553 \(1960\)](#); [Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\)](#); [Kirkland v. Handrick, 173 S.W.2d 735 \(Tex. Civ. App. San Antonio 1943\)](#), writ refused w.o.m., (Oct. 20, 1943).

- Real property purchased at a foreclosure sale was not subject to constructive trusts, despite an oral agreement that the previous owner could repurchase the property within 90 days of foreclosure, in the absence of a showing that the purchaser committed a wrong and was unjustly enriched; the previous owner originated the arrangement, failed to perform the agreement by not tendering the purchase price within 90 days of the foreclosure sale, and did not contribute funds used to purchase property at the foreclosure sale. [Dew v. Langford, 666 So. 2d 739 \(Miss. 1995\)](#).

[FN2] [Patrick v. Kirkland, 53 Fla. 768, 43 So. 969 \(1907\)](#); [Kirkland v. Handrick, 173 S.W.2d 735 \(Tex. Civ. App. San Antonio 1943\)](#), writ refused w.o.m., (Oct. 20, 1943).

- A complaint which alleged that prior to a foreclosure sale of the plaintiff's property, the defendant had agreed to purchase the premises on the plaintiff's behalf on specified conditions, sufficiently stated facts which, if established at trial would create a cause of action based on constructive trust as a result of such alleged agreement and a confidential relationship between the plaintiff and defendant. [Sarnataro v. Presta, 79 A.D.2d 986, 434 N.Y.S.2d 472 \(2d Dep't 1981\)](#).

[FN3] [Gaffney v. Harmon, 405 Ill. 273, 90 N.E.2d 785, 20 A.L.R.2d 1273 \(1950\)](#).

[FN4] [Strasner v. Carroll, 125 Ark. 34, 187 S.W. 1057 \(1916\)](#); [Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\)](#); [Rollow v. Taylor, 1924 OK 1093, 104 Okla. 275, 231 P. 224 \(1924\)](#).

- In an action by a plaintiff seeking to impose a constructive trust on property purchased at a foreclosure auction sale in which it was alleged that the plaintiff orally agreed to refrain from bidding on certain real estate in exchange for the defendants' promise to convey one-half interest in the property if their bid were successful, a trial court properly granted defendants' motion for summary judgment where the plaintiff did not establish the existence of a fiduciary relationship or joint venture agreement to warrant imposition of a constructive trust. [John Alden Transp. Co., Inc. v. Bloom, 11 Mass. App. Ct. 920, 415 N.E.2d 250 \(1981\).](#)

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[\[FN5\] Patrick v. Kirkland, 53 Fla. 768, 43 So. 969 \(1907\); Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\).](#)

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[\[FN6\] Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\).](#)

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§ 194. Wrongful conversion

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [104](#), [105](#)

A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form;[\[FN1\]](#) that is, when one person wrongfully takes the property of another.[\[FN2\]](#)

[FN1] [Colonial Bank and Trust Co. v. Matoff, 18 Conn. App. 20, 556 A.2d 619 \(1989\).](#)

- A superior court's establishment of a constructive trust to pay nonparty crew members of a fishing boat and spotter pilot their share of damages from the amount awarded a fisherman for conversion of fish was proper; the jury was able to compute the value of the catch, and the use of a constructive trust did not increase the liability of the defendants. [Jensen v. Goresen, 881 P.2d 1119 \(Alaska 1994\).](#)

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[FN2] [Matter of Estate of Crawford, 795 S.W.2d 835, 14 U.C.C. Rep. Serv. 2d 1189 \(Tex. App. Amarillo 1990\).](#)

- Where a wife, without the consent of her husband, converts a property interest which was formerly held by the entireties, to her individual use, a constructive trust may be imposed, or a reconveyance required, to restore the property to joint ownership. [Angelli v. Sherway, 560 A.2d 1028 \(Del. 1989\).](#)

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§ 195. Wrongful management, intermeddling, or use

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [104](#), [105](#)

The wrongful use of funds may be grounds for the imposition of a constructive trust; a constructive trust may arise in favor of a person whose money has been wrongfully acquired and used by another.[FN1] A

constructive trust may be imposed, for instance, where funds solicited to benefit a religious organization are used to benefit the personal estate of a religious leader.[\[FN2\]](#)

[\[FN1\] DeMello v. Home Escrow, Inc., 4 Haw. App. 41, 659 P.2d 759 \(1983\).](#)

- A state court would not have declined to impose a constructive trust, during the mother's life, on one-half of the father's community property which should have passed to the son upon the father's death, but which the mother treated as her own property and used for her own purposes for 30 years, notwithstanding that the son eventually received nearly all of his mother's estate. [Estate of Bailey v. C.I.R., 741 F.2d 801 \(5th Cir. 1984\)](#) (interpreting Texas law).

- A developer did not breach a fiduciary duty when it failed to pay taxes and utility bills on subdivision recreational property, as required to impose a constructive trust on the funds paid by the homeowners as assessments, absent evidence the assessments were spent on anything not provided in the declaration creating the homeowners' association. [Hampton Ridge Homeowners Ass'n, Inc. v. Marett Properties, Ltd., 265 Ga. 655, 460 S.E.2d 790 \(1995\).](#)

- [\[FN2\] In re Estate of Muhammad, 165 Ill. App. 3d 890, 117 Ill. Dec. 444, 520 N.E.2d 795 \(1st Dist. 1987\).](#)

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§ 196. Wrongful management, intermeddling, or use—Use of money or property of another for acquisition or improvement

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [104](#), [105](#)

While a constructive trust may be imposed where homesteads have been acquired with fraudulently obtained money, such trusts may not be imposed where the homesteads are merely augmented or improved with wrongfully acquired funds.[\[FN1\]](#)

CUMULATIVE SUPPLEMENT

Cases:

In Florida, an equitable lien can be imposed on a homestead where an innocent party used fraudulently obtained funds to invest in the homestead. [West's F.S.A. Const. Art. 10, § 4. Crawford v. Silette, 608 F.3d 275 \(5th Cir. 2010\).](#)

[END OF SUPPLEMENT]

[\[FN1\] Matter of Moody, 862 F.2d 1194 \(5th Cir. 1989\)](#) (interpreting Texas law).

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§ 197. Effect of criminality of conduct

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West's Key Number Digest, [Trusts](#) 104, 105

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[Imposition of constructive trust in property bought with stolen or embezzled funds, 38 A.L.R.3d 1354](#)

Forms

Complaint, petition, or declaration—Allegation—Employee's use of embezzled funds to make payments on life insurance policy. [Am. Jur. Pleading and Practice Forms, Trusts, § 76](#)

A constructive trust will be imposed based on the wrongful use or fraudulent use of property of another even though criminal responsibility is involved.[FN1] A constructive trust arises in favor of the owner of property which is embezzled.[FN2] Thus, a constructive trust will ordinarily arise when stolen or embezzled funds are used to purchase other property.[FN3] A confidential or fiduciary relationship between the thief and his or her victim is not requisite to such a constructive trust.[FN4]

A constructive trust may also be employed where one murders another and, as a result of such act, would profit from acquiring an interest in property belonging to the victim.[FN5] When the named beneficiary of a life insurance policy murders the policyholder, the beneficiary forfeits whatever rights he or she had under the policy and is deemed to hold the proceeds of the policy in constructive trust for the estate of the deceased.[FN6] However, a constructive trust cannot be used to deprive such a criminal offender of property he or she has lawfully acquired, but can be imposed only to prevent such person from acquiring a beneficial interest from the unlawful act committed.[FN7]

[FN1] [Warsco v. Oshkosh Savings & Trust Co., 190 Wis. 87, 208 N.W. 886, 47 A.L.R. 366 \(1926\).](#)

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[FN2] [American Ry. Exp. Co. v. Houle, 169 Minn. 209, 210 N.W. 889, 48 A.L.R. 1266 \(1926\); Namow Corp. v. Egger, 99 Nev. 590, 668 P.2d 265 \(1983\).](#)

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[FN3] [Republic of Haiti v. Crown Charters, Inc., 667 F. Supp. 839 \(S.D. Fla. 1987\) \(applying Florida law\); Dennis v. U.S., 372 F. Supp. 563 \(E.D. Va. 1974\) \(applying Virginia law\). Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co., 78 Cal. App. 3d 371, 144 Cal. Rptr. 189 \(2d Dist. 1978\); Mickelson v. Barnet, 390 Mass. 786, 460 N.E.2d 566 \(1984\) \(recognizing rule\).](#)

- Where a thief embezzles money and uses it to purchase property, he or she can be required to convey the property to the person from whom the money was taken, by means of a constructive trust. [Namow Corp. v. Egger, 99 Nev. 590, 668 P.2d 265 \(1983\).](#)

- With regard to misappropriated property, the constructive trust includes the product of the misappropriated property: the constructive trust extends to property acquired in exchange for that wrongfully acquired, and includes the direct product, that is, profit on and enhancement in value of the property traced into the trust. [Gladstone v. Hillel, 203 Cal. App. 3d 977, 250 Cal. Rptr. 372 \(1st Dist. 1988\).](#)

- When an embezzler purchases property with stolen funds, the property may be subjected to a constructive trust but until the court grants the victim the constructive trust remedy, the victim merely has the right to seek such

remedy. [U.S. v. Brimberry, 779 F.2d 1339, 19 Fed. R. Evid. Serv. 1204 \(8th Cir. 1985\)](#).

- Imposition of a constructive trust on the proceeds of a sale of a defendant husband's homestead was proper on the basis that the wife used converted funds from an employer over a period of time for incremental payments on the home, even though the husband did not know of the wife's wrongdoing, since the homestead protection afforded by the constitution was never intended to protect stolen funds. [Bransom v. Standard Hardware, Inc., 874 S.W.2d 919 \(Tex. App. Fort Worth 1994\)](#), writ denied, (Sept. 8, 1994).

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[FN4] [Pioneer Mining Co v. Tyberg, 215 F. 501, 4 Alaska Fed. 228 \(C.C.A. 9th Cir. 1914\)](#); [Lamb v. Rooney, 72 Neb. 322, 100 N.W. 410 \(1904\)](#); [Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Jolley, 24 Utah 2d 187, 467 P.2d 984, 38 A.L.R.3d 1350 \(1970\)](#).

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[FN5] [Ragland v. Ragland, 743 S.W.2d 758 \(Tex. App. Waco 1987\)](#).

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[FN6] [Estate of Chiesi v. First Citizens Bank, N.A., 613 N.E.2d 14 \(Ind. 1993\)](#).

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[FN7] [Ragland v. Ragland, 743 S.W.2d 758 \(Tex. App. Waco 1987\)](#).

- In a personal representative's action to impose a constructive trust on property or its proceeds in favor of a wife's estate, the requirement that the person's title be obtained by means of fraud or unconscionable conduct in order to obtain a constructive trust was not applicable because the unconscionable and outrageous conduct of the husband in murdering the wife occurred long after he acquired the property in question and the record showed that no fraudulent or unconscionable conduct occurred in connection with the acquisition of that property, and the rule that one who acquires property by murder takes the property subject to a constructive trust for the benefit of those persons who would have been entitled to the property upon the natural death of the decedent makes a distinction between property acquired as the consequence of a wrongful act and that lawfully acquired prior to the act. [Krueger v. Rodenberg, 190 Wis. 2d 367, 527 N.W.2d 381 \(Ct. App. 1994\)](#).

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§ 198. Breach of contract; failure of performance or payment

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [101](#), [103](#)

A constructive trust may be imposed, in some instances, as a remedy for a breach of contract;[FN1] breach of contract or intentional interference with a contract can make the offending party a constructive trustee.[FN2] Thus, for instance, the relief which may be granted in an action for quasi-specific performance of a contract to bequeath or devise property is the imposition of a constructive trust upon the property in favor of the promisee-plaintiff.[FN3] When property is given or devised to a defendant in breach of a donor's or testator's contract with a plaintiff, equity will impose a constructive trust upon that property in the hands of the recipient, even though: (1) the transfer is not the result of breach of a fiduciary duty or an actual or constructive fraud practiced upon the plaintiff; and (2) the donee or devisee had no knowledge of the wrongdoing or breach of contract.[FN4]

A constructive trust may also be imposed upon the breach of a separation[FN5] or settlement agreement.[FN6]

However, there is also support for the rule that the mere failure to perform an agreement, or the failure to pay a debt, cannot in itself give rise to a constructive trust, where such a breach does not in itself constitute fraud or abuse of confidence or duty when such fraud or abuse is requisite to the existence of a constructive trust.[FN7] Thus, a constructive trust may not be imposed to secure an ordinary business debt.[FN8] Furthermore, in some jurisdictions, a breach of contract does not, by itself, warrant the imposition of a constructive trust in the absence of other wrongful conduct.[FN9] Thus, it has been stated that a breach of contract alone is not sufficient and does not qualify as the type of wrongful act or fraud which would warrant the imposition of a constructive trust.[FN10] Otherwise, a constructive trust might be available whenever there was a breach of an oral agreement and, under the view followed in some jurisdictions, mere breach of an oral promise is not a sufficient basis to impose a constructive trust.[FN11]

Observation: Breach of contract does not entitle a plaintiff to a constructive trust on a defendant's general assets to be used to satisfy a plaintiff's claim.[FN12]

[FN1] [In re Seaway Exp. Corp.](#), 912 F.2d 1125, 12 U.C.C. Rep. Serv. 2d 557 (9th Cir. 1990) (interpreting Washington law).

- A subcontractor was entitled to go forward with its claim of a constructive trust against a school district arising from nonpayment for work performed by the subcontractor for the school district due to the invalidity of payment bonds, based on evidence that the school district verbally assured the subcontractor that it was protected by the payment bonds and certified the payment bonds' validity when it provided the subcontractor with certified copies of them; the subcontractor could prove at trial that it would not have continued construction in the absence of the school district's representation. [Kammer Asphalt Paving Co., Inc. v. East China Tp. Schools](#), 443 Mich. 176, 504 N.W.2d 635, 85 Ed. Law Rep. 257 (1993).

[FN2] [GHK Associates v. Mayer Group, Inc.](#), 224 Cal. App. 3d 856, 274 Cal. Rptr. 168 (2d Dist. 1990).

[\[FN3\] *Lombardo v. Santa Monica Young Men's Christian Assn.*, 169 Cal. App. 3d 529, 215 Cal. Rptr. 224 \(2d Dist. 1985\)](#), listing the elements requisite to relief in such action as being:

(1) the existence of a contract sufficiently definite in its terms to be enforced;

(2) that the contract was just and reasonable;

(3) that the plaintiff performed his side of the bargain;

(4) that the promisor failed to perform;

(5) that the contract was supported by adequate consideration;

(6) that the remedy at law is inadequate; and

(7) where the contract was oral, the complaint also must allege that the defendant is estopped to rely on the statute of frauds because failure to enforce the contract would result in either unconscionable injury to plaintiff or the unjust enrichment of defendant.

- A constructive trust would be imposed on a wife's estate pursuant to terms of her mutual will that had been executed in connection with a contract between spouses not to revoke their mutual wills, notwithstanding the probate of the wife's subsequently executed will; the contract not to revoke the mutual will had become irrevocable upon the death of the husband. [Pruss v. Pruss](#), 245 Neb. 521, 514 N.W.2d 335 (1994).

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[\[FN4\] *Faulknier v. Shafer*](#), 264 Va. 210, 563 S.E.2d 755 (2002).

- A wife would be entitled to have a constructive trust imposed upon four gifts that an intestate husband made to other relatives prior to his death, if those gifts amounted to a substantial portion of his property so as to violate the husband's promise in a postnuptial agreement to leave his estate to his wife. [Peirce v. Peirce](#), 2000 UT 7, 994 P.2d 193 (Utah 2000).

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[\[FN5\] *Faulknier v. Shafer*](#), 264 Va. 210, 563 S.E.2d 755 (2002) (where an insured's former wife stated a cause of action against a beneficiary for a constructive trust on life insurance proceeds to prevent unjust enrichment by the beneficiary; the solvency of the estate was not established, and the beneficiary acquired the proceeds after the insured breached the terms of his separation agreement).

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[\[FN6\] *Nile v. Nile*](#), 432 Mass. 390, 734 N.E.2d 1153 (2000) (where the imposition of a constructive trust was an appropriate remedy for the wrongful transfer of the bulk of assets to a revocable inter vivos trust in violation of a settlement agreement requiring that two-thirds of an estate be bequeathed to the children of a first marriage, as the failure to impose a trust would have resulted in unjust enrichment); [Bemis v. Estate of Bemis](#), 114 Nev. 1021, 967 P.2d 437 (1998) (a decedent's estate held, in constructive trust for the decedent's two sons, monies for a trust for the sons that the decedent had promised to establish in a divorce settlement agreement but that the

decedent had failed to establish during his lifetime); [Flanigan v. Munson, 175 N.J. 597, 818 A.2d 1275 \(2003\)](#) (a mother's widower was "unjustly enriched" by the receipt of proceeds from the mother's life insurance policies, and thus the imposition of a constructive trust was warranted in an action brought against the widower by the legal custodians of the mother's children, whom the mother failed to name as beneficiaries even though she was required to list them as beneficiaries under the terms of a property settlement agreement in the mother's divorce case involving a former husband, since the policies did not list the widower as a beneficiary, and the fact that the mother and widower paid premiums on one policy that reduced their joint household income did not transform the widower into a bona fide purchaser for value).

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[\[FN7\] City of Rochelle v. Stocking, 336 Ill. App. 6, 82 N.E.2d 693 \(2d Dist. 1948\)](#); [Security Nat. Bank of Greensboro v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 \(1965\)](#); [All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741, 159 A.L.R. 981 \(1942\)](#).

- A partial assignee that lost an interest in a nonproducing tract due to the negotiation of new oil and gas leases by a partial assignee for a producing tract and due to the termination of the original lease had no basis for a constructive trust on all the new leases covering the nonproducing tract; the partial assignees were not in a confidential relationship, and the assignee for the producing tract owed no duty to the assignee for the nonproducing tract to perpetuate the original lease or to procure its renewal or extension. [Ridge Oil Co., Inc. v. Guinn Investments, Inc., 47 Tex. Sup. Ct. J. 1080, 2004 WL 1966096 \(Tex. 2004\)](#).

- While the Statute of Frauds does not prevent recognition of a constructive trust, no such trust could be imposed to enforce an alleged oral promise by a defendant-attorney that the plaintiff-doctor's medical bill for services rendered to the defendant's client would be paid out of the settlement of the patient's personal injury action with respect to the funds remaining for distribution since the necessary confidential or fiduciary relationship between the parties did not exist. [Healy v. Brotman, 96 Misc. 2d 386, 409 N.Y.S.2d 72 \(Sup 1978\)](#).

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[\[FN8\] Deane v. Superior Court, 164 Cal. App. 3d 292, 210 Cal. Rptr. 406 \(4th Dist. 1985\)](#).

- The sale of a business without paying the seller's secured lender did not entitle the lender to a constructive trust against the buyer's lender; the seller's lender retained a first priority security interest and could take action against the collateral in the hands of the buyer or against the sale proceeds in the hands of the seller. [Century Nat. Bank v. Makkar, 132 Md. App. 84, 751 A.2d 1, 41 U.C.C. Rep. Serv. 2d 384 \(2000\)](#).

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[\[FN9\] Amendola v. Bayer, 907 F.2d 760, 18 Fed. R. Serv. 3d 305 \(7th Cir. 1990\)](#).

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[\[FN10\] Presten v. Sailer, 225 N.J. Super. 178, 542 A.2d 7 \(App. Div. 1988\)](#).

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[\[FN11\] Presten v. Sailer, 225 N.J. Super. 178, 542 A.2d 7 \(App. Div. 1988\)](#).

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[\[FN12\] Finkelstein v. Southeast Bank, N.A., 490 So. 2d 976 \(Fla. Dist. Ct. App. 4th Dist. 1986\)](#).

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§ 199. Acquisition of property on consideration paid by another

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [104](#), [105](#)

In some jurisdictions, a constructive trust may arise if consideration for the acquisition of property is furnished by one party and title is taken in the name of another so that retention of the property would result in an unjust enrichment; the deciding factor has been said to be whether the party who possesses the property has been unjustly enriched.^[FN1] A constructive trust may be imposed where one has purchased real property with the funds of another.^[FN2]

^[FN1] [Yates v. Taylor, 58 Wash. App. 187, 791 P.2d 924 \(Div. 3 1990\).](#)

- The presumption of an equitable ownership arising from circumstances justifying the imposition of a constructive trust is increased where there is evidence that one party has paid all or considerable part of the purchase price, since one who provides the purchase price or a part thereof is presumed to be an equitable owner unless a contrary intent is ascertainable from the dealings of the parties. [Williams v. Department of Health and Rehabilitative Services, 522 So. 2d 951 \(Fla. Dist. Ct. App. 1st Dist. 1988\).](#)

^[FN2] [Zobrist v. Bennison, 268 Ga. 245, 486 S.E.2d 815 \(1997\); Maki v. Chong, 119 Nev. 390, 75 P.3d 376 \(2003\).](#)

- A constructive trust, in favor of the assignee of a promissory note and mortgage given by the trustee, was required upon real property which was transferred to the beneficiary of a trust without consideration; the beneficiary enjoyed the benefit of the underlying debt incurred on behalf of the trust, received distribution of the real property that left the trust effectively without funds, and there was no showing that the beneficiary changed position after the transfer so as to make the imposition of a constructive trust inequitable. [Wendell Corp. Trustee v. Thurston, 239 Conn. 109, 680 A.2d 1314 \(1996\).](#)

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§ 200. Mistake in title transferred or decreed; failure to transfer title

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [93](#)

Grounds for imposition of a constructive trust are present where a court decrees an interest in property, by mistake, to the wrong extent; the imposition of a constructive trust was proper where the court made an obvious mistake in decreeing the property in fee simple to a life tenant when it should have decreed the property to her for her life only and furthermore, this situation is an appropriate case for imposing an implied trust where a good-faith purchaser would not be prejudiced by so doing.^[FN1] A constructive trust also arises where a deed is made absolute by mistake, and where, but for the mistake, it would have been made in trust.^[FN2] And, where property is conveyed for a consideration, and not as a gift, and the conveyance is ineffective to transfer the property, a court of equity will treat the transaction as though there were a precedent contract to transfer the property, and will compel the person making the conveyance to transfer it, upon the theory of a constructive trust based upon the duty of the transferor to complete the transfer for which he or she received the consideration; this principle applies whether the ineffectiveness of the conveyance extends to the whole or part of the subject matter.^[FN3] There is authority for the view that the ineffectiveness of an attempt to convey property for consideration is grounds for a constructive trust, to compel the transfer, whether it is due to fraud or mutual mistake.^[FN4] Where, however, the ineffectiveness of the conveyance to transfer the land as a whole is due to mistake, the mistake involved must be material in order to justify the imposition of a constructive trust on the property.^[FN5]

Where one mistakenly retains property or money which rightfully belongs to another, a constructive trust is the proper remedial device to correct the situation.^[FN6]

[\[FN1\] Loberg v. Alford, 372 N.W.2d 912 \(N.D. 1985\).](#)

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[\[FN2\] Knight Newspapers v. Commissioner of Internal Revenue, 143 F.2d 1007, 154 A.L.R. 1267 \(C.C.A. 6th Cir. 1944\); Bennett v. Bennett, 137 Ky. 17, 121 S.W. 495 \(1909\).](#)

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[\[FN3\] Strout v. Burgess, 144 Me. 263, 68 A.2d 241, 12 A.L.R.2d 939 \(1949\).](#)

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[\[FN4\] Strout v. Burgess, 144 Me. 263, 68 A.2d 241, 12 A.L.R.2d 939 \(1949\).](#)

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[\[FN5\] Mt. Sneffels Co. v. Estate of Scott, 789 P.2d 464 \(Colo. Ct. App. 1989\).](#)

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[\[FN6\] Yamaha Motor Corp., U.S.A. v. Tri-City Motors and Sports, Inc., 171 Mich. App. 260, 429 N.W.2d 871, 7 U.C.C. Rep. Serv. 2d 1190 \(1988\).](#)

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§ 201. Frustration of testamentary intent; breach of promise which induced execution or change of will

West's Key Number Digest

A constructive trust may be brought under circumstances establishing a cause of action for tortious interference with an intended bequest.[\[FN1\]](#)

Fraud in the procurement of a will is an equitable cause of action that seeks the imposition of a constructive trust in favor of the rightful beneficiaries on proceeds that have been fraudulently obtained by the defendant.[\[FN2\]](#) In testamentary circumstances, a constructive trust will be imposed when a named devisee either expressly promises or by silence implies that he or she will perform according to the intention of the testator.[\[FN3\]](#) More specifically, a constructive trust arises where an heir, devisee, or legatee breaches a promise to the testator—either express or inferable from words or conduct—to hold for or give another an inheritance, devise, or legacy, on which promise the testator has relied in making or changing a will.[\[FN4\]](#)

A constructive trust could not be imposed over the assets of an estate in favor of a beneficiary named in an invalidly executed will, as the decedent failed to sign or to direct someone to sign her will, there was no way of knowing why she did not sign her name or whether the will properly reflected her testamentary intent, and there was no evidence that the decedent intended the typewritten name below the signature line to serve as her signature.[\[FN5\]](#) However, a constructive trust would be imposed on assets conveyed by codicil where the testator's intent to revoke the codicil was frustrated by his mistake in destroying a copy of the codicil rather than the original, and where the residual beneficiary of the codicil benefited at the expense of testator's intended beneficiary.[\[FN6\]](#)

[\[FN1\]](#) [Plimpton v. Gerrard, 668 A.2d 882 \(Me. 1995\).](#)

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[\[FN2\]](#) [Anderson v. Meadowcroft, 339 Md. 218, 661 A.2d 726 \(1995\).](#)

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[\[FN3\]](#) [Fix v. Fix, 847 S.W.2d 762 \(Mo. 1993\).](#)

- A constructive trust was imposed on real property which the decedent conveyed to one of her three daughters in light of evidence that the decedent intended her children to share equally in her estate and the purpose of the conveyance was to create eligibility for nursing home benefits; the decedent's will provided for the equal division of property among her children, disinterested witnesses testified to statements by the decedent that she wanted children to share equally in her estate, and the grantee's testimony that the decedent did not want the state to take property if she required nursing home care. [Nichols v. Wray, 325 Ark. 326, 925 S.W.2d 785 \(1996\).](#)

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[\[FN4\]](#) [Voelkel v. Tohulka, 236 Ind. 588, 141 N.E.2d 344, 70 A.L.R.2d 1349 \(1957\); Strype v. Lewis, 352 Mo. 1004, 180 S.W.2d 688, 155 A.L.R. 99 \(1944\).](#)

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[\[FN5\]](#) [Allen v. Dalk, 826 So. 2d 245 \(Fla. 2002\).](#)

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[\[FN6\]](#) [In re Estate of Tolin, 622 So. 2d 988 \(Fla. 1993\).](#)

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**§ 202. Frustration of testamentary intent; breach of promise which induced execution or change of will—
Conduct preventing execution or change of will**

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 97

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[Rights and remedies against one who induces, prevents, or interferes in the making, changing, or revoking of a will, or holds the fruits thereof, 11 A.L.R.2d 808](#) (secs. 3-10 superseded by [Liability in damages for interference with expected inheritance or gift, 22 A.L.R.4th 1229](#)).

An heir, or beneficiary of a prior will, who by force, fraud, or other misconduct prevents the execution of a will, is chargeable as trustee for the benefit of one to whom, except for such conduct, the legacy or devise would have been made; even a mild form of misconduct may constitute sufficient ground for such relief.[\[FN1\]](#)

Furthermore, where a legatee induces a testator not to change a will, a constructive trust also may result.[\[FN2\]](#) In such instances, the person preventing a change of will is a constructive trustee to the amount or extent that the will would have been changed.[\[FN3\]](#)

[\[FN1\]](#) [Latham v. Father Divine, 299 N.Y. 22, 85 N.E.2d 168, 11 A.L.R.2d 802 \(1949\)](#).

[\[FN2\]](#) [Lowe Foundation v. Northern Trust Co., 342 Ill. App. 379, 96 N.E.2d 831 \(1st Dist. 1951\)](#); [Danner v. Danner, 366 Pa. 178, 77 A.2d 217 \(1950\)](#).

- In an action by heirs at law to impose a constructive trust on property which passed to a testatrix's grandchildren under her will, a cause of action for the imposition of a constructive trust was stated by the

complaint alleging that the executor of the testatrix's deceased daughter fraudulently promised to adopt the daughter's adopted children so that the testatrix would not have to change her will to prevent the children from taking thereunder and that such promise was not fulfilled. [White v. Mulvania, 575 S.W.2d 184 \(Mo. 1978\)](#).

- The entire content of a testatrix's estate would be subjected to a constructive trust where the testatrix wanted to change her will to name the plaintiff as her sole beneficiary, and the defendant, knowing this and employing the assistance of the decedent's attorney, successfully conspired to prevent the execution of a new will, and where, had the decedent changed her will, the plaintiff would have been her sole beneficiary under a new will, as was the wish of the decedent. [Dawson v. Vasquez, 139 Misc. 2d 588, 528 N.Y.S.2d 255 \(Sup 1988\)](#), judgment aff'd, [153 A.D.2d 836, 545 N.Y.S.2d 682 \(2d Dep't 1989\)](#).

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[\[FN3\] Lowe Foundation v. Northern Trust Co., 342 Ill. App. 379, 96 N.E.2d 831 \(1st Dist. 1951\)](#).

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§ 203. Taking under forged or fraudulent will

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [97](#)

A constructive trust may be declared in favor of persons defrauded by the probate of a forged or fraudulent will.[\[FN1\]](#) To warrant such relief, the fraud complained of must be extrinsic and collateral to the issues tried in the probate court.[\[FN2\]](#)

Practice guide: Where a wrongdoer has failed to destroy a will in accord with the testator's instructions, an action to impose a constructive trust may be brought as soon as the fraudulent will is probated.[\[FN3\]](#)

[\[FN1\] Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194 \(1933\); Seeds v. Seeds, 116 Ohio St. 144, 5 Ohio L. Abs. 174, 156 N.E. 193, 52 A.L.R. 761 \(1927\).](#)

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[\[FN2\] Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194 \(1933\).](#)

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[\[FN3\] Ludwicki v. Guerin, 57 Cal. 2d 127, 17 Cal. Rptr. 823, 367 P.2d 415 \(1961\).](#)

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§ 204. Property of unmarried cohabitants

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [103\(5\)](#)

A.L.R. Library

[Property rights arising from relationship of couple cohabiting without marriage, 69 A.L.R.5th 219](#)

Forms

Complaint, petition, or declaration—To impress trust on unmarried cohabitant's property. [Am. Jur. Pleading and Practice Forms, Trusts, § 73](#)

As a matter of law, a constructive trust may be imposed to do equity between unmarried cohabitants.^[FN1] In this regard, a court may impose a constructive trust on property for the benefit of a live-in companion of the owner, under certain circumstances.^[FN2] For example, where two unmarried people were living together, a male cohabitant has been held to hold a one-half interest in the common residential premises in constructive trust for his female companion, based on findings of fact demonstrating that there was a fiduciary relationship between the parties and that the defendant violated his fiduciary duty to the plaintiff.^[FN3] A claimant's interest based on an implied constructive trust is not barred due simply to the claimant's status as the domestic partner of the titled owner.^[FN4] A cause of action for a constructive trust is maintainable between parties cohabiting illicitly as long as it is clear that there was a valid, lawful consideration, separate and apart from any express or implied agreement regarding sexual relations; under this view, money, labor, and material—separate and distinct from spouse-like services—are valid considerations that will support the imposition of a constructive trust.^[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Unmarried male who had purchased residential property and put it in name of female who was cohabiting with him, followed by phrase "as nominee" in the warranty deed, failed to establish constructive trust, as would require female to convey property to male after couple separated; male overtly engaged in acts that were inconsistent with female's role as nominee holding bare legal title, including his representation to state department of revenue that female was sole legal owner of the property, and female would not be unjustly enriched by a finding that she had part ownership, in light of her extensive labor over the course of eleven years to improve the property. [LeFeber v. Johnson, 2009 MT 188, 351 Mont. 75, 209 P.3d 254 \(2009\)](#).

[END OF SUPPLEMENT]

^[FN1] [Evans v. Wall, 542 So. 2d 1055 \(Fla. Dist. Ct. App. 3d Dist. 1989\)](#).

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^[FN2] [Sullivan v. Rooney, 404 Mass. 160, 533 N.E.2d 1372 \(1989\)](#).

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^[FN3] [Sullivan v. Rooney, 404 Mass. 160, 533 N.E.2d 1372 \(1989\)](#), stating that it would be unjust not to impose constructive trust where plaintiff gave up career as flight attendant and undertook to maintain a home for defendant while he advanced his career, and plaintiff contributed her earnings and services to home, and that defendant's assurances to plaintiff that they would own property together (although title would be taken only in his name), his later promises to transfer title to joint ownership, and plaintiff's reasonable reliance on those promises, made by one in whom she reasonably placed special confidence, called for imposition of constructive trust in plaintiff's favor in one-half of property.

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[\[FN4\] Lathem v. Hestley, 270 Ga. 849, 514 S.E.2d 440 \(1999\).](#)

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[\[FN5\] Evans v. Wall, 542 So. 2d 1055 \(Fla. Dist. Ct. App. 3d Dist. 1989\).](#)

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Forms

[Am. Jur. Legal Forms 2d, Trusts §§ 251:355 to 251:392](#)

[Am. Jur. Pleading and Practice Forms, Trusts §§ 85 to 179](#)

Model Codes and Restatements

[Uniform Probate Code § 7-105](#)

[Uniform Trust Code §§ 701, 704 to 706](#) (2000)

[Restatement, Third-Trusts §§ 31 to 37](#)

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 - A. Trustees; Trust Advisors
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§ 205. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [123](#), [155](#) to [170](#)

The trustee is that person in the trust transaction who holds the legal title to the property subject to the trust, for the benefit of the beneficiary,^[FN1] with certain powers and subject to certain duties imposed by the terms of the trust, equity jurisprudence, or statutory provision.^[FN2] A trustee does not merely serve at the pleasure of the trust beneficiaries.^[FN3] A trustee appointed by a will is a person to whom some interest or power affecting the estate assets, other than those assigned to the executor, is vested by the will for the benefit of another.^[FN4]

While it has been stated that to create a trust there must be a valid trustee,[\[FN5\]](#) a trust will not fail for the want of a trustee,[\[FN6\]](#) insofar as a court of equity will appoint a trustee where necessary or take measures to execute the trust or otherwise effect its accomplishment.[\[FN7\]](#)

Pursuant to the imposition of a trust by operation of law, a person holding property is, by law, deemed a trustee of certain property; for example, by imposition of a constructive trust, the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest.[\[FN8\]](#)

A trustee may serve provisionally, where his or her appointment so indicates.[\[FN9\]](#)

[\[FN1\] § 240.](#)

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[\[FN2\] Reinecke v. Smith, 289 U.S. 172, 53 S. Ct. 570, 77 L. Ed. 1109 \(1933\).](#)

- As to interests in trust property, generally, see §§ [275](#) to [291](#).

- As to trustees' powers, duties, and liabilities in administering trusts, generally, see §§ [316](#) to [324](#).

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[\[FN3\] Schildberg v. Schildberg, 461 N.W.2d 186 \(Iowa 1990\).](#)

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[\[FN4\] In re Armour's Will, 33 N.J. 517, 166 A.2d 376, 85 A.L.R.2d 529 \(1960\).](#)

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[\[FN5\] § 51.](#)

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[\[FN6\] §§ 51, 84.](#)

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[\[FN7\] § 217.](#)

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[\[FN8\] § 171.](#)

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[\[FN9\] Miller v. Miller, 817 So. 2d 1166 \(La. Ct. App. 2d Cir. 2002\), writ denied, 827 So. 2d 1154 \(La. 2002\).](#)

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Trusts

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V. Trustees, Trust Advisors, and Beneficiaries, in General
A. Trustees; Trust Advisors
1. General Nature and Characterization

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 206. Relation to trust instrument

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [123](#)

Trust instruments sometimes name trust advisors with specified duties.^[FN1] A trust advisor has only the authority given by the terms of the trust instrument and cannot exceed that authority by reason of also being the sole income beneficiary of the trust with a testamentary power of appointment over all trust assets.^[FN2]

Absent the effective creation of a trust, there can be no trustee, nor can the duties of a trustee be imposed upon a person in the absence of an effective trust.^[FN3]

CUMULATIVE SUPPLEMENT

Cases:

Purported trust to which taxpayer transferred his business lacked economic substance, and therefore would be disregarded for federal income tax purposes; taxpayer's relationship to property transferred did not differ in any material respect after transfer, trust did not have independent trustee who exercised meaningful control over its operations due to taxpayer's failure to observe formalities with respect to resignation and appointment of trustees and taxpayer's unfettered control of trust's assets and operations, trust was mere intermediary for passing economic benefit to taxpayer, and taxpayer was not in practice bound by any restrictions imposed by trust or law of trusts. [Edwards v. C.I.R., T.C. Memo. 2005-52, T.C.M. \(RIA\) P 2005-052 \(2005\)](#)

[END OF SUPPLEMENT]

^[FN1] [Papiernik v. Papiernik, 45 Ohio St. 3d 337, 544 N.E.2d 664 \(1989\).](#)

- As to the powers and duties of trustees, see §§ [316](#) to [324](#).

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^[FN2] [Papiernik v. Papiernik, 45 Ohio St. 3d 337, 544 N.E.2d 664 \(1989\).](#)

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^[FN3] [Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429 \(Tex. App. Houston 14th Dist. 2000\)](#) (a lawsuit settlement agreement did not create a trust in the proceeds of another settlement used as funding; thus, the attorney for the liable party was not a trustee and had no duty to act as one).

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A. Trustees; Trust Advisors
2. Who May Serve As Trustee

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§ 207. Generally; nonresidents

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [155](#) to [157](#)

Forms

Who may be trustee. [Am. Jur. Legal Forms 2d, Trusts § 251:356](#)

Objection—To confirmation or appointment of trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 96](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 32](#)

Any person may be appointed to serve as a trustee, as long as the nominee meets the qualifications required of a trustee.[[FN1](#)]

As the rule is expressed in the Restatement Third of Trusts, any natural person has the capacity to take and hold property in a trust to the extent the person has the capacity to take and hold the property as a beneficial owner.[[FN2](#)] Any person also has the capacity to administer trust property and act as trustee to the same extent the person would have capacity to deal with the property as a beneficial owner.[[FN3](#)]

A minor may be a trustee and may be compelled to execute his or her trust;[FN4] and if, after coming of age, he or she affirms the trust and ratifies the acts which were done in accordance with the trust, it is out of his or her power to deny that any trust ever existed.[FN5]

A nominee does not have to be an attorney in order to serve as a trustee.[FN6]

In some jurisdictions, a nonresident may be a trustee.[FN7] Some jurisdictions require the trustee to be a resident of the state, even though the trustee is not a resident of the particular county where the trust is created or to be administered.[FN8] In such jurisdictions, residency in and of itself is not a sufficient test for adjudicating the fitness or competency of a potential trustee, and at the same time, the only consideration pertinent to residency is that the trustee be a resident of the state.[FN9] The Restatement Third of Trusts recognizes that a nonresident may be a trustee under certain conditions.[FN10]

Observation: Where a testamentary trust is created in one state, that state retains exclusive statutory jurisdiction to determine the qualification of a trustee; another state's courts may not appoint a successor trustee in order to allow the transfer of the trust corpus and administration of the trust to that other state, even though the beneficiaries all reside in such other state.[FN11]

[FN1] [Estate of Doyle v. Hunt, 60 S.W.3d 838 \(Tenn. Ct. App. 2001\).](#)

-

[FN2] [Restatement, Third-Trusts § 32\(a\).](#)

-

[FN3] [Restatement, Third-Trusts § 32\(b\).](#)

-

[FN4] [Restatement, Third-Trusts § 32](#), comment.

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[FN5] [Irvine v. Irvine, 76 U.S. 617, 19 L. Ed. 800 \(1869\).](#)

-

[FN6] [Estate of Doyle v. Hunt, 60 S.W.3d 838 \(Tenn. Ct. App. 2001\).](#)

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[FN7] [Munford v. Maclellan, 258 Ga. 679, 373 S.E.2d 368 \(1988\).](#)

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[FN8] [In re Trust of Selsor, 13 Ohio App. 3d 164, 468 N.E.2d 745 \(12th Dist. Madison County 1983\).](#)

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[FN9] [In re Trust of Selsor, 13 Ohio App. 3d 164, 468 N.E.2d 745 \(12th Dist. Madison County 1983\).](#)

-

[FN10] [Restatement, Third-Trusts § 32](#), comment d.

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[FN11] [Rosenberg v. Bank of America, N.A., 2003 WL 1823467 \(Tex. App. Dallas 2003\).](#)

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§ 208. Trustor or settlor

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [155](#)

Forms

Who may be trustee. [Am. Jur. Legal Forms 2d, Trusts § 251:356](#)

Objection—To confirmation or appointment of trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 96](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 32](#)

It is permissible for the settlor of a trust to act also as trustee.[\[FN1\]](#) This view is expressly endorsed by the Restatement.[\[FN2\]](#) The trust is not invalidated on the basis of one's taking such a dual capacity.[\[FN3\]](#)

Where the owner of personal property, in creating a trust therein, constitutes himself or herself as trustee, it is not necessary as between himself or herself and the beneficiary that he or she should part with the possession of the property.[\[FN4\]](#)

[\[FN1\] Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 \(2001\);](#)
[- Nickson v. Filtrol Corp., 262 A.2d 267 \(Del. Ch. 1970\).](#)

[\[FN2\] Restatement, Third-Trusts § 32\(a\).](#)

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[\[FN3\] § 50.](#)

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[\[FN4\] § 253.](#)

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§ 209. Beneficiary or beneficiaries; remaindermen

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [155](#) to [157](#)

Forms

Who may be trustee. [Am. Jur. Legal Forms 2d, Trusts § 251:356](#)

Objection—To confirmation or appointment of trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 96](#)

The sole beneficiary of a trust cannot be the sole trustee of that trust;[\[FN1\]](#) a separation of legal and equitable interests is essential to the existence of a trust,[\[FN2\]](#) and the meeting in the same person of all the legal and all the equitable interest in property subject to a trust results in a termination of the trust.[\[FN3\]](#)

Observation: The Restatement phrases the rule somewhat differently, stating instead that a beneficiary may be a trustee to the extent that he or she both: (1) has the capacity to take and hold the property as a beneficial owner; and (2) has the capacity to administer trust property and act as trustee to the same extent the person would have capacity to deal with the property as a beneficial owner.[FN4]

Where the sole beneficiary is selected by the instrument purporting to create a trust as the sole trustee, such trustee becomes the owner of the property free of the trust, and the attempt to create the trust is considered as having failed.[FN5] This does not mean, however, that a beneficiary may not be a trustee of the trust where there is lack of complete identity between the beneficiary and the trustee, and he or she is, under the circumstances, a fit person to become trustee.[FN6] That is, the sole beneficiary of a trust may be one of several cotrustees,[FN7] and one of several beneficiaries of a trust may be a cotrustee of the trust or even the sole trustee of it.[FN8]

A family member who is also a contingent remainderman of a trust is not automatically excluded from serving as a trustee of the trust.[FN9]

[FN1] Vaughan v. Shirey, 212 Ark. 935, 208 S.W.2d 441 (1948); Reed v. Browne, 295 N.Y. 184, 66 N.E.2d 47, 165 A.L.R. 1061 (1946).

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[FN2] § 43.

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[FN3] § 90.

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[FN4] Restatement, Third-Trusts § 32.

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[FN5] Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 (C.C.A. 8th Cir. 1937).

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[FN6] In re Stack's Will, 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

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[FN7] In re Peck's Estate, 320 Mich. 692, 32 N.W.2d 14 (1948); Julian v. Northwestern Trust Co., 192 Minn. 136, 255 N.W. 622 (1934).

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[FN8] Sieling v. Sieling, 151 Md. 536, 135 A. 376 (1926); State v. Exchange Bank of Ogallala, 114 Neb. 664, 209 N.W. 249 (1926); In re Dewey's Estate, 45 Utah 98, 143 P. 124 (1914).

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[FN9] In re Pace, 182 Misc. 2d 618, 699 N.Y.S.2d 257 (Sup 1999).

- As to the effect of conflicts of interest, see § 233.

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§ 210. Beneficiary or beneficiaries—Multiple persons as both exclusive beneficiaries and trustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 155 to 157

A.L.R. Library

[Trusts: Merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621](#)

Forms

Objection—To confirmation or appointment of trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 96](#)

Where multiple beneficiaries and trustees are authorized, there is some authority for the position that no trust may be validly created where the same persons are both beneficiaries and trustees.^[FN1] However, generally speaking, a trust instrument may name two or more trustees and make the same persons the exclusive beneficiaries of the trust.^[FN2] In this regard, where, under the terms of the trust, neither trustee can transfer the trust property without the concurrence of the other trustee, neither is the sole beneficiary,^[FN3] and there is no merger of the legal and equitable titles in the property to them.^[FN4] The theory behind the rule that an intended trust is validly created although the trust instrument names the same persons both trustees and beneficiaries is that the necessary separation of the legal and equitable interests exists and that there is not automatically a merger of them even though the beneficiaries are also trustees; in such a case, each of the beneficiaries has an equitable interest of the same kind that they would have if a third person had been named as trustee, and there exists no good reason for defeating the intention of the settlor.^[FN5] However, there is no such merger of the legal and equitable interests as will render the trust invalid where no one of the trustees is free to deal alone with his or her own equitable interest, any action taken by the trustees must be unanimous, and complete authority passes to the surviving trustees in case of the death of any trustee.^[FN6]

[\[FN1\] Collins v. Mosher, 115 F.2d 900 \(C.C.A. 9th Cir. 1940\) \(applying Arizona law\).](#)

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[\[FN2\] First Alabama Bank of Tuscaloosa, N.A. v. Webb, 373 So. 2d 631, 7 A.L.R.4th 610 \(Ala. 1979\); Hill v. Conover, 191 Cal. App. 2d 171, 12 Cal. Rptr. 522 \(2d Dist. 1961\); Fry v. McCormick, 170 Kan. 741, 228 P.2d 727 \(1951\); Turner v. Mitchell, 297 S.W.2d 458 \(Mo. 1956\); Cahill v. Armatys, 185 Neb. 539, 177 N.W.2d 277 \(1970\); Pennsylvania Co. for Banking & Trusts v. Bates, 7 N.J. Super. 482, 71 A.2d 917 \(Ch. Div. 1950\); Reed v. Browne, 295 N.Y. 184, 66 N.E.2d 47, 165 A.L.R. 1061 \(1946\) \(holding trust valid so long as more than one of them is alive\); Blades v. Norfolk Southern Ry. Co., 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 \(1944\); Miller v. Miller, 202 Tenn. 249, 304 S.W.2d 74 \(1957\); Horlick v. Sidley, 241 Wis. 81, 3 N.W.2d 710 \(1942\).](#)

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[\[FN3\] Hill v. Conover, 191 Cal. App. 2d 171, 12 Cal. Rptr. 522 \(2d Dist. 1961\); Cahill v. Armatys, 185 Neb. 539, 177 N.W.2d 277 \(1970\).](#)

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[\[FN4\] Hill v. Conover, 191 Cal. App. 2d 171, 12 Cal. Rptr. 522 \(2d Dist. 1961\); Fry v. McCormick, 170 Kan. 741, 228 P.2d 727 \(1951\); Morgan v. Murton, 131 N.J. Eq. 481, 26 A.2d 45 \(Ch. 1942\).](#)

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[\[FN5\] Blades v. Norfolk Southern Ry. Co., 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 \(1944\).](#)

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[\[FN6\] Blades v. Norfolk Southern Ry. Co., 224 N.C. 32, 29 S.E.2d 148, 151 A.L.R. 1278 \(1944\).](#)

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§ 211. Corporations

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 155 to 157

Forms

Appointment of trustee—Corporation. [Am. Jur. Legal Forms 2d, Trusts § 251:358](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 33\(1\)](#)

A corporation may, by authority expressly[[FN1](#)] or impliedly[[FN2](#)] conferred upon it by its charter, hold property and administer it in trust,[[FN3](#)] whether the property is realty or personalty.[[FN4](#)]

The Restatement Third of Trusts recognizes that a corporation may be a trustee except as otherwise limited by law and only to the extent of the powers conferred on it by law.[[FN5](#)] This authority extends to national banks whose charters permit them to act as trustees.[[FN6](#)]

[[FN1](#)] [Vidal v. Girard's Ex'rs](#), 43 U.S. 127, 2 How. 127, 11 L. Ed. 205 (1844); [Port Arthur Trust Co. v. Muldrow](#), 155 Tex. 612, 291 S.W.2d 312, 60 A.L.R.2d 913 (1956).

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[[FN2](#)] [Restatement, Third-Trusts § 33\(1\)](#).

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[[FN3](#)] [Perin v. Carey](#), 65 U.S. 465, 24 How. 465, 16 L. Ed. 701 (1860); [In re Risher's Will](#), 227 Wis. 104, 277 N.W. 160, 115 A.L.R. 790 (1938).

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[[FN4](#)] [Vidal v. Girard's Ex'rs](#), 43 U.S. 127, 2 How. 127, 11 L. Ed. 205 (1844); [Port Arthur Trust Co. v. Muldrow](#), 155 Tex. 612, 291 S.W.2d 312, 60 A.L.R.2d 913 (1956).

- As to the power of a foreign corporation to act as a trustee, see [§ 212](#).

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[[FN5](#)] [Restatement, Third-Trusts § 33\(1\)](#).

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[[FN6](#)] [Restatement, Third-Trusts § 33](#), comment b(1).

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§ 212. Corporations—Foreign corporations

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 155 to 157

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[Eligibility of foreign corporation to appointment as executor, administrator, or testamentary trustee, 26 A.L.R.3d 1019](#)

[Eligibility of foreign corporation to appointment as trustee of inter vivos trust, 82 A.L.R.2d 946](#)

Forms

Appointment of trustee—Corporation. [Am. Jur. Legal Forms 2d, Trusts § 251:358](#)

Petition or application—For appointment or confirmation of testamentary trustee—Allegation—Qualification of foreign corporation to act as trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 93](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 33](#), comment c

The Uniform Probate Code recognizes that foreign corporations may serve as trustees and contains express provisions governing the registration and qualification of a foreign trustee to do business in a particular state.[\[FN1\]](#)

Except as specific statutory provisions forbid appointment of a foreign fiduciary corporation as trustee of an inter vivos trust, there appears to be no basic public policy reason why such an appointment should not be valid, although a court, in its discretion, may refuse to make such an appointment under the circumstances of a particular case.[\[FN2\]](#)

Foreign corporations, qualified to act as testamentary trustees in the state of their domicile, have been permitted, under the law of comity, to act in a foreign state when their acting would neither violate the laws or public policy of the foreign state nor inflict injury on any of the citizens of the latter state.[\[FN3\]](#) Furthermore, in the absence of a statute to the contrary, a testator may nominate by will a foreign corporation as testamentary trustee, and the court will follow the intention of the testator.[\[FN4\]](#)

In some instances foreign corporations have not qualified to act as testamentary trustees because of statutes which have specifically excluded them from acting in such capacity.[\[FN5\]](#) However, a statutory provision barring a trust company located in a state from serving as testamentary trustee because it was controlled by a corporation domiciled or licensed in a contiguous state invidiously discriminates against the trust company and denies it the equal protection of the laws.[\[FN6\]](#)

[\[FN1\]](#) [Uniform Probate Code § 7-105.](#)

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[\[FN2\]](#) [In re V-I-D, Inc., 198 F.2d 392 \(7th Cir. 1952\); Ingalls v. Ingalls, 263 Ala. 106, 81 So. 2d 610 \(1955\).](#)

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[\[FN3\]](#) [In re Taylor's Estate, 5 Ariz. App. 144, 424 P.2d 186, 26 A.L.R.3d 1010 \(1967\).](#)

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[\[FN4\]](#) [In re Frank's Trust, 400 Pa. 614, 162 A.2d 680, 82 A.L.R.2d 937 \(1960\).](#)

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[\[FN5\]](#) [American Trust Co., Inc. v. South Carolina State Bd. of Bank Control, 381 F. Supp. 313 \(D.S.C. 1974\); Succession of Guillory, 232 La. 213, 94 So. 2d 38 \(1957\); Carlock v. Ladies Cemetery Ass'n, 317 S.W.2d 432 \(Mo. 1958\).](#)

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[\[FN6\]](#) [American Trust Co., Inc. v. South Carolina State Bd. of Bank Control, 381 F. Supp. 313 \(D.S.C. 1974\).](#)

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§ 213. Municipal or other governmental bodies

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 155 to 157

Where the trusteeship is germane to the objects of the governmental corporate body and otherwise within its corporate powers and its charter powers, a municipal corporation may hold and administer property in trust.[FN1] Municipal corporations may accept and administer trusts, although typically this authority is limited to trusts serving a public purpose.[FN2] Unincorporated associations may also serve as trustees to the extent that they otherwise have the power to take and hold property.[FN3]

[FN1] [Girard v. City of Philadelphia, 74 U.S. 1, 19 L. Ed. 53 \(1868\); In re Eggan's Estate, 86 Idaho 328, 386 P.2d 563 \(1963\).](#)

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[FN2] [Restatement, Third-Trusts § 33](#), comment d.

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[FN3] [Restatement, Third-Trusts § 33\(2\), 33](#) comment f.

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§ 214. Generally; appointment by court

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Forms

Certificate—By clerk—That letters of trusteeship have been issued and are in full force. [Am. Jur. Pleading and Practice Forms, Trusts § 132.](#)

Certificate—By clerk—That copy of letters of trusteeship is true and correct. [Am. Jur. Pleading and Practice Forms, Trusts § 133](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 34](#)

The creator of a trust has the right to appoint his or her own trustees.[FN1]

A trustee can be appointed by any person so empowered by the terms of the trust, including a cotrustee.[FN2]

According to the Restatement Third of Trusts, unless required by statute, a trustee designated by or selected in accordance with the terms of a trust can act without being appointed or confirmed by an order of court.[FN3] The court is authorized to act, however, if the appointment of a trustee is not provided for or made pursuant to the terms of the trust.[FN4]

By one view, the power of a court to appoint trustees is to be strictly construed.[FN5] The contrary view has also been expressed that the power to appoint trustees is a very broad one, addressed to the sound discretion of the court.[FN6] Where the appointment of a trustee is deemed within the discretion of the trial court,[FN7] then, in the exercise of that discretion, the court should always give careful consideration to the purposes of the trust and the best interest of all the beneficiaries.[FN8] Thus, where it appears to a court that a life tenant of personalty may endanger the value of the remainder of the estate if allowed to continue in possession of the personalty, the court may, in its discretion, appoint a trustee to assume management and control.[FN9]

Effect must be given to valid terms of a trust relative to the mode and manner of selecting trustees in the administration of the trust.[FN10] Thus, when a court seeks to exercise its residual authority of appointment of trustees, it should do so only in rare circumstances, since the identity and number of the trustees is central to the structure of the trust and a key indicator of the intent of the settlor.[FN11] Nevertheless, a court always retains the discretion to reject a trustee nominee "prayed for by name" where the nominee is justifiably found to be unsuitable or there exist facts strongly indicative of the necessity of a different appointment.[FN12]

Observation: In some jurisdictions, persons who seek to be appointed as trustees by a court may be statutorily required to meet certain regulatory qualifications to be eligible for a judicial appointment; however, trustee nominees who are not appointed by a court may not be similarly required to meet these same statutory or regulatory qualifications,[\[FN13\]](#) resulting in a dichotomy of qualifications dependent upon the source of the appointment.

[\[FN1\] Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 \(Mo. Ct. App. S.D. 2001\); Estate of Doyle v. Hunt, 60 S.W.3d 838 \(Tenn. Ct. App. 2001\).](#)

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[\[FN2\] American Center for Education, Inc. v. Cavnar, 80 Cal. App. 3d 476, 145 Cal. Rptr. 736 \(2d Dist. 1978\).](#)

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[\[FN3\] Restatement, Third-Trusts § 34\(1\).](#)

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[\[FN4\] Restatement, Third-Trusts § 34\(2\).](#)

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[\[FN5\] In re Steinsapir, 392 Pa. Super. 355, 572 A.2d 1270 \(1990\).](#)

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[\[FN6\] Wertin v. Wertin, 217 Minn. 51, 13 N.W.2d 749, 151 A.L.R. 1302 \(1944\).](#)

- As to the discretion of a court to appoint a successor trustee, see [§ 238](#).

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[\[FN7\] Regie de l'assurance Auto. du Quebec v. Jensen, 399 N.W.2d 85 \(Minn. 1987\); Bonney v. Granger, 292 S.C. 308, 356 S.E.2d 138 \(Ct. App. 1987\); Matter of Estate of Srubar, 728 S.W.2d 437 \(Tex. App. Houston 1st Dist. 1987\).](#)

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[\[FN8\] McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\); Bonney v. Granger, 292 S.C. 308, 356 S.E.2d 138 \(Ct. App. 1987\).](#)

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[\[FN9\] Matter of Estate of Srubar, 728 S.W.2d 437 \(Tex. App. Houston 1st Dist. 1987\).](#)

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[\[FN10\] Colt v. Colt, 111 U.S. 566, 4 S. Ct. 553, 28 L. Ed. 520 \(1884\); In re Frank's Trust, 400 Pa. 614, 162 A.2d 680, 82 A.L.R.2d 937 \(1960\).](#)

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[\[FN11\] McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\).](#)

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[\[FN12\] In re Will of Crabtree, 440 Mass. 177, 795 N.E.2d 1157 \(2003\).](#)

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[\[FN13\] In re Will of Crabtree, 440 Mass. 177, 795 N.E.2d 1157 \(2003\).](#)

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§ 215. Effect of time of appointment; prerequisite of existing trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 155 to [160\(3\)](#)

Generally, for a designation of a trustee to be effective, there must be in existence a trust agreement or other declaration of trust at the time that the designation is made.[\[FN1\]](#) Otherwise stated, the mere designation of a grantee as "trustee" in a deed, without other language showing that a trust exists, does not make the grantee a trustee of a trust.[\[FN2\]](#)

A life insurance beneficiary designation which states that the proceeds are to be placed in trust is ineffective as a designation of a trustee.[\[FN3\]](#) Similarly, the designation "Trustee" after a grantee's name in a sheriff's deed does not create a trust or make the grantee a trustee of a trust.[\[FN4\]](#)

[\[FN1\]](#) *Estate of Stewart*, 158 Misc. 2d 349, 601 N.Y.S.2d 400 (Sur. Ct. 1993) (statutory requirement); *Gammarino v. Hamilton Cty. Bd. of Revision*, 84 Ohio St. 3d 155, 1998-Ohio-715, 702 N.E.2d 415 (1998).

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[\[FN2\]](#) *Gammarino v. Hamilton Cty. Bd. of Revision*, 84 Ohio St. 3d 155, 1998-Ohio-715, 702 N.E.2d 415 (1998).

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[\[FN3\]](#) *Estate of Stewart*, 158 Misc. 2d 349, 601 N.Y.S.2d 400 (Sur. Ct. 1993).

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[\[FN4\]](#) *Gammarino v. Hamilton Cty. Bd. of Revision*, 84 Ohio St. 3d 155, 1998-Ohio-715, 702 N.E.2d 415 (1998).

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§ 216. Duty to appoint suitable, competent trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [159](#), [160\(1\)](#)

It is the duty of the court to appoint a suitable[[FN1](#)] and competent[[FN2](#)] person as trustee.

Competence refers not only to legal capacity to act as trustee,[[FN3](#)] but also to competence to perform the duties of a trustee.[[FN4](#)]

Under this duty, the fact that the trustee may have an interest in the outcome of the case or on the recovery does not denote incompetency to serve as trustee. Indeed, it is commonplace for the surviving spouse or one of the next of kin to be appointed as trustee, notwithstanding the obvious interest he or she may have in the outcome of the action.[[FN5](#)]

[[FN1](#)] [Regie de l'assurance Auto. du Quebec v. Jensen, 399 N.W.2d 85 \(Minn. 1987\)](#) (referring to statutory requirement).

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[[FN2](#)] [Regie de l'assurance Auto. du Quebec v. Jensen, 399 N.W.2d 85 \(Minn. 1987\)](#) (referring to statutory requirement).

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[[FN3](#)] [§ 207](#).

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[[FN4](#)] [In re Charnock, 158 N.C. App. 35, 579 S.E.2d 887 \(2003\)](#), cert. denied, [357 N.C. 506, 588 S.E.2d 473 \(2003\)](#) and decision aff'd, [358 N.C. 523, 597 S.E.2d 706 \(2004\)](#).

- As to incompetence in performance of duties as a ground for removal of a trustee, see [§ 230](#).

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[FN5] [Regie de l'assurance Auto. du Quebec v. Jensen, 399 N.W.2d 85 \(Minn. 1987\)](#).

- As to conflict of interest as a ground to decline to appoint a person as trustee, see [§ 233](#).

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§ 217. Effect of failure of settlor's appointment

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [160\(2\)](#)

Forms

Petition or application—For appointment as testamentary trustee—Failure of will to designate trustee. [Am. Jur. Pleading and Practice Forms, Trusts, Form 92](#)

Order—Appointing trustee of testamentary trust—Where will failed to designate trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 98](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 34\(2\)](#)

A trust will never fail for want of a trustee;[FN1] a court may, in such instances, appoint a trustee where necessary to the administration of a trust or to prevent failure of the trust, whether the necessity arises from failure of appointment, from nonacceptance or disqualification of a trustee, or from other cause.[FN2] However, although a court generally possesses the authority to appoint a trustee if the trust instrument fails to do so, where the terms of the trust provide a method for filling vacancies by some method other than by the appointment of the court, such designated method of replacement should be followed.[FN3] Furthermore, where a trusteeship is purely personal in the sense that the trustor has excluded its administration by any person other than the trustee so designated,[FN4] a court cannot appoint a trustee in the event of the death, incompetency, or other failure of the designated trustee.[FN5]

[FN1] § § [51](#), [84](#).

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[FN2] [Fitchie v. Brown](#), 211 U.S. 321, 29 S. Ct. 106, 53 L. Ed. 202 (1908); [Stell v. Boulder County Dept. of Social Services](#), 92 P.3d 910 (Colo. 2004), as modified on denial of reh'g, (July 12, 2004); [McNeil v. McNeil](#), 798 A.2d 503 (Del. 2002).

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[FN3] [McNeil v. McNeil](#), 798 A.2d 503 (Del. 2002).

- As to the court's power to appoint, generally, see [§ 214](#).

- As to appointing successor trustees, see §§ [238](#), [239](#).

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[FN4] [§ 319](#).

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[FN5] [Gathright's Trustee v. Gaut](#), 276 Ky. 562, 124 S.W.2d 782, 120 A.L.R. 1403 (1939); [Sheridan v. Krause](#), 161 Va. 873, 172 S.E. 508, 91 A.L.R. 1067 (1934).

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§ 218. Appointment of additional trustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [160\(1\)](#), [160\(3\)](#)

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[Court's power to appoint additional trustees over number specified in trust instrument, 59 A.L.R.3d 1129](#)

Forms

Appointment of cotrustees. [Am. Jur. Legal Forms 2d, Trusts §§ 251:361 to 251:365](#)

Petition or application—For appointment of successor cotrustee to fill vacancy—Allegation—Necessity of more than one trustee. [Am. Jur. Pleading and Practice Forms, Trusts, Form 121](#)

As a rule, a court having supervision over a trust has the general discretionary power to appoint additional trustees, over the number specified by the settlor, where the welfare of the parties and proper administration of the trust seem to call for such an appointment.[FN1] This view is recognized in the Uniform Trust Code.[FN2] For example, a court has inherent authority to appoint a cotrustee where a will invalidly confers upon the sole trustee-beneficiary the power to invade the trust corpus for the beneficiary's own benefit.[FN3] Similarly, a court may have statutory authority to appoint a cotrustee where a statute prohibits a trustee from exercising any power to distribute trust principal to himself or herself and provides for court appointment of a cotrustee to pass upon a request by a trustee-beneficiary to invade the trust corpus.[FN4]

However, the appointment of cotrustees has been denied based, in part, on the lack of statutory authority providing therefor.[FN5] Additionally, the authority of the court may be limited where the parties have validly contracted otherwise.[FN6]

The discretion conferred upon the courts by this rule may be exercised in only rare circumstances,[FN7] permitting appointment of a new trustee only if the administration of the trust is in some respect inadequate, or reasonably likely to become so,[FN8] since the identity and number of the trustees is a central part of the structure of the trust and a key indicator of the intent of the settlor.[FN9]

[FN1] [Mills v. Ball](#), 380 So. 2d 1134 (Fla. Dist. Ct. App. 1st Dist. 1980); [Matter of Ikuta's Estate](#), 64 Haw. 236, 639 P.2d 400 (1981); [Estate of Kagan](#), 118 Misc. 2d 1084, 462 N.Y.S.2d 128 (Sur. Ct. 1983); [In re La Rocca's Trust Estate](#), 419 Pa. 176, 213 A.2d 666 (1965) (recognizing view); [Moody v. Haas](#), 493 S.W.2d 555, 59 A.L.R.3d 1109 (Tex. Civ. App. Houston 14th Dist. 1973), writ refused, (Oct. 3, 1973) (apparently recognizing view).

[\[FN2\] Uniform Trust Code § 704\(e\) \(2000\).](#)

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[\[FN3\] Matter of Seidman's Estate, 58 A.D.2d 72, 395 N.Y.S.2d 674 \(2d Dep't 1977\).](#)

- As to the invalidity of making the sole beneficiary the trustee, see [§ 209](#).

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[\[FN4\] Matter of Seidman's Estate, 58 A.D.2d 72, 395 N.Y.S.2d 674 \(2d Dep't 1977\).](#)

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[\[FN5\] Tait v. Anderson Banking Co., 171 F. Supp. 3 \(S.D. Ind. 1959\) \(applying Indiana law\).](#)

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[\[FN6\] Raffety v. Parker, 241 F.2d 594 \(8th Cir. 1957\).](#)

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[\[FN7\] Schildberg v. Schildberg, 461 N.W.2d 186 \(Iowa 1990\)](#) (recognizing existence of view); [Estate of Crozer, 493 Pa. 352, 426 A.2d 585 \(1981\)](#) (holding that stringent standard must be applied by appellate courts when reviewing lower court's appointment of additional trustee made pursuant to Comment e); [Moody v. Haas, 493 S.W.2d 555, 59 A.L.R.3d 1109 \(Tex. Civ. App. Houston 14th Dist. 1973\)](#), writ refused, (Oct. 3, 1973).

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[\[FN8\] Estate of Crozer, 493 Pa. 352, 426 A.2d 585 \(1981\).](#)

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[\[FN9\] Schildberg v. Schildberg, 461 N.W.2d 186 \(Iowa 1990\).](#)

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§ 219. Procedure to determine eligibility or qualification of trustee; hearing

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [160\(3\)](#)

Forms

Petitions or applications—For confirmation or appointment of trustee designated by will. [Am. Jur. Pleading and Practice Forms, Trusts §§ 90, 91](#)

Order—To show cause why trustee designated by will should not be confirmed or appointed. [Am. Jur. Pleading and Practice Forms, Trusts § 94](#)

Notice—Hearing of petition for appointment of testamentary trustee—Where will failed to designate trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 95](#)

Order—Confirming or appointing trustee designated by will. [Am. Jur. Pleading and Practice Forms, Trusts § 97](#)

Generally, absent valid objection to a petition to be appointed as trustee, the petition will be granted; frivolous or conclusory allegations of improvidence or misconduct against the petitioner will not merit denial of the petition.^[FN1] Rather, the objection or opposition papers must allege facts sufficient to necessitate that the petitioner be declared ineligible to act as a trustee.^[FN2]

Observation: Where the order appointing a trustee is unclear, as in the instance where the order relates to multiple trusts but does not clearly indicate to which trust an appointment applies, or where multiple trusts and multiple trustees for each trust are involved, petition may be made to clarify these issues, including a remand of the final disposition of the case for further fact-finding as to the identification of the intended trustees and their respective liabilities with regard to particular trusts.^[FN3]

^[FN1] [Will of Marsh, 179 A.D.2d 578, 578 N.Y.S.2d 911 \(1st Dep't 1992\).](#)

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^[FN2] [Will of Marsh, 179 A.D.2d 578, 578 N.Y.S.2d 911 \(1st Dep't 1992\)](#) (finding opposing papers insufficient where petitioner appeared otherwise qualified and in compliance with statutory requirements).

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^[FN3] [Matter of Estate of Erlie, 190 Wis. 2d 400, 527 N.W.2d 389 \(Ct. App. 1994\)](#) (remand in case seeking discharge of personal representative where wife was named personal representative, sole beneficiary of marital trust, and cotrustee of family trust).

- As to liabilities of trustees, see §§ [331](#) to [401](#).

- As to multiple trustees, see [§ 265](#).

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§ 220. Accepting or declining position or appointment as trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [159](#)

Forms

Acceptance of trust by trustee. Am. Jur. Legal Forms 2d, Trusts § [251:366](#), 251:366.1

Declination by trustee of testamentary trust. [Am. Jur. Legal Forms 2d, Trusts § 251:623](#)

Acceptance or declination of appointment. [Am. Jur. Pleading and Practice Forms, Trusts §§ 101 to 106](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 35](#)

In the case of an express trust, acceptance of a trust by a trustee is necessary to charge him or her with the office of trustee and the administration of the trust.^[FN1] According to the Restatement Third of Trusts, a designated trustee may accept the trusteeship either by words or by conduct.^[FN2] Acceptance by a trustee may be presumed until the trustee declines the position.^[FN3] Acceptance may also be inferred where the trustee takes actions consistent with the position.^[FN4] Nevertheless, the issue of acceptance is one of fact.^[FN5]

At any time before acceptance, a designated trustee may decline a trusteeship.^[FN6] A person may also be deemed to have declined the trusteeship if it is not accepted within a reasonable time.^[FN7] While a person who is designated or appointed a trustee may decline the responsibility and thereby be free from any legal or equitable duty or liability in the matter,^[FN8] such a disclaimer cannot be of only some of the designated

obligations imposed on the trustee under the terms of the trust.^[FN9] However, absent a different intention of the settlor, if the same person is appointed both executor and trustee under a will, he or she may accept as executor and disclaim as trustee and conversely may disclaim as executor and accept as trustee.^[FN10]

Neither acceptance nor disclaimer of the position requires any specific formality to be effective, and conduct will suffice.^[FN11]

Caution: The Uniform Trust Code provides that a nominee may act to preserve the trust property at any time pending rejection of the appointment or act to investigate potential environmental or other legal liability without being deemed to have accepted the appointment.^[FN12]

^[FN1] [Cummings v. Tolman, 292 Mass. 58, 197 N.E. 476, 101 A.L.R. 1457 \(1935\).](#)

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^[FN2] [Restatement, Third-Trusts § 35\(1\).](#)

- As to acceptance under the Uniform Trust Code, see [Uniform Trust Code § 701\(a\)](#) (2000).

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^[FN3] [Lange v. Houston Bank & Trust Co., 194 S.W.2d 797 \(Tex. Civ. App. Galveston 1946\)](#), writ refused n.r.e..

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^[FN4] [Murphey v. Dalton, 314 S.W.2d 726, 67 A.L.R.2d 1278 \(Mo. 1958\).](#)

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^[FN5] [Blieden v. Greenspan, 751 S.W.2d 858 \(Tex. 1988\).](#)

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^[FN6] [Uniform Trust Code § 701\(b\)](#) (2000); [Restatement, Third-Trusts § 35\(2\).](#)

- As to resignation, see [§ 223](#).

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^[FN7] [Uniform Trust Code § 701\(b\)](#) (2000).

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^[FN8] [In re Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204, 172 A.L.R. 977 \(1947\).](#)

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^[FN9] [Will of Witz, 95 Misc. 2d 36, 406 N.Y.S.2d 671 \(Sur. Ct. 1978\)](#) (where trustee attempted to disclaim authority to invade principal of testamentary trust for benefit of income beneficiary, and court held that purported disclaimer was nullity).

- As to renunciation of trusteeship, generally, see [§ 223](#).

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^[FN10] [Lentz v. Lentz, 5 N.C. App. 309, 168 S.E.2d 437 \(1969\).](#)

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^[FN11] [In re Newman's Estate, 86 Nev. 151, 465 P.2d 616 \(1970\).](#)

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^[FN12] [Uniform Trust Code § 701\(c\)](#) (2000).

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§ 221. Qualification of testamentary trustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [159](#)

Forms

Petition or application—For confirmation or appointment of trustee designated by will. [Am. Jur. Pleading and Practice Forms, Trusts § 90](#)

Order—To show cause why trustee designated by will should not be confirmed or appointed. [Am. Jur. Pleading and Practice Forms, Trusts § 94](#)

Trustees appointed by will have sometimes been required to qualify in a court having jurisdiction of the administration of the decedent's estate.[FN1] Qualification may involve the filing of an acceptance of the trust by the trustee, an oath on his or her part, and the furnishing of a bond,[FN2] but a statute may validly relieve a corporate trustee from oath[FN3] and security[FN4] requirements, without so relieving an individual trustee.[FN5]

[FN1] [In re Strasser's Estate, 220 Iowa 194, 262 N.W. 137, 102 A.L.R. 117 \(1935\); Butler v. Builders Trust Co., 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 \(1938\).](#)

[\[FN2\] Butler v. Builders Trust Co., 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 \(1938\).](#)

- As to security or bond of trustee, see §§ [397](#) to [399](#).

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[\[FN3\] Butler v. Builders Trust Co., 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 \(1938\).](#)

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[\[FN4\] § 397.](#)

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[\[FN5\] Butler v. Builders Trust Co., 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 \(1938\).](#)

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4. Tenure and Termination of Office

a. In General; Resignation or Renunciation

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§ 222. Tenure and termination, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [162](#) to [168](#)

Forms

Answer—Defense—Lack of capacity of trustee to sue on behalf of trust—Termination of trust. Am. Jur. Pleading and Practice Forms, Trusts § 329

The tenure of a trustee continues until his or her resignation,[FN1] discharge,[FN2] death,[FN3] incompetence,[FN4] or the final winding up and termination of the trust.[FN5]

In those instances where a trust is created for a person laboring under a disability which makes him or her incapable of managing his or her own property, the trust may be executed as to such person, and in the absence of a stipulation to the contrary, the title and control of the trust remains in the trustee until the disability is removed.[FN6]

The divorce of a grantor from the trustee spouse does not effect the automatic removal of the spouse as trustee unless the trust instrument so provides.[FN7]

[FN1] [§ 223](#).

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[FN2] [§ § 225, 226](#).

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[FN3] [In re Strasser's Estate, 220 Iowa 194, 262 N.W. 137, 102 A.L.R. 117 \(1935\)](#).

- As to the devolution of the legal title of a trustee, see [§ 257](#).

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[FN4] [In re Strasser's Estate, 220 Iowa 194, 262 N.W. 137, 102 A.L.R. 117 \(1935\)](#).

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[FN5] [In re Estate of Moring v. Colorado Dept. of Health Care Policy and Financing, 24 P.3d 642 \(Colo. Ct. App. 2001\)](#).

- As to termination of a trust, see §§ [71](#) to [93](#).

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[FN6] [Odum v. Henry, 254 Ga. 739, 334 S.E.2d 304 \(1985\)](#).

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[FN7] [Moore v. John Hancock Life Ins. Co., 876 So. 2d 443 \(Ala. 2003\)](#).

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§ 223. Resignation or renunciation by trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [162](#)

Forms

Resignations by trustee. [Am. Jur. Legal Forms 2d, Trusts §§ 251:367 to 251:269](#)

Petition or application—By trustee and beneficiaries—For leave to resign—For order appointing successor trustee to serve without compensation—Change of trustees necessary to preserve trust property. [Am. Jur. Pleading and Practice Forms, Trusts § 146](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 36](#)

A trustee has the right to surrender, resign, or renounce the trust so long as an established legal mode is utilized to do so.^[FN1] In this regard, a trustee's power to resign is sometimes subject to court approval.^[FN2] Under the view reflected in the Restatement Third of Trusts, a trustee who has accepted the trust may only resign upon the terms declared by a proper court, or in accordance with the terms of the trust, or with the consent of all the beneficiaries.^[FN3] Under the Uniform Trust Code, resignation should occur within 30 days of appointment, or upon court approval, which approval may be conditioned on the continued performance or completion of particular acts before the resignation is effective.^[FN4]

A person may refuse an appointment to act as trustee.^[FN5]

A trust agreement may expressly set forth resignation procedures; in such event, and provided that a valid trust is created, these procedures must be followed.^[FN6]

Observation: Where a trustee accepts automatic appointment as a successor trustee at the time of the creation of the trust or at such other time preceding an automatic appointment under the trust documents, the successor trustee's subsequent disclaimer of his or her appointment upon automatically succeeding to the position is more appropriately termed a resignation, rather than a disclaimer.^[FN7]

A trustee may be precluded from resigning where a resignation is deemed by the court to be unduly detrimental to the administration of the trust;^[FN8] this determination is at the discretion of the trial court, subject to a review as to whether an abuse has occurred in the exercise of that discretion.^[FN9]

If a conflict of interest arises,^[FN10] the trustee must either remove the personal interest or resign his or her position as trustee.^[FN11]

The resignation of a trustee subsequent to the transfers of the grantor's property to the trustee pursuant to grant deeds does not render the trust invalid.^[FN12]

[FN1] [Kenaday v. Edwards](#), 134 U.S. 117, 10 S. Ct. 523, 33 L. Ed. 853 (1890); [Craig v. Bank of New York](#), 59 Fed. Appx. 388 (2d Cir. 2003).

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[FN2] [In re White](#), 506 Pa. 218, 484 A.2d 763 (1984).

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[FN3] [Restatement, Third-Trusts § 36](#).

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[FN4] [Uniform Trust Code § 705](#) (2000).

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[FN5] [Stell v. Boulder County Dept. of Social Services](#), 92 P.3d 910 (Colo. 2004), as modified on denial of reh'g, (July 12, 2004).

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[FN6] [Moore v. John Hancock Life Ins. Co.](#), 876 So. 2d 443 (Ala. 2003); [Craig v. Bank of New York](#), 59 Fed. Appx. 388 (2d Cir. 2003) (finding that the trustee did not have to conform to the resignation procedures where the trust also permitted the trustee to rely on counsel's advice that no binding trust had been created).

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[FN7] [Godley v. Valley View State Bank](#), 277 Kan. 736, 89 P.3d 595 (2004).

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[FN8] [Stell v. Boulder County Dept. of Social Services](#), 92 P.3d 910 (Colo. 2004), as modified on denial of reh'g, (July 12, 2004); [In re White](#), 506 Pa. 218, 484 A.2d 763 (1984).

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[FN9] [In re White](#), 506 Pa. 218, 484 A.2d 763 (1984).

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[FN10] [§ 233](#).

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[FN11] [Matter of Wills of Jacobs](#), 91 N.C. App. 138, 370 S.E.2d 860 (1988).

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[FN12] [Keitel v. Heubel](#), 103 Cal. App. 4th 324, 126 Cal. Rptr. 2d 763 (1st Dist. 2002), review denied, (Jan. 15, 2003).

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Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

- V. Trustees, Trust Advisors, and Beneficiaries, in General
 - A. Trustees; Trust Advisors
 - 4. Tenure and Termination of Office
 - b. Discharge or Removal

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 224. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 163 to 167

Forms

Removal of trustee. [Am. Jur. Legal Forms 2d, Trusts § 251:370 to 251:373](#)

Petition or application—For final discharge—On termination of trust. [Am. Jur. Pleading and Practice Forms, Trusts § 155](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 37](#)

The remedy for bona fide problems with a trustee is not rewriting a will or trust but replacing the trustee with a new trustee.^[FN1] Generally, a trustee may be removed in the manner provided in the trust.^[FN2] Another method to remove a trustee is by compliance with a statutory provision permitting the amendment or modification of a trust upon the consent of all of the beneficiaries; the terms of the modification or amendment then specify the removal and replacement of the existing trustee.^[FN3]

A trustee can be removed by any person so empowered by the terms of the trust, including a cotrustee.^[FN4] The settlor of an inter vivos trust may reserve the right to remove the trustee,^[FN5] although this right may be nullified where the settlor is rendered incompetent to amend the trust, either by law or pursuant to the terms of the trust regarding what constitutes incompetence.^[FN6] Even so, an application by a beneficiary to remove a trustee is addressed to the sound discretion of the trial court,^[FN7] and its action in refusing to remove the trustee will not be reversed unless it appears that such discretion has been abused.^[FN8]

A trusteeship may be terminated where the original purpose therefor no longer exists.^[FN9]

Caution: A trustee's action to remove a cotrustee is not barred by a general in terrorem clause in the trust instrument, so long as the clause does not address actions by trustees, and no other provision of the trust instrument addresses the removal of trustees.[FN10]

Observation: Statutes sometimes make binding a bona fide transaction between a discharged trustee and one who has no actual knowledge of the discharge. Under one such statute, constructive knowledge of the discharge of a trustee was not sufficient to void the transaction; the term "bona fide transaction" was construed not to mean a transaction involving a bona fide purchaser but as meaning a transaction which the parties operated in, or with, good faith, honestly, openly, and sincerely, without deceit or fraud.[FN11]

[FN1] [In re Estate of Ward, 200 Ariz. 113, 23 P.3d 108 \(Ct. App. Div. 1 2001\).](#)

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[FN2] [Restatement, Third-Trusts § 36\(1\).](#)

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[FN3] [In re Estate of Berthot, 2002 MT 277, 312 Mont. 366, 59 P.3d 1080 \(2002\)](#) (recognizing the ability to amend the trust on consent, but finding that all beneficiaries had not consented where one chose to remain neutral as to the amendment); [In re Catherine H. Bowen Charitable Trust, 240 Wis. 2d 55, 2000 WI App 264, 622 N.W.2d 471 \(Ct. App. 2000\)](#) (despite trust provision prohibiting modification or amendment of trust agreement and removal did not have to be based on cause).

- As to amendment of a trust, see § § [67](#), [68](#).

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[FN4] [American Center for Education, Inc. v. Cavnar, 80 Cal. App. 3d 476, 145 Cal. Rptr. 736 \(2d Dist. 1978\).](#)

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[FN5] [Miller v. Miller, 817 So. 2d 1166 \(La. Ct. App. 2d Cir. 2002\)](#), writ denied, [827 So. 2d 1154 \(La. 2002\).](#)

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[FN6] [Manning v. Glens Falls Nat. Bank and Trust Co., 265 A.D.2d 743, 697 N.Y.S.2d 203 \(3d Dep't 1999\).](#)

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[FN7] [§ 225.](#)

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[FN8] [§ 226.](#)

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[FN9] [Christie v. Lowrey, 589 S.W.2d 870 \(Tex. Civ. App. Dallas 1979\).](#)

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[FN10] [Conte v. Conte, 56 S.W.3d 830 \(Tex. App. Houston 1st Dist. 2001\).](#)

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[FN11] [Leach v. Home Savings & Loan Assn., 185 Cal. App. 3d 1295, 230 Cal. Rptr. 553 \(1st Dist. 1986\).](#)

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Trusts

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- V. Trustees, Trust Advisors, and Beneficiaries, in General
 - A. Trustees; Trust Advisors
 - 4. Tenure and Termination of Office
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§ 225. Removal or discharge by court, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [165](#)

Forms

Petition or application—For removal of trustee—Breach of duty. [Am. Jur. Pleading and Practice Forms, Trusts § 143](#)

Order—Removing trustee—Appointing successor trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 154](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 37\(2\)](#)

The power of a court to remove a trustee is found in its general equity jurisdiction.^[FN1] Independently of any statutory provision or of any directions contained in the trust instrument,^[FN2] a court may, in its discretion,^[FN3] remove or discharge a trustee^[FN4] for good or reasonable cause or for such other reason as the court deems necessary and proper.^[FN5] The power of the court to remove a trustee should be used sparingly.^[FN6]

Where statutory provisions exist, the court's jurisdiction to remove a trustee exists pursuant to the statute.^[FN7]

Observation: Statute may vest the court with the discretion to select among a number of courses of relief, the most serious of which is revocation of the appointment as trustee and removal of the trustee as the trust's fiduciary.^[FN8]

[FN1] [Getty v. Getty, 205 Cal. App. 3d 134, 252 Cal. Rptr. 342 \(2d Dist. 1988\)](#); [Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 \(Mo. Ct. App. S.D. 2001\)](#); [Kerper v. Kerper, 780 P.2d 923 \(Wyo. 1989\)](#).

[FN2] [Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 \(Ind. Ct. App. 3d Dist. 1982\)](#).

- See also [Uniform Trust Code § 706 \(2000\)](#)

[FN3] [Lowrey v. McNeel, 773 So. 2d 449 \(Ala. 2000\)](#); [Thinn v. Parks, 79 Ark. App. 20, 83 S.W.3d 430 \(2002\)](#); [McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\)](#); [Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 \(Ind. Ct. App. 3d Dist. 1982\)](#); [Matter of Estate of Atwood, 577 N.W.2d 60 \(Iowa Ct. App. 1998\)](#); [Steele v. Kelley, 46 Mass. App. Ct. 712, 710 N.E.2d 973 \(1999\)](#); [Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 \(Mo. Ct. App. S.D. 2001\)](#); [In re Estate of La Corte, 7 A.D.3d 909, 777 N.Y.S.2d 209 \(App. Div. 3d Dep't 2004\)](#); [Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\)](#) (referring to powers of court of equity); [Cloud v. U. S. Nat. Bank of Oregon, 280 Or. 83, 570 P.2d 350, 6 A.L.R.4th 1185 \(1977\)](#); [Estate of Oshiver, 406 Pa. Super. 531, 594 A.2d 746 \(1991\)](#); [Ward v. NationsBank of Virginia, N.A., 256 Va. 427, 507 S.E.2d 616 \(1998\)](#); [In re Marriage of Petrie, 105 Wash. App. 268, 19 P.3d 443 \(Div. 1 2001\)](#), as amended, (Apr. 10, 2001).

[FN4] [May v. May, 167 U.S. 310, 17 S. Ct. 824, 42 L. Ed. 179 \(1897\)](#); [Thinn v. Parks, 79 Ark. App. 20, 83 S.W.3d 430 \(2002\)](#); [McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\)](#); [Matter of Estate of Atwood, 577 N.W.2d 60 \(Iowa Ct. App. 1998\)](#); [In re Estate of La Corte, 7 A.D.3d 909, 777 N.Y.S.2d 209 \(App. Div. 3d Dep't 2004\)](#); [Ward v. NationsBank of Virginia, N.A., 256 Va. 427, 507 S.E.2d 616 \(1998\)](#); [In re Marriage of Petrie, 105 Wash. App. 268, 19 P.3d 443 \(Div. 1 2001\)](#), as amended, (Apr. 10, 2001).

[FN5] [§ 227](#).

[FN6] [Cadle Co. v. D'Addario, 268 Conn. 441, 844 A.2d 836 \(2004\)](#); [McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\)](#); [Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 \(Mo. Ct. App. S.D. 2001\)](#).
- As to grounds for removal, see §§ [227](#) to [235](#).

[FN7] [Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 \(Mo. Ct. App. S.D. 2001\)](#).

[FN8] [In re Estate of La Corte, 7 A.D.3d 909, 777 N.Y.S.2d 209 \(App. Div. 3d Dep't 2004\)](#).

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76 Am. Jur. 2d Trusts § 226

Trusts

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- V. Trustees, Trust Advisors, and Beneficiaries, in General
 - A. Trustees; Trust Advisors
 - 4. Tenure and Termination of Office
 - b. Discharge or Removal

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§ 226. Procedure, generally; review on appeal

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [167](#)

Forms

Petition or application—For removal of trustee—Breach of duty. [Am. Jur. Pleading and Practice Forms, Trusts § 143](#)

Order—Removing trustee—Appointing successor trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 154](#)

Removal of a trustee may be sought upon a petition by a beneficiary.[FN1] The Uniform Trust Code provides that the settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed upon the court's own initiative.[FN2]

In exercising its jurisdiction to remove a trustee, the court does not act arbitrarily but upon certain well-defined principles, and after affording the trustee an opportunity to answer the charges against him or her, and giving ample opportunity to be heard.[FN3]

The court's decision whether to remove a trustee is always subject to appellate review.[FN4] On appeal, the lower court will not be reversed except upon the finding of a clear[FN5] or manifest[FN6] abuse of discretion.[FN7] An appellate court will not disturb a trial court's exercise of its discretion to remove a trustee unless the trial court's actions were shown to have been made arbitrarily and capriciously[FN8] and in disregard of the use of sound judgment regarding what is right under the circumstances.[FN9]

By one view, an appellate court will examine the record de novo to determine whether there was an abuse of discretion by the trial court in refusing to remove the trustee, where the issue arises on appeal.[FN10] By another view, the appellate court's review of a trial court's action in removing a trustee is limited to determining whether the trial court abused its discretion or committed an error of law in so acting; in such instances, if the trial court's adjudication was supported by the record, the appellate court cannot disturb its determination because the higher court would have arrived at a different result.[FN11]

Proceedings for removal need not be instituted, and no formal application for removal of the trustee is necessary, where the vacancy in the trusteeship exists by reason of death, incompetency, or a receivership.[FN12]

The death of the settlor of a revocable inter vivos trust does not render moot the settlor's petition to remove a trustee, where the trust will continue in perpetuity, making the identity of the trustee a viable and important matter affecting the rights of the parties.[FN13]

If, in the context of the court's determination as to whether a trustee should be removed, an issue of fact exists concerning alleged improper conduct of a trustee, that issue is properly submitted to the jury.[FN14]

While a court may be granted the power to remove a trustee provisionally, this does not require that every removal be made provisionally or that the appointment of a successor trustee be deemed a provisional appointment.[FN15]

Observation: Although counsel fees may be a proper charge against a trust estate where a trustee has successfully defended against an effort to remove him or her, legal expenses involved in an unsuccessful defense resulting in removal for misconduct are the removed trustee's own personal obligation.[FN16] Nevertheless, where the attorney's fee statute permits recovery from the trust of all legal expenses incurred for the benefit or protection of the estate, fees to defend a suit to remove the trustee cannot be recovered.[FN17] Legal expenses incurred by beneficiaries in a successful petition to remove a trustee may be recoverable from the trust estate.[FN18]

[FN1] Morrison v. Doyle, 582 N.W.2d 237 (Minn. 1998); In re Loyal W. Sheen Family Trust, 263 Neb. 477, 640 N.W.2d 653 (2002).

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[FN2] Uniform Trust Code § 706(a) (2000).

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[FN3] Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 (Ind. Ct. App. 3d Dist. 1982); Woods v. Wells Fargo Bank Wyoming, 2004 WY 61, 90 P.3d 724 (Wyo. 2004) (finding no deprivation of due process in procedure utilized).

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[FN4] Ollick v. Rice, 16 Ohio App. 3d 448, 476 N.E.2d 1062 (8th Dist. Cuyahoga County 1984).

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[FN5] Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 (Ind. Ct. App. 3d Dist. 1982).

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[FN6] Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 (App. Div. 1985).

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[FN7] Lowrey v. McNeel, 773 So. 2d 449 (Ala. 2000); Ashman v. Pickens, 12 Ark. App. 233, 674 S.W.2d 4 (1984); Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 (Ind. Ct. App. 3d Dist. 1982); Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 (Mo. Ct. App. S.D. 2001); Estate of Oshiver, 406 Pa. Super. 531, 594 A.2d 746 (1991); In re Marriage of Petrie, 105 Wash. App. 268, 19 P.3d 443 (Div. 1 2001), as amended, (Apr. 10, 2001).

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[FN8] Estate of Oshiver, 406 Pa. Super. 531, 594 A.2d 746 (1991).

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[FN9] Kerper v. Kerper, 780 P.2d 923 (Wyo. 1989).

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[FN10] Schildberg v. Schildberg, 461 N.W.2d 186 (Iowa 1990).

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[\[FN11\] In re White, 506 Pa. 218, 484 A.2d 763 \(1984\).](#)

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[\[FN12\] In re Strasser's Estate, 220 Iowa 194, 262 N.W. 137, 102 A.L.R. 117 \(1935\).](#)

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[\[FN13\] Manning v. Glens Falls Nat. Bank and Trust Co., 265 A.D.2d 743, 697 N.Y.S.2d 203 \(3d Dep't 1999\).](#)

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[\[FN14\] Novak v. Schellenberg, 718 S.W.2d 822 \(Tex. App. Corpus Christi 1986\).](#)

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[\[FN15\] Miller v. Miller, 817 So. 2d 1166 \(La. Ct. App. 2d Cir. 2002\), writ denied, 827 So. 2d 1154 \(La. 2002\).](#)

- As to provisional trustees, see [§ 205](#).

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[\[FN16\] In re Estate of La Corte, 7 A.D.3d 909, 777 N.Y.S.2d 209 \(App. Div. 3d Dep't 2004\).](#)

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[\[FN17\] Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\).](#)

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[\[FN18\] In re Marriage of Petrie, 105 Wash. App. 268, 19 P.3d 443 \(Div. 1 2001\), as amended, \(Apr. 10, 2001\).](#)

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Trusts

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V. Trustees, Trust Advisors, and Beneficiaries, in General
A. Trustees; Trust Advisors
5. Grounds for Declining to Appoint, or to Discharge or Remove

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 227. Grounds, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [166](#) to [166\(2\)](#)

Model Codes and Restatements

[Restatement, Third-Trusts § 37\(2\)](#)

Independently of any statutory provision or of any directions contained in the trust instrument, a court may, in its discretion, remove or discharge a trustee^[FN1] for good^[FN2] or reasonable^[FN3] cause. Otherwise stated, a trustee stands subject to removal where cause is shown therefor,^[FN4] or on grounds that the court, in its discretion, deems necessary and proper.^[FN5] The Restatement Third of Trusts simply states that a trustee may be removed by a proper court for cause.^[FN6] The Uniform Trust Code sets forth specific grounds for the removal of a trustee, providing specifically that the court may remove a trustee if the trustee has committed a serious breach of trust; lack of cooperation among cotrustees substantially impairs the administration of the trust; because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.^[FN7]

In exercising its discretion to remove a trustee, the court must act within its sound^[FN8] or reasonable^[FN9] discretion. Even so, removal of a trustee should be granted only sparingly.^[FN10]

^[FN1] [§ 225](#).

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^[FN2] [Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 \(Ind. Ct. App. 3d Dist. 1982\); In re Catherine H. Bowen Charitable Trust, 240 Wis. 2d 55, 2000 WI App 264, 622 N.W.2d 471 \(Ct. App. 2000\)](#) (under statute).

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^[FN3] [Porter v. Porter, 107 Wash. 2d 43, 726 P.2d 459, 68 A.L.R.4th 859 \(1986\)](#).

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^[FN4] [Robinson v. Kirbie, 1990 OK CIV APP 45, 793 P.2d 315 \(Ct. App. Div. 3 1990\)](#).

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^[FN5] [Novak v. Schellenberg, 718 S.W.2d 822 \(Tex. App. Corpus Christi 1986\)](#).

- As to grounds for removal or discharge, see §§ [227](#) to [235](#).

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^[FN6] [Restatement, Third-Trusts § 37\(2\)](#).

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^[FN7] [Uniform Trust Code § 706\(b\) \(2000\)](#).

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^[FN8] [Ashman v. Pickens, 12 Ark. App. 233, 674 S.W.2d 4 \(1984\); Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 \(Ind. Ct. App. 3d Dist. 1982\); Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 \(App. Div. 1985\); Ollick v. Rice, 16 Ohio App. 3d 448, 476 N.E.2d 1062 \(8th Dist. Cuyahoga County 1984\); In re White, 506 Pa. 218, 484 A.2d 763 \(1984\); Kerper v. Kerper, 780 P.2d 923 \(Wyo. 1989\)](#).

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[\[FN9\] Shirk v. Walker, 298 Mass. 251, 10 N.E.2d 192, 125 A.L.R. 620 \(1937\); Edinburg v. Cavers, 22 Mass. App. Ct. 212, 492 N.E.2d 1171 \(1986\).](#)

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[\[FN10\] § 225.](#)

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V. Trustees, Trust Advisors, and Beneficiaries, in General

A. Trustees; Trust Advisors

5. Grounds for Declining to Appoint, or to Discharge or Remove

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 228. Grounds, generally—General standards, requisites, and considerations in removal determination

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [166](#) to [166\(2\)](#)

Forms

Petition or application—For removal of trustee—By beneficiary—Incapacity of trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 145](#)

The broad inquiry sparked by an application for removal of a trustee is whether the circumstances are such that the continuance of the trustee in office would be detrimental to the trust and require the court to grant removal.[\[FN1\]](#) In this regard, a trustee may be removed when, for any reason, the interests of the estate are likely to be jeopardized by the trustee's continuation in office;[\[FN2\]](#) that is, a trustee should be removed when such action is required to protect the trust property,[\[FN3\]](#) and there should be such misconduct as to evidence of want of capacity or fidelity, which has, or might likely, put the trust in jeopardy.[\[FN4\]](#) Furthermore, the courts

have the authority to remove and replace trustees to protect the best interests of the trust and its beneficiaries;[\[FN5\]](#) in this regard, the view has been followed that the power to remove a trustee should be used only when the objects of the trusts are endangered.[\[FN6\]](#) Where removal is sought on motion, the trial court must determine whether removal is in the best interest of the trust.[\[FN7\]](#)

In some jurisdictions, until such time as a trustee violates some fiduciary duty, the trustee cannot be removed.[\[FN8\]](#) Removal of a trustee should be predicated upon a clear showing of abuse or wrongdoing in the actual administration of the trust; in this regard, where there is no showing that trustees had not administered the trust in anything but an efficient manner, to warrant the removal, a showing of actual, not potential, mismanagement has to be made.[\[FN9\]](#) On the other hand, however, in some jurisdictions it is not required that there be evidence of actual past wrongdoing to remove a trustee who has been given broad powers, since the purpose of removing a trustee is not to inflict a penalty for past action but to preserve the trust assets.[\[FN10\]](#)

Trustees may be removed for legal incapacity.[\[FN11\]](#) Similarly, it may be appropriate to remove a professional legal corporation as trustee of a living trust where it is not otherwise required to post a fidelity bond, there is no assurance that the person acting on behalf of the corporation for the trust will be an attorney, and the shareholders of the corporation are not personally liable for the corporation's wrongful acts (as opposed to legal malpractice).[\[FN12\]](#)

Under state statute, when a trustee violates any provision of the Uniform Trusts Act as enacted into state law, the trustee may be removed.[\[FN13\]](#)

[\[FN1\]](#) [Getty v. Getty](#), 205 Cal. App. 3d 134, 252 Cal. Rptr. 342 (2d Dist. 1988); [Lovett v. Peavy](#), 253 Ga. 79, 316 S.E.2d 754 (1984); [Wolosoff v. CSI Liquidating Trust](#), 205 N.J. Super. 349, 500 A.2d 1076 (App. Div. 1985); [Cloud v. U. S. Nat. Bank of Oregon](#), 280 Or. 83, 570 P.2d 350, 6 A.L.R.4th 1185 (1977); [In re Betty A. Luhrs Trust](#), 443 N.W.2d 646 (S.D. 1989).

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[\[FN2\]](#) [In re White](#), 506 Pa. 218, 484 A.2d 763 (1984); [Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust](#), 55 S.W.3d 896 (Mo. Ct. App. S.D. 2001).

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[\[FN3\]](#) [In re White](#), 506 Pa. 218, 484 A.2d 763 (1984); [Barrientos v. Nava](#), 94 S.W.3d 270 (Tex. App. Houston 14th Dist. 2002) (when it becomes necessary for the protection and preservation of the trust).

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[\[FN4\]](#) [Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust](#), 55 S.W.3d 896 (Mo. Ct. App. S.D. 2001).

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[\[FN5\]](#) [Schildberg v. Schildberg](#), 461 N.W.2d 186 (Iowa 1990); [In re Marriage of Petrie](#), 105 Wash. App. 268, 19 P.3d 443 (Div. 1 2001), as amended, (Apr. 10, 2001).

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[\[FN6\]](#) [Schildberg v. Schildberg](#), 461 N.W.2d 186 (Iowa 1990).

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[\[FN7\]](#) [Ward v. NationsBank of Virginia, N.A.](#), 256 Va. 427, 507 S.E.2d 616 (1998).

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[\[FN8\]](#) [In re White](#), 506 Pa. 218, 484 A.2d 763 (1984).

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[\[FN9\]](#) [Parr v. Cushing](#), 507 So. 2d 1227 (Fla. Dist. Ct. App. 5th Dist. 1987).

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[\[FN10\]](#) [Getty v. Getty](#), 205 Cal. App. 3d 134, 252 Cal. Rptr. 342 (2d Dist. 1988).

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[\[FN11\] Lovett v. Peavy, 253 Ga. 79, 316 S.E.2d 754 \(1984\).](#)

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[\[FN12\] Erwin & Erwin v. Bronson, 117 Or. App. 443, 844 P.2d 269 \(1992\).](#)

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[\[FN13\] Matter of Wills of Jacobs, 91 N.C. App. 138, 370 S.E.2d 860 \(1988\).](#)

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V. Trustees, Trust Advisors, and Beneficiaries, in General

A. Trustees; Trust Advisors

5. Grounds for Declining to Appoint, or to Discharge or Remove

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 229. Grounds, generally—Effect of appointment by settlor; weight of settlor's intent

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [166](#) to [166\(2\)](#)

Consideration of a petition for removal of a trustee calls for careful consideration of all the circumstances, the existing relations, and to some extent, the state of feeling between the parties. This is particularly so where the judge's assessment of the credibility of witnesses is central to his or her decision.[\[FN1\]](#) Another important consideration in determining whether a trustee should be removed is whether the trustee was appointed by the settlor or by a court or some third party, as courts are more reluctant to remove a trustee who has been appointed by the settlor.[\[FN2\]](#) In this regard, courts will ordinarily not remove a trustee appointed by the settlor for grounds existing at the time of the trust's creation and known to the settlor,[\[FN3\]](#) even though the court would not have appointed such person trustee.[\[FN4\]](#)

Observation: There is a distinction between cases involving the removal of a court appointed trustee and those involving the removal of a testamentary trustee. A testator has the privilege and the power, as a property

right, to place the management of his or her estate in a selected person as a condition of his or her bounty, and the status of such a fiduciary is not the same as that of a trustee, guardian, or administrator appointed by the court. Thus, a testamentary trustee should only be removed when the estate is actually endangered and intervention is necessary to save trust property.[FN5]

[FN1] [Edinburg v. Cavers](#), 22 Mass. App. Ct. 212, 492 N.E.2d 1171 (1986).

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[FN2] [Parker v. Shullman](#), 843 So. 2d 960 (Fla. Dist. Ct. App. 4th Dist. 2003), review denied, [857 So. 2d 197](#) (Fla. 2003); [Lovett v. Peavy](#), 253 Ga. 79, 316 S.E.2d 754 (1984); [Schildberg v. Schildberg](#), 461 N.W.2d 186 (Iowa 1990).

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[FN3] [Parker v. Shullman](#), 843 So. 2d 960 (Fla. Dist. Ct. App. 4th Dist. 2003), review denied, [857 So. 2d 197](#) (Fla. 2003); [Schildberg v. Schildberg](#), 461 N.W.2d 186 (Iowa 1990); [In re Hormel's Trusts](#), 282 Minn. 197, 163 N.W.2d 844 (1968).

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[FN4] [In re Hormel's Trusts](#), 282 Minn. 197, 163 N.W.2d 844 (1968).

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[FN5] [Estate of Oshiver](#), 406 Pa. Super. 531, 594 A.2d 746 (1991).

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V. Trustees, Trust Advisors, and Beneficiaries, in General

A. Trustees; Trust Advisors

5. Grounds for Declining to Appoint, or to Discharge or Remove

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 230. Grounds relating to performance of duties of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 166 to [166\(2\)](#)

Forms

Petition or application—For removal of trustee—Breach of duty. [Am. Jur. Pleading and Practice Forms, Trusts § 143](#)

Order—Removing trustee—Breach of duty—Appointing successor trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 153](#)

A trustee may be judicially removed for neglect to perform his or her duties,[\[FN1\]](#) a want of reasonable fidelity,[\[FN2\]](#) or a breach of trust.[\[FN3\]](#) The Uniform Trust Code sets forth specific grounds relating to the performance of duties, including serious breach of trust; lack of cooperation of cotrustees substantially impairing the administration of the trust; and unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, making removal in the best interests of the trust.[\[FN4\]](#)

Trustees may be removed for:

- the commission of breaches of trust or of conduct sufficient to show unfitness to administer the trust[\[FN5\]](#)
- being unsuitable to execute the trust[\[FN6\]](#)
- breaching fiduciary duties[\[FN7\]](#)
- mismanagement of trust property[\[FN8\]](#)
- self-dealing with trust property[\[FN9\]](#)
- repeatedly spending trust funds without mandated prior court approval[\[FN10\]](#)
- flouting of court orders regarding trust property[\[FN11\]](#)
- misuse of custodial funds for personal purposes and commingling of personal assets with custodial assets, as indicative of unfitness to act as trustee for noncustodial assets[\[FN12\]](#)
- failure or neglect or impropriety in the investment of the trust estate[\[FN13\]](#)
- failure to determine how to handle trust funds for an extended period[\[FN14\]](#)
- failure of a trustee to file accounts[\[FN15\]](#)
- willful and malicious action in refusing to comply with the provisions of a trust[\[FN16\]](#)
- unwillingness to take action with regard to trust property which is necessary to fulfill the primary purpose of the trust[\[FN17\]](#)
- failure to distribute income from the trust for an extended period[\[FN18\]](#)
- refusing to permit the beneficiary to inspect the trust's records[\[FN19\]](#)

- the failure to collect all trust assets[[FN20](#)]
- filing inaccurate income tax returns[[FN21](#)]

All circumstances affecting a trustee's ability to perform his or her duties may be considered when deciding whether to remove the trustee.[[FN22](#)]

Observation: In proving this ground, there must be a clear necessity for interference to save the trust property in order to remove a testamentary trustee; there must be such misconduct as to show a want of capacity or of fidelity, putting the trust in jeopardy.[[FN23](#)]

Proof of actual past wrongdoing by a trustee is not necessary if some other legally proper ground for removal exists.[[FN24](#)] A jury award of damages for the breach of a fiduciary duty can constitute a material financial loss to the trust for the purpose of establishing a basis for the removal of a trustee.[[FN25](#)]

[[FN1](#)] [Cavender v. Cavender](#), 114 U.S. 464, 5 S. Ct. 955, 29 L. Ed. 212 (1885); [Brown v. Memorial Nat. Home Foundation](#), 162 Cal. App. 2d 513, 329 P.2d 118, 75 A.L.R.2d 427 (2d Dist. 1958); [Fontenot ex rel. Fontenot v. Choppin](#), 836 So. 2d 322 (La. Ct. App. 1st Cir. 2002); [In re Rowe](#), 274 A.D.2d 87, 712 N.Y.S.2d 662 (3d Dep't 2000); [In re Charnock](#), 158 N.C. App. 35, 579 S.E.2d 887 (2003), cert. denied, 357 N.C. 506, 588 S.E.2d 473 (2003) and decision aff'd, 358 N.C. 523, 597 S.E.2d 706 (2004).

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[[FN2](#)] [In re Charnock](#), 158 N.C. App. 35, 579 S.E.2d 887 (2003), cert. denied, 357 N.C. 506, 588 S.E.2d 473 (2003) and decision aff'd, 358 N.C. 523, 597 S.E.2d 706 (2004).

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[[FN3](#)] [Fontenot ex rel. Fontenot v. Choppin](#), 836 So. 2d 322 (La. Ct. App. 1st Cir. 2002); [Robinson v. Kirbie](#), 1990 OK CIV APP 45, 793 P.2d 315 (Ct. App. Div. 3 1990).

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[[FN4](#)] [Uniform Trust Code § 706\(b\)](#) (2000).

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[[FN5](#)] [Lovett v. Peavy](#), 253 Ga. 79, 316 S.E.2d 754 (1984).

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[[FN6](#)] [In re Hall](#), 275 A.D.2d 979, 713 N.Y.S.2d 622 (4th Dep't 2000).

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[[FN7](#)] [Lee v. Lee](#), 47 S.W.3d 767 (Tex. App. Houston 14th Dist. 2001).

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[[FN8](#)] [Lovett v. Peavy](#), 253 Ga. 79, 316 S.E.2d 754 (1984); [In re Rowe](#), 274 A.D.2d 87, 712 N.Y.S.2d 662 (3d Dep't 2000); [In re White](#), 506 Pa. 218, 484 A.2d 763 (1984) (wasting or mismanaging of estate); [In re Charnock](#), 158 N.C. App. 35, 579 S.E.2d 887 (2003), cert. denied, 357 N.C. 506, 588 S.E.2d 473 (2003) and decision aff'd, 358 N.C. 523, 597 S.E.2d 706 (2004).

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[[FN9](#)] [In re Loyal W. Sheen Family Trust](#), 263 Neb. 477, 640 N.W.2d 653 (2002); [Gouiran v. Gouiran](#), 263 A.D.2d 393, 693 N.Y.S.2d 127 (1st Dep't 1999).

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[[FN10](#)] [In re Guardianship of Monus](#), 2004 Ohio 2808 (Ohio.App.7. Dist.Mahoning., 2004).

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[\[FN11\] Gouiran v. Gouiran, 263 A.D.2d 393, 693 N.Y.S.2d 127 \(1st Dep't 1999\).](#)

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[\[FN12\] In re Marriage of Petrie, 105 Wash. App. 268, 19 P.3d 443 \(Div. 1 2001\), as amended, \(Apr. 10, 2001\) \(trustee purchased a luxury car with trust funds for beneficiary who could not drive\).](#)

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[\[FN13\] Cavender v. Cavender, 114 U.S. 464, 5 S. Ct. 955, 29 L. Ed. 212 \(1885\); In re Rowe, 274 A.D.2d 87, 712 N.Y.S.2d 662 \(3d Dep't 2000\) \(investment of trust property in volatile stocks without regard to duty to distribute annually stated amounts to charitable beneficiaries and without sufficiently monitoring stock performance\).](#)

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[\[FN14\] Barrientos v. Nava, 94 S.W.3d 270 \(Tex. App. Houston 14th Dist. 2002\) \(failure to determine how to handle funds in three years since appointment as trustee\).](#)

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[\[FN15\] Fontenot ex rel. Fontenot v. Choppin, 836 So. 2d 322 \(La. Ct. App. 1st Cir. 2002\); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

- As to accounting by trustees, generally, see §§ [371](#) to [396](#).

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[\[FN16\] First Nat. Bank of Birmingham v. Ingalls, 257 Ala. 536, 59 So. 2d 914 \(1952\).](#)

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[\[FN17\] In re Rowe, 669 N.W.2d 260 \(Iowa Ct. App. 2003\).](#)

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[\[FN18\] Fontenot ex rel. Fontenot v. Choppin, 836 So. 2d 322 \(La. Ct. App. 1st Cir. 2002\).](#)

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[\[FN19\] Fontenot ex rel. Fontenot v. Choppin, 836 So. 2d 322 \(La. Ct. App. 1st Cir. 2002\).](#)

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[\[FN20\] Fontenot ex rel. Fontenot v. Choppin, 836 So. 2d 322 \(La. Ct. App. 1st Cir. 2002\).](#)

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[\[FN21\] Fontenot ex rel. Fontenot v. Choppin, 836 So. 2d 322 \(La. Ct. App. 1st Cir. 2002\).](#)

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[\[FN22\] Barrientos v. Nava, 94 S.W.3d 270 \(Tex. App. Houston 14th Dist. 2002\).](#)

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[\[FN23\] Cadle Co. v. D'Addario, 268 Conn. 441, 844 A.2d 836 \(2004\).](#)

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[\[FN24\] In re Estate of Klarner, 98 P.3d 892 \(Colo. Ct. App. 2003\), cert. granted, 2004 WL 2211536 \(Colo. 2004\) and cert. granted, \(Oct. 4, 2004\).](#)

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[\[FN25\] Lee v. Lee, 47 S.W.3d 767 \(Tex. App. Houston 14th Dist. 2001\).](#)

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§ 231. Grounds relating to performance of duties of trustee—When removal unwarranted

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 166 to [166\(2\)](#)

Forms

Petition or application—For removal of trustee—Breach of duty. [Am. Jur. Pleading and Practice Forms, Trusts § 143](#)

Petition or application—For removal of trustee—Allegation—Waste and embezzlement. [Am. Jur. Pleading and Practice Forms, Trusts § 149](#)

Petition or application—For removal of trustee—Allegation—Gross mismanagement of trust property. [Am. Jur. Pleading and Practice Forms, Trusts § 150](#)

Removal is not justified when the overall performance of the trustee in the interest of the trust outweighs a breach of the trust agreement and the overall interests of the beneficiaries will be better served by having the trustee continue.[FN1] Furthermore, judicial removal of a trustee usually will not be grounded on a mere error of judgment or conduct even though there is a technical breach of the trust, if the trust estate does not suffer,[FN2] or can be protected against it, or can and will be reimbursed by the trustee for any loss suffered.[FN3] A trustee will not be removed for every violation of duty, or even a breach of trust, if the fund is in no danger of being lost.[FN4]

A cotrustee does not waste trust assets, so as to warrant removal, by leaving them in a mutual fund that is experiencing significant losses, where the trustee employed a financial adviser and directed that the assets be invested conservatively with long-term goals in mind.[FN5]

A trustee's breach of a discretionary support trust's provisions by refusing to use the trust principal to pay the beneficiary's nursing home expenses does not warrant removal as trustee.[FN6] Thus, a trustee's error in

preparing a fiduciary tax return for a trust does not constitute a breach of fiduciary duties warranting removal, where the trustee is able to correct the error and file the trust's tax return on time.[FN7]

Removal is not warranted for a failure to update the appraised value of a trust parcel of real property.[FN8]

[FN1] [Schildberg v. Schildberg, 461 N.W.2d 186 \(Iowa 1990\)](#).

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[FN2] [Cadle Co. v. D'Addario, 268 Conn. 441, 844 A.2d 836 \(2004\)](#); [Schildberg v. Schildberg, 461 N.W.2d 186 \(Iowa 1990\)](#); [Fontenot ex rel. Fontenot v. Choppin, 836 So. 2d 322 \(La. Ct. App. 1st Cir. 2002\)](#) (mere technical error); [In re Estate of La Corte, 7 A.D.3d 909, 777 N.Y.S.2d 209 \(App. Div. 3d Dep't 2004\)](#) (inadvertent commingling of personal funds with those of trust by cotrustee).

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[FN3] [Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 \(1939\)](#).

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[FN4] [Cadle Co. v. D'Addario, 268 Conn. 441, 844 A.2d 836 \(2004\)](#).

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[FN5] [In re Estate of La Corte, 7 A.D.3d 909, 777 N.Y.S.2d 209 \(App. Div. 3d Dep't 2004\)](#).

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[FN6] [In re Trust of McCabe, 2002 WL 31757533 \(Iowa Ct. App. 2002\)](#).

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[FN7] [In re Couch Trust, 723 A.2d 376 \(Del. Ch. 1998\)](#).

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[FN8] [In re Estate of La Corte, 7 A.D.3d 909, 777 N.Y.S.2d 209 \(App. Div. 3d Dep't 2004\)](#).

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§ 232. Grounds relating to absence of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 166 to [166\(2\)](#)

The mere fact that a trustee leaves the jurisdiction does not in itself constitute ground for removal or discharge; but where the trustee's absence is such as to interfere with the administration of the trust, ground for removal or discharge of the trustee does exist.[\[FN1\]](#) This is particularly true where an absent trustee admits that he or she does not actively participate in the administration of the trust, nor in major decisions relating to the trust, but rather only signs papers and documents when sent to him or her.[\[FN2\]](#)

The Uniform Trust Code sets forth specific grounds, which include unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, making removal in the best interests of the trust.[\[FN3\]](#) It also provides that a trustee has a duty to act unless absent and defines how unavailability or absence affects the liability of a trustee or cotrustees.[\[FN4\]](#)

[\[FN1\]](#) [Ashman v. Pickens, 12 Ark. App. 233, 674 S.W.2d 4 \(1984\); Letcher's Trustee v. German Nat. Bank, 134 Ky. 24, 119 S.W. 236 \(1909\).](#)

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[\[FN2\]](#) [Ashman v. Pickens, 12 Ark. App. 233, 674 S.W.2d 4 \(1984\).](#)

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[\[FN3\]](#) [Uniform Trust Code § 706\(b\)\(3\) \(2000\).](#)

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[\[FN4\]](#) [Uniform Trust Code § 703\(c\), 703\(d\) \(2000\).](#)

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§ 233. Grounds relating to conflicts of interest

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 166 to [166\(2\)](#)

As a rule, trustees may be removed from office for conflicts of interest,[\[FN1\]](#) such as acquisition of an interest conflicting with that of the beneficiaries[\[FN2\]](#) but not for potential conflicts of interest.[\[FN3\]](#) Stated otherwise, should there be any self-interest on a trustee's part in the administration of the trust which would interfere with the duty of complete loyalty, the trustee's removal may be warranted.[\[FN4\]](#) Thus, for example, where a trustee, because of a conflict of interest, fails or refuses to pursue a claim against a party to the benefit of the trust estate, then such conflict of interest renders the trustee incapable of executing its fiduciary duties and mandates the trustee's removal.[\[FN5\]](#)

Irreconcilable conflicts between a trustee's personal interests and those of the trust estate and its beneficiaries are grounds for removal.[\[FN6\]](#)

When the settlor of a trust has named a trustee, fully aware of possible conflict inherent in his or her appointment, only rarely will a court remove the trustee.[\[FN7\]](#) In some jurisdictions, a conflict of interest, particularly where the settlor knew of the potential conflict at the time the trust was created and the trustee named, does not, of itself, constitute sufficient cause for the removal of a trustee.[\[FN8\]](#) Nevertheless, where the settlor appoints the same person as trustee for separate trusts, and such trustee prolongs litigation involving the multiple trusts in order to resolve and pay the trustee's disputed fiduciary fees to such an extent as to render the trustee incapable of executing the trust, then the trustee may be removed.[\[FN9\]](#)

Conflict of interest may also be a ground to preclude the appointment of a person as a trustee, such as the instance in which a trustee is also entitled to a remainder interest in the trust upon its termination.[\[FN10\]](#) However, a conflict of interest is not sufficient to bar a person from serving as a trustee where the trustee would owe a statutory fiduciary duty to the trust, any breach of which would subject the trustee to a surcharge, and where regulations exist to assure the fulfillment of the fiduciary obligations.[\[FN11\]](#)

[\[FN1\]](#) [Getty v. Getty](#), 205 Cal. App. 3d 134, 252 Cal. Rptr. 342 (2d Dist. 1988); [In re Estate of Klarner](#), 98 P.3d 892 (Colo. Ct. App. 2003), cert. granted, [2004 WL 2211536](#) (Colo. 2004) and cert. granted, (Oct. 4, 2004); [In re Andrews' Appeal from Probate](#), 78 Conn. App. 429, 826 A.2d 1260 (2003); [In re Hall](#), 275 A.D.2d 979, 713 N.Y.S.2d 622 (4th Dep't 2000); [Porter v. Porter](#), 107 Wash. 2d 43, 726 P.2d 459, 68 A.L.R.4th 859 (1986).

[\[FN2\]](#) [Lovett v. Peavy](#), 253 Ga. 79, 316 S.E.2d 754 (1984).

[\[FN3\]](#) [Getty v. Getty](#), 205 Cal. App. 3d 134, 252 Cal. Rptr. 342 (2d Dist. 1988); [In re Betty A. Luhrs Trust](#), 443 N.W.2d 646 (S.D. 1989).

[FN4] [In re Charnock, 158 N.C. App. 35, 579 S.E.2d 887 \(2003\)](#), cert. denied, [357 N.C. 506, 588 S.E.2d 473 \(2003\)](#) and decision aff'd, [358 N.C. 523, 597 S.E.2d 706 \(2004\)](#).

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[FN5] [Ramsdell v. Union Trust Co., 202 Conn. 57, 519 A.2d 1185 \(1987\)](#).

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[FN6] [In re Estate of Klarner, 98 P.3d 892 \(Colo. Ct. App. 2003\)](#), cert. granted, [2004 WL 2211536 \(Colo. 2004\)](#) and cert. granted, (Oct. 4, 2004) (the trustees of a trust which was a beneficiary of the decedent's estate had a conflict of interest in also serving as the trustees of a qualified terminable interest property (QTIP) trust included in the decedent's estate).

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[FN7] [In re Betty A. Luhrs Trust, 443 N.W.2d 646 \(S.D. 1989\)](#).

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[FN8] [City Bank & Trust Co. v. Hawthorne, 551 So. 2d 658 \(La. Ct. App. 3d Cir. 1989\)](#).

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[FN9] [In re Andrews' Appeal from Probate, 78 Conn. App. 429, 826 A.2d 1260 \(2003\)](#).

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[FN10] [§ 209](#).

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[FN11] [In re Pace, 182 Misc. 2d 618, 699 N.Y.S.2d 257 \(Sup 1999\)](#).

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§ 234. Grounds involving relationship with beneficiaries or other trustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 166(1)

Forms

Petition or application—For removal of trustee—Breach of duty. [Am. Jur. Pleading and Practice Forms, Trusts § 143](#)

Intentional misinformation to a beneficiary regarding the existence of the trust, status as a beneficiary, or rights as a beneficiary thereof, which amount to dishonesty in office, constitutes a ground for removal of a trustee.[\[FN1\]](#) The failure of one cotrustee to keep itself informed as to the conduct of the other in the administration of the trust is a ground for removal or discharge.[\[FN2\]](#) A cotrustee's refusal to cooperate and communicate with the other cotrustee will support the removal of the uncooperative cotrustee.[\[FN3\]](#) However, a trustee will not be removed for failing to provide a cotrustee with information that the cotrustee already possesses.[\[FN4\]](#) A trustee will not be removed merely because of a disagreement among cotrustees.[\[FN5\]](#)

The fact that some of the trust beneficiaries are unhappy with a particular person as trustee is of no importance;[\[FN6\]](#) without a demonstration that the trust corpus is in danger of dissipation, mere displeasure of a beneficiary is an insufficient reason for removing a testamentary trustee.[\[FN7\]](#) A court will not remove a trustee against its will simply because a cotrustee and the beneficiaries prefer to deal with another individual or entity.[\[FN8\]](#)

Removal of a trustee is not warranted by the trustee's unsuccessful counterclaim and request for sanctions against a beneficiary in response to the beneficiary's challenge to the trustee's accounting, even though the trustee is unsuccessful on the counterclaim and request for sanctions, provided that such counterclaim and request are not frivolous.[\[FN9\]](#)

The decision whether to appoint an independent trustee for a supplemental needs trust over a family member can only be made after the court has inquired into the relative fitness of the proposed family member to act as a fiduciary. Items such as the family member's history of caring and sacrificing for the disabled person, proven financial and fiduciary skills, and attitudes concerning the appropriate use and expenditure of the disabled person's funds will bear on his or her qualifications to serve as a fiduciary; in addition, the family member's personal financial stability and credit history, including any existing judgments and bankruptcies, are a relevant area of inquiry.[\[FN10\]](#)

[\[FN1\]](#) [McNeil v. McNeil](#), 798 A.2d 503 (Del. 2002); [Robinson v. Kirbie](#), 1990 OK CIV APP 45, 793 P.2d 315 (Ct. App. Div. 3 1990); [White v. White](#), 2002 WL 32341854 (Tex. App. Eastland 2002).

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[\[FN2\]](#) [Hartford Nat. Bank & Trust Co. v. Malcolm-Smith](#), 129 Conn. 67, 26 A.2d 234, 140 A.L.R. 805 (1942) (overruled on other grounds by, [Stanley v. Stanley](#), 175 Conn. 200, 397 A.2d 101 (1978)).

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[\[FN3\]](#) [Thinn v. Parks](#), 79 Ark. App. 20, 83 S.W.3d 430 (2002).

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[\[FN4\]](#) [Edinburg v. Cavers](#), 22 Mass. App. Ct. 212, 492 N.E.2d 1171 (1986).

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[\[FN5\]](#) [Reed v. South Carolina Nat. Bank](#), 293 S.C. 357, 360 S.E.2d 527 (Ct. App. 1987).

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[\[FN6\] In re White, 506 Pa. 218, 484 A.2d 763 \(1984\).](#)

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[\[FN7\] In re White, 506 Pa. 218, 484 A.2d 763 \(1984\); In re Betty A. Luhrs Trust, 443 N.W.2d 646 \(S.D. 1989\).](#)

- As to hostility, see § 235.

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[\[FN8\] Reed v. South Carolina Nat. Bank, 293 S.C. 357, 360 S.E.2d 527 \(Ct. App. 1987\).](#)

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[\[FN9\] Diemert v. Diemert, 2003 Ohio 6496 \(Ohio.App.8.Dist.Cuyahoga.,2003\).](#)

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[\[FN10\] In re Pace, 182 Misc. 2d 618, 699 N.Y.S.2d 257 \(Sup 1999\).](#)

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§ 235. Grounds involving relationship with beneficiaries or other trustees—Hostility

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [166\(1\)](#)

A.L.R. Library

[Hostility between trustee and beneficiary as ground for removal, 63 A.L.R.2d 523](#)

As a rule, hostility between a trustee and beneficiaries is not per se ground for removal of trustee;[FN1] mere friction,[FN2] ill will,[FN3] disagreeable personal relations,[FN4] or tension[FN5] between a trustee and beneficiaries does not in itself constitute a ground for the removal or discharge of the trustee. In this regard, allegations of hostility which amount to nothing more than allegations of social or family animosity and incompatibility are insufficient, without more, to warrant removal of trustee.[FN6]

Even so, such hostility is a factor to be taken into consideration where the hostilities of the parties combine with other circumstances to render removal of the trustee essential to the interests of the beneficiary and the execution of the trust.[FN7] However, where the hostility or tension between the trustee and beneficiary is extreme,[FN8] jeopardizing[FN9] or materially[FN10] interfering[FN11] with the administration of the trust, it is ground for the trustee's removal or discharge, even though he or she has been without fault.[FN12] However, removal of a trustee will not be authorized without a finding that the trustee's hostility did or will affect his or her performance in office[FN13] or either resulted in actual acts of misconduct or created a conflict of interest which appears likely to endanger the trust or the welfare of the beneficiary.[FN14]

The cause of the hostility, or the responsibility therefor, as between the parties, may be of importance in determining the sufficiency thereof as a ground for the removal of a trustee.[FN15]

A court will not sanction the creation of hostility by a beneficiary in order to effectuate the removal of a trustee.[FN16]

[FN1] Parker v. Shullman, 843 So. 2d 960 (Fla. Dist. Ct. App. 4th Dist. 2003), review denied, 857 So. 2d 197 (Fla. 2003); Rennacker v. Rennacker, 156 Ill. App. 3d 712, 109 Ill. Dec. 137, 509 N.E.2d 798 (3d Dist. 1987); Massey v. St. Joseph Bank and Trust Co., 411 N.E.2d 751 (Ind. Ct. App. 3d Dist. 1980); Fertel v. Brooks, 832 So. 2d 297 (La. Ct. App. 4th Cir. 2002); Estate of Utterback, 521 A.2d 1184 (Me. 1987); Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 (Mo. Ct. App. S.D. 2001); Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 (App. Div. 1985); Akin v. Dahl, 661 S.W.2d 911 (Tex. 1983); Kerper v. Kerper, 780 P.2d 923 (Wyo. 1989).

[FN2] Schildberg v. Schildberg, 461 N.W.2d 186 (Iowa 1990); Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 (App. Div. 1985).

[FN3] Akin v. Dahl, 661 S.W.2d 911 (Tex. 1983).

[FN4] Estate of Utterback, 521 A.2d 1184 (Me. 1987).

[FN5] Parr v. Cushing, 507 So. 2d 1227 (Fla. Dist. Ct. App. 5th Dist. 1987); Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 (Okla. 1961).

[FN6] Succession of Noe, 398 So. 2d 1173 (La. Ct. App. 2d Cir. 1981), writ denied, 405 So. 2d 530 (La. 1981).

[FN7] Rennacker v. Rennacker, 156 Ill. App. 3d 712, 109 Ill. Dec. 137, 509 N.E.2d 798 (3d Dist. 1987).

[FN8] Steele v. Kelley, 57 Mass. App. Ct. 1111, 784 N.E.2d 50 (2003) (legal equivalent of "total war"); Brown v. Batt, 1981 OK CIV APP 39, 631 P.2d 1346 (Ct. App. Div. 2 1981).

[FN9] May v. May, 167 U.S. 310, 17 S. Ct. 824, 42 L. Ed. 179 (1897); Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 (App. Div. 1985).

[\[FN10\] Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 \(App. Div. 1985\).](#)

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[\[FN11\] Dennis v. Rhode Island Hosp. Trust Nat. Bank, 744 F.2d 893 \(1st Cir. 1984\) \(abrogated on other grounds by, Salve Regina College v. Russell, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190, 65 Ed. Law Rep. 1030 \(1991\)\); Rennacker v. Rennacker, 156 Ill. App. 3d 712, 109 Ill. Dec. 137, 509 N.E.2d 798 \(3d Dist. 1987\); Fertel v. Brooks, 832 So. 2d 297 \(La. Ct. App. 4th Cir. 2002\); Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 \(App. Div. 1985\); Fred Hutchinson Cancer Research Center v. Holman, 107 Wash. 2d 693, 732 P.2d 974 \(1987\).](#)

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[\[FN12\] Steele v. Kelley, 57 Mass. App. Ct. 1111, 784 N.E.2d 50 \(2003\); Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\).](#)

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[\[FN13\] Akin v. Dahl, 661 S.W.2d 911 \(Tex. 1983\).](#)

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[\[FN14\] Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 \(App. Div. 1985\).](#)

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[\[FN15\] Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 \(App. Div. 1985\).](#)

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[\[FN16\] duPont v. Southern Nat. Bank of Houston, Tex., 771 F.2d 874, 3 Fed. R. Serv. 3d 273 \(5th Cir. 1985\); Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 500 A.2d 1076 \(App. Div. 1985\); In re Betty A. Luhrs Trust, 443 N.W.2d 646 \(S.D. 1989\).](#)

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§ 236. Method of appointment or substitution, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 169 to [169\(3\)](#)

Forms

Succession. Am. Jur. Legal Forms 2d, Trusts § 251:775 to 251:392

Petition or application—For appointment of successor trustee to fill vacancy—Allegation—Selection by surviving trustees of successor trustee pursuant to terms of trust instrument. [Am. Jur. Pleading and Practice Forms, Trusts § 116](#)

Petition or application—For appointment of substitute testamentary trustee—Allegation—Declination of designated trustee to accept appointment. [Am. Jur. Pleading and Practice Forms, Trusts § 119](#)

If a trust is created and the trustee ceases for any reason to be a trustee, a new trustee can be appointed by a proper court[[FN1](#)] or by the person, if any, who by the terms of the trust is authorized to appoint a trustee.[[FN2](#)]

The creator of a trust may provide for the appointment of a successor or successors to the trustee on such terms as he or she chooses to impose.[[FN3](#)] Effect must be given to the valid terms of a trust as to the mode and manner of the substitution, and succession of trustees in the administration of the trust[[FN4](#)] and such terms must be carefully followed.[[FN5](#)] In this regard, the power to appoint trustees is to be strictly construed,[[FN6](#)] although a construction is to be avoided which will constitute a highly improbable intent.[[FN7](#)] Even so, where the settlor has given the power of postvacancy selection to the board of trustees, such power will be erased only reluctantly.[[FN8](#)] In short, if a trust instrument prescribes a procedure for dealing with a vacancy in trustees, the court should generally defer to this procedure and follow the desires of the settlors absent a showing that to do so would frustrate the purposes of the trust or be detrimental to the interests of the beneficiaries.[[FN9](#)]

To illustrate the foregoing, where the trust mandates the appointment of a successor corporate trustee, the appointment of an individual successor trustee will not fulfill such a requirement, and the individual trustee will not be accorded the right to take unilateral action in the absence of such an appointment of a corporate trustee.[[FN10](#)] In contrast, where the trust settlor intends no replacement of the multiple trustees named, as evidenced by trust provisions giving all rights, powers, and duties to the remaining trustees or trustee upon the death, disability, resignation, or refusal to serve of any trustee, no substitution or succession is necessary; this is true even though the trust also permits action by majority vote as long as multiple trustees are acting, since such a provision simply indicates the method by which the original cotrustees are to resolve differences of opinion.[[FN11](#)] Where, however, the terms of the trust are silent in the matter, the substitution and succession of trustees must be governed by applicable statute or caselaw.[[FN12](#)]

Observation: A statute authorizing a surviving fiduciary, where two or more fiduciaries have been designated, to continue to act without the appointment of a successor fiduciary does not prohibit a settlor, or one who acts on behalf of a settlor, from exercising a retained power to modify the trust by adding cotrustees.[[FN13](#)]

In cases involving multiple trustees, the resignations of two trustees may permit the remaining trustee to execute the trust; generally, appointing replacement trustees is not necessary to prevent the failure of the trust.[[FN14](#)] Similarly, where one of two trustees dies, the trusteeship instead devolves on the surviving trustee, pending appointment, if any, of a new trustee.[[FN15](#)]

CUMULATIVE SUPPLEMENT

Cases:

Circuit court's conservatorship, which was based on the court's finding that protected person who was trustor and sole trustee of living trust was impaired to such an extent that she lacked the capacity to properly manage her property and financial affairs without the assistance or protection of a conservator, triggered successor-trustee clause, even though there was no physician statement providing that she was unable to serve under the terms of the trust. [In re Conservatorship of Didier, 2010 SD 56, 784 N.W.2d 486 \(S.D. 2010\)](#).

Trustee vacancy did not occur so as to allow circuit court to appoint conservator as trustee after removal of unfit trustee; successor-trustee's written declination was contingent upon conservator being appointed as co-trustee and it was expressly rescinded should conservator not serve as co-trustee, and the record did not indicate that other successor-trustee filed a declination and consent. [SDCL § 55-3-20. In re Conservatorship of Didier, 2010 SD 56, 784 N.W.2d 486 \(S.D. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\] § 238.](#)

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[\[FN2\] Bonney v. Granger, 292 S.C. 308, 356 S.E.2d 138 \(Ct. App. 1987\).](#)

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[\[FN3\] McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\); Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 \(Mo. Ct. App. S.D. 2001\); Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN4\] Colt v. Colt, 111 U.S. 566, 4 S. Ct. 553, 28 L. Ed. 520 \(1884\); Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 \(Mo. Ct. App. S.D. 2001\); In re Frank's Trust, 400 Pa. 614, 162 A.2d 680, 82 A.L.R.2d 937 \(1960\); Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\); Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN5\] In re Frank's Trust, 400 Pa. 614, 162 A.2d 680, 82 A.L.R.2d 937 \(1960\); Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\).](#)

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[\[FN6\] In re Frank's Trust, 400 Pa. 614, 162 A.2d 680, 82 A.L.R.2d 937 \(1960\); In re Steinsapir, 392 Pa. Super. 355, 572 A.2d 1270 \(1990\).](#)

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[\[FN7\] Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\).](#)

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[\[FN8\] In re Steinsapir, 392 Pa. Super. 355, 572 A.2d 1270 \(1990\).](#)

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[\[FN9\] McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\); Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 \(Ind. Ct. App. 3d Dist. 1982\); Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\).](#)

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[\[FN10\] Godfrey v. Kamin, 62 Fed. Appx. 693 \(7th Cir. 2003\) \(applying Illinois law\).](#)

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[\[FN11\] Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\).](#)

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[\[FN12\] NCNB Texas Nat. Bank v. Cowden, 895 F.2d 1488 \(5th Cir. 1990\); Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\).](#)

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[\[FN13\] In re Elsie B, 265 A.D.2d 146, 707 N.Y.S.2d 695 \(3d Dep't 2000\).](#)

- As to the settlor's power to modify a trust, see [§ 68](#).

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[\[FN14\] Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\).](#)

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[\[FN15\] Bumbaugh v. Burns, 635 S.W.2d 518 \(Tenn. Ct. App. 1982\).](#)

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§ 237. Status of successor trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [169\(1\)](#)

Forms

A successor trustee who is expressly named as such under the terms of the trust instrument assumes the position of successor trustee by operation of law.[\[FN1\]](#) A substitute or successor trustee when appointed steps into the place of the former trustee.[\[FN2\]](#) Successor trustees are regarded as transferees or assignees of all the interests of their predecessor.[\[FN3\]](#) The substitute or successor trustee assumes the trust estate subject to all liabilities binding the trust estate in the hands of his or her predecessor.[\[FN4\]](#)

A successor trustee may appropriately continue an accounting proceeding commenced by a predecessor.[\[FN5\]](#)

Where the trust instrument itself provides expressly or impliedly that new trustees shall have the same powers, rights, and interests in the trust property as their predecessors, title vests in the successor trustees by virtue of the original trust instrument without necessity for a formal conveyance.[\[FN6\]](#)

[\[FN1\]](#) [Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896 \(Mo. Ct. App. S.D. 2001\).](#)

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[\[FN2\]](#) [Boone v. Wachovia Bank & Trust Co., 163 F.2d 809, 173 A.L.R. 1285 \(App. D.C. 1947\).](#)

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[\[FN3\]](#) [Mosser v. Darrow, 341 U.S. 267, 71 S. Ct. 680, 95 L. Ed. 927 \(1951\).](#)

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[\[FN4\]](#) [Whiting v. Hudson Trust Co., 234 N.Y. 394, 138 N.E. 33, 25 A.L.R. 1470 \(1923\)](#) (liability for money stolen by preceding trustee to make good his defalcation to trust estate).

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[\[FN5\]](#) [In re Campbell's Estate, 46 Haw. 475, 382 P.2d 920 \(1963\).](#)

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[\[FN6\]](#) [Price v. Marathon Oil Co., 11 Ohio App. 3d 106, 463 N.E.2d 410 \(3d Dist. Hancock County 1983\).](#)

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§ 238. Appointment and control by court

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [169](#) to [169\(3\)](#)

Forms

Method of appointing successor trustee—By court. [Am. Jur. Legal Forms 2d, Trusts §§ 251:387](#)

Petition or application—For appointment of successor trustee to fill vacancy—Testamentary trust. [Am. Jur. Pleading and Practice Forms, Trusts § 108](#)

Petition or application—For appointment of successor trustee to fill vacancy—Inter vivos trust. [Am. Jur. Pleading and Practice Forms, Trusts § 109](#)

Letters of trusteeship—Provision—Appointment of substitute or successor trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 131](#)

Upon the required showing of cause for removal of a trustee,[\[FN1\]](#) a court may appoint a successor trustee;[\[FN2\]](#) the courts have the authority to remove[\[FN3\]](#) and replace trustees where there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries.[\[FN4\]](#) Furthermore, the courts generally have jurisdiction, in the case of the trustee's death, to appoint a successor trustee on application of the beneficiaries.[\[FN5\]](#)

A settlor may indicate his or her intention that a court of appropriate jurisdiction appoint a successor trustee if the designated trustee is unable to fulfill its responsibilities.[\[FN6\]](#) In making its determination, the court may consider the settlor's prior record of appointments, including the settlor's consistent choice of a corporate trustee with investment expertise, as well as the nature and value of the trust overall, its ability to pay corporate trustee fees, and the lack of expertise of any interested individual who seeks to become trustee.[\[FN7\]](#) The court may also decline to appoint a designated successor where the successor has opposed the petition to appoint him or her, even though it has not formally stated that it would refuse such an appointment, if made.[\[FN8\]](#)

In naming a trustee to fill a vacancy where the instrument does not prescribe a method, the court has a wide discretionary range.[\[FN9\]](#) However, a statute which authorizes a court to appoint replacement trustees does not permit the court to appoint a replacement trustee if the settlor does not intend such replacement; rather, it is a remedial statute to provide, in the absence of applicable language in the trust instrument, for the appointment of a replacement trustee or trustees where such an appointment is required to prevent the failure of the trust.[\[FN10\]](#)

A court has no jurisdiction to appoint a substitute or successor trustee where the trusteeship is purely personal and confidential.[\[FN11\]](#)

An evidentiary hearing may be required before a court will approve a provision of a trust designating the attorney who drafted the trust to act as the successor trustee in order to determine whether the attorney induced the settlor to name the attorney to act in a fiduciary capacity.[\[FN12\]](#)

[\[FN1\] § 227.](#)

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[\[FN2\] Getty v. Getty, 205 Cal. App. 3d 134, 252 Cal. Rptr. 342 \(2d Dist. 1988\); Porter v. Porter, 107 Wash. 2d 43, 726 P.2d 459, 68 A.L.R.4th 859 \(1986\).](#)

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[\[FN3\] § 225.](#)

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[\[FN4\] Schildberg v. Schildberg, 461 N.W.2d 186 \(Iowa 1990\).](#)

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[\[FN5\] Bumbaugh v. Burns, 635 S.W.2d 518 \(Tenn. Ct. App. 1982\).](#)

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[\[FN6\] Lowrey v. McNeel, 773 So. 2d 449 \(Ala. 2000\); Hamilton v. Donahue, 847 So. 2d 1112 \(Fla. Dist. Ct. App. 4th Dist. 2003\).](#)

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[\[FN7\] Reddick v. Suntrust Bank, East Cent. Florida, 718 So. 2d 950 \(Fla. Dist. Ct. App. 5th Dist. 1998\).](#)

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[\[FN8\] In re Rowe, 669 N.W.2d 260 \(Iowa Ct. App. 2003\).](#)

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[\[FN9\] In re Will of Crabtree, 440 Mass. 177, 795 N.E.2d 1157 \(2003\).](#)

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[\[FN10\] Bond v. Bond, 215 W. Va. 22, 592 S.E.2d 801 \(2003\).](#)

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[\[FN11\] § 319.](#)

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[\[FN12\] In re Estate of Rothwell, 189 Misc. 2d 191, 730 N.Y.S.2d 664 \(Sur. Ct. 2001\).](#)

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§ 239. Appointment by remaining or preceding trustee or by beneficiaries

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West's Key Number Digest, [Trusts](#) [169\(3\)](#)

A.L.R. Library

[Trustee's appointment of associate or successor trustee under powers of trust instrument, 57 A.L.R.2d 887](#)

Forms

Method of appointing successor trustee—By resigning trustee. [Am. Jur. Legal Forms 2d, Trusts § 251:386](#)

Order—Confirming or appointing successor trustee—Successor selected by surviving trustees pursuant to terms of trust instrument. [Am. Jur. Pleading and Practice Forms, Trusts § 126](#)

Order—Sustaining objections to appointment of successor trustee and appointing alternate successor trustee—Surviving cotrustee without power to appoint successor. [Am. Jur. Pleading and Practice Forms, Trusts § 127](#)

Provisions contained in an instrument of trust may properly vest in the trustee a power to appoint a successor,[\[FN1\]](#) or it may vest in beneficiaries a power to change the trustee.[\[FN2\]](#)

Some trust provisions specifically provide for the appointment of successor trustees upon the death of a cotrustee and provide that such appointment shall be upon the recommendation of the remaining trustee or trustees.[\[FN3\]](#)

A power in trustees to appoint other trustees is to be strictly construed.[\[FN4\]](#)

An individual trustee has no power to appoint a corporate fiduciary where statute authorizes such appointment by only the settlor.[\[FN5\]](#)

Generally, a trustee given power to appoint a successor may do so without consultation with other interested parties.[\[FN6\]](#)

[\[FN1\]](#) [In re Frank's Trust, 400 Pa. 614, 162 A.2d 680, 82 A.L.R.2d 937 \(1960\).](#)

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[\[FN2\]](#) [Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309, 139 A.L.R. 1117 \(1942\).](#)

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[\[FN3\]](#) [In re Trust of Selsor, 13 Ohio App. 3d 164, 468 N.E.2d 745 \(12th Dist. Madison County 1983\).](#)

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[\[FN4\] Matter of Estate of Bensel, 127 A.D.2d 832, 512 N.Y.S.2d 411 \(2d Dep't 1987\); In re Frank's Trust, 400 Pa. 614, 162 A.2d 680, 82 A.L.R.2d 937 \(1960\).](#)

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[\[FN5\] In re Frank's Trust, 400 Pa. 614, 162 A.2d 680, 82 A.L.R.2d 937 \(1960\).](#)

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[\[FN6\] In re Strobel's Trust, 18 Misc. 2d 145, 188 N.Y.S.2d 273 \(Sup 1959\) \(apply Ohio law\).](#)

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[Wills: Gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 A.L.R.4th 978](#)

Forms

[Am. Jur. Legal Forms 2d, Trusts §§ 251:50, 251:51, 251:64 to 251:64.2, 251:75 to 251:80, 251:316 to 318, 251:351 to 251:354](#)

[Am. Jur. Pleading and Practice Forms, Trusts § 182, 185](#)

Model Codes and Restatements

[Restatement, Third-Trusts §§ 43, 45, 46, 48](#)

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§ 240. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [9](#)

Forms

Designation of beneficiaries and distributees. [Am. Jur. Legal Forms 2d, Trusts §§ 251:351 to 251:354](#)

Model Codes and Restatements

[Restatement, Third-Trusts §§ 43, 45, 46, 48](#)

A person who has the capacity to take and hold the legal title to property has the capacity to be the beneficiary of a trust of such property.[\[FN1\]](#)

The terms "cestui que trust" or "beneficiary of a trust" signify one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by the trustee.[\[FN2\]](#) A beneficiary is generally required for the creation of a valid express trust,[\[FN3\]](#) and such beneficiary must be certain and identifiable,[\[FN4\]](#) although beneficiaries may be designated by a class which is a proper one for the purpose[\[FN5\]](#) and a trustee may be empowered to elect or appoint beneficiaries from such a class.[\[FN6\]](#) In addition, persons not yet born may be designated beneficiaries of a trust without invalidating the trust or violating the general requirements of definiteness.[\[FN7\]](#)

Any person to whom the settlor intends to give a beneficial interest is considered a beneficiary.[\[FN8\]](#)

The trustor may be the sole beneficiary of a trust or one of several beneficiaries.[\[FN9\]](#) One cannot, however, create a trust in his or her own favor that is free from liability for his or her debts or torts.[\[FN10\]](#)

Generally, the trustee may not be the sole trustee and the sole beneficiary of a trust, but he or she may be one of the beneficiaries of a trust, or the beneficiary of a trust of which he or she is one of the trustees.[\[FN11\]](#)

[\[FN1\] DPS Trust v. Sherman, 2002 Ohio 3846 \(Ohio.App.11.Dist.Lake.Co.,2002\).](#)

[\[FN2\] Reinecke v. Smith, 289 U.S. 172, 53 S. Ct. 570, 77 L. Ed. 1109 \(1933\); Hammond v. U.S., 584 F. Supp. 163 \(D. Conn. 1984\), judgment aff'd, 764 F.2d 88 \(2d Cir. 1985\); Neel v. Clark, 193 S.C. 412, 8 S.E.2d 740 \(1940\).](#)

- As to interests of beneficiaries in trust property, generally, see §§ [258](#) to [272](#).

[\[FN3\] § 52.](#)

[\[FN4\] § 53.](#)

[\[FN5\] § 56.](#)

[\[FN6\] § 241.](#)

[\[FN7\] § 55.](#)

[\[FN8\] Cruse v. Leary, 727 S.W.2d 408 \(Ky. Ct. App. 1987\).](#)

[\[FN9\] Mayer v. American Security & Trust Co., 222 U.S. 295, 32 S. Ct. 95, 56 L. Ed. 206 \(1911\); Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 \(C.C.A. 8th Cir. 1937\); Cramer v. Hartford-](#)

[Connecticut Trust Co., 110 Conn. 22, 147 A. 139, 73 A.L.R. 201 \(1929\).](#)

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[\[FN10\] § 102.](#)

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[\[FN11\] § 209.](#)

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§ 241. Classes of beneficiaries, generally; power of trustee to elect from class

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [9](#)

Forms

Designation of beneficiaries and distributees. [Am. Jur. Legal Forms 2d, Trusts §§ 251:351 to 251:354](#)

Model Codes and Restatements

[Restatement, Third-Trusts §§ 45, 46](#)

Although designation of beneficiaries as a class may satisfy the requirement for the creation and existence of trusts that the designation of the beneficiaries be clear and certain,[FN1] there is a lack of universal agreement as to the validity of a trust which leaves it to the discretion of a trustee to appoint or elect beneficiaries from a designated class. In this regard, under one view, such a trust is valid, at least where the class designated is reasonably limited.[FN2] Under this view, it is clear that a trust may be created for the benefit of the members of a definite class of persons, although by the terms of the trust the trustee is authorized to select which of the members of the class shall take and in what proportions, and this is true whether the trustee has discretion as to only the proportion of the trust property which each member of the class is to receive or has discretion to exclude some members of the class altogether.[FN3]

There is some authority, however, for the view that trusts leaving the appointment or selection of beneficiaries from a class to a trustee is void for uncertainty, although the class is that of brothers and sisters,[FN4] relatives generally, or a particular class of relatives.[FN5] Likewise, discretion in a trustee to give the estate to relatives or others or to a charity has been deemed to make the trust indefinite and unenforceable.[FN6]

[FN1] § 56.

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[FN2] In re Work Family Trust, 260 Iowa 898, 151 N.W.2d 490 (1967).

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[FN3] Zweig v. Zweig, 275 S.W.2d 201 (Tex. Civ. App. San Antonio 1955), writ refused n.r.e., (May 18, 1955).

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[FN4] Wilce v. Van Anden, 248 Ill. 358, 94 N.E. 42 (1911).

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[FN5] In re Moller's Estate, 178 N.Y.S. 682 (Sur. Ct. 1919).

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[FN6] In re Lawrence's Estate, 104 N.H. 457, 189 A.2d 491, 5 A.L.R.3d 709 (1963).

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§ 242. Beneficiaries taking as class or as individuals

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[Wills: Gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 A.L.R.4th 978](#)

Forms

Designation of beneficiaries and distributees. [Am. Jur. Legal Forms 2d, Trusts §§ 251:351 to 251:354](#)

Model Codes and Restatements

[Restatement, Third-Trusts §§ 45, 46](#)

Certain differences arise based on whether beneficiaries take as a class or as individuals. In this regard, where beneficiaries of a trust take as a class, the death of one of them before they take merely reduces the class, with the consequence that each member of the class takes more in proportion; and the birth of a member of the class makes him or her a beneficiary of the trust, although born after the execution of the trust instrument, the death of the trustor, or the event upon which the beneficial interest vests in the class. However, where beneficiaries take as individuals, the death of one does not increase the benefits coming to the others, and after-born persons, if they are beneficiaries at all, do not come in as members of a class with the former but take under some provision for a future interest in them.^[FN1]

The intention of the trustor governs as to whether a class of beneficiaries take as a class or as individuals.^[FN2] Indicia of the trustor's intention that the beneficiaries are to take as a class include the trustor's description of them as a class, in general terms,^[FN3] the naturalness of beneficiaries as a class,^[FN4] the collective treatment of beneficiaries,^[FN5] and the vesting of the interests of beneficiaries at the same time.^[FN6] On the other hand, indicia that beneficiaries take as individuals and not as a class are the naming^[FN7] and numbering of them,^[FN8] as for example, by a statement in a testamentary trust limiting the beneficiaries to specified descendants living at the time of the testator's death^[FN9] and separate treatment of or taking by them.^[FN10] In the absence of a contrary intent, a gift of income of a testamentary trust to named beneficiaries also identified by relationship to the testator or another person is a gift to them individually and not a gift to them as a class.^[FN11]

A trust, by its provisions, may give a gift as a class to members of different generations.^[FN12]

[FN1] [Stuart v. Stuart, 33 Del. Ch. 501, 106 A.2d 771, 50 A.L.R.2d 1156 \(1953\).](#)

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[FN2] [Roberts v. Trustees of Trust Fund for Town of Tamworth, 96 N.H. 223, 73 A.2d 119 \(1950\).](#)

-

[FN3] [Prince v. Roberts, 436 A.2d 1078 \(R.I. 1981\)](#) (where provision of trust gave trust interest "to and among female children and more remote female issue").

- Gift of trust fund corpus, at the death of the trustor's daughter without issue, to such of his brothers, or their issue per stirpes, as survive the life tenant, was gift to a class. [Combs v. First Sec. Nat. Bank & Trust Co., 431 S.W.2d 719 \(Ky. 1968\).](#)

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[FN4] [In re Knickenberg's Will, 180 Misc. 217, 40 N.Y.S.2d 437 \(Sur. Ct. 1943\).](#)

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[FN5] [Talley v. Ferguson, 64 W. Va. 328, 62 S.E. 456 \(1908\).](#)

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[FN6] [Bowers v. Moore, 138 Tenn. 132, 196 S.W. 147 \(1917\).](#)

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[FN7] [Union & New Haven Trust Co. v. Sellek, 128 Conn. 566, 24 A.2d 485, 140 A.L.R. 837 \(1942\); In re Eltzeroth's Estate, 83 So. 2d 772 \(Fla. 1955\).](#)

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[FN8] [Flye v. Jones, 283 Mass. 136, 186 N.E. 64 \(1933\).](#)

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[FN9] [Succession of Burgess, 359 So. 2d 1006 \(La. Ct. App. 4th Cir. 1978\), writ denied, 360 So. 2d 1178 \(La. 1978\).](#)

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[FN10] [Old Colony Trust Co. v. Stetson, 326 Mass. 641, 96 N.E.2d 245 \(1951\).](#)

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[FN11] [In re Hennes' Will, 240 So. 2d 859 \(Fla. Dist. Ct. App. 4th Dist. 1970\); National Bank of Georgia v. First Nat. Bank of Atlanta, 234 Ga. 734, 218 S.E.2d 23 \(1975\); In re Hannah's Estate, 215 Kan. 892, 529 P.2d 154 \(1974\); Svenson v. First Nat. Bank of Boston, 5 Mass. App. Ct. 440, 363 N.E.2d 1129 \(1977\); Jorgensen v. Pioneer Trust Co., 198 Or. 579, 258 P.2d 140 \(1953\); Black v. Gettys, 238 S.C. 167, 119 S.E.2d 660 \(1961\).](#)

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[FN12] [Prince v. Roberts, 436 A.2d 1078 \(R.I. 1981\)](#) (where provision of trust gave trust interest "to and among female children and more remote female issue").

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§ 243. Construction of terms describing beneficiaries

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[Wills: Gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 A.L.R.4th 978](#)

Forms

Irrevocable trust agreements—For benefit of trustor's children or grandchildren. Am. Jur. Legal Forms 2d, Trusts §§ 251:75 to 251:80 to 251:64.2

Revocable trust agreement—With corporate trustee—Single person—To continue in trust for children after death of trustor. [Am. Jur. Legal Forms 2d, Trusts § 251:50](#)

Revocable trust agreement—With corporate trustee—To continue in trust after grantor's death for benefit of spouse and children. [Am. Jur. Legal Forms 2d, Trusts § 251:51](#)

Revocable trust agreements—Grantor with children but no surviving spouse—At grantor's death, outright distribution to children. [Am. Jur. Legal Forms 2d, Trusts §§ 251:64 to 251:64.2](#)

Model Codes and Restatements

[Restatement, Third-Trusts §§ 43, 45, 46, 48](#)

Where the provision is expressly or clearly for the benefit of children as a family, a class gift, letting in after-born children as beneficiaries, is indicated.^[FN1] In this regard, a conveyance from decedent to defendant, to be held by defendant as trustee for decedent's son "and his children," has established a life estate in the son with a remainder interest held in common among all of the son's children, including those born after effective date of transaction.^[FN2]

The term "issue," as appearing in a trust agreement, unless otherwise limited or qualified, embraces all lineal descendants of the settlor.^[FN3] A trust provision "to and among female children and more remote issue" creates a class gift.^[FN4] Normally, when the word "children" is used, "grandchildren" are excluded, and where there are either children or a child who fully answers the description of the word "children" and where confining a testamentary bequest to them will fully satisfy the whole apparent design of the settlor-testator, grandchildren or more remote descendants may not share with them.^[FN5] However, testamentary trusts providing for trust income to be divided in equal shares among each of the testator's children and a separate class of "grandchildren," with the principal of such trusts to be paid to testator's "grandchildren" upon death of last of testator's children, has been construed as including great-grandchildren of the testator.^[FN6]

Statutes have sometimes provided that unless a contrary intent is established by the instrument, all references in a trust instrument to an individual or member of a class described generically in relation to a particular person as "children," "issue," "grandchildren," "descendants," "heirs," "heirs of the body," "next-of-kin," "distributees," "grandparents," "brothers," "nephews," or other relatives shall include any person who would be treated as so related for all purposes of intestate succession,^[FN7] with exceptions as to adopted persons.^[FN8]

^[FN1] [Zillig v. Patzer, 365 Mo. 787, 287 S.W.2d 771 \(1956\).](#)

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^[FN2] [Kaufman v. Zimmer, 287 N.W.2d 884 \(Iowa Ct. App. 1979\).](#)

-

^[FN3] [Bonney v. Granger, 292 S.C. 308, 356 S.E.2d 138 \(Ct. App. 1987\).](#)

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^[FN4] [Prince v. Roberts, 436 A.2d 1078 \(R.I. 1981\).](#)

-

^[FN5] [Hartford Nat. Bank & Trust Co. v. VonZiegesar, 154 Conn. 352, 225 A.2d 811 \(1966\); Old Colony Trust Co. v. Attorney General of U.S., 326 Mass. 532, 95 N.E.2d 649, 34 A.L.R.2d 1 \(1950\).](#)

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^[FN6] [Estate of Zerbey, 313 Pa. Super. 297, 459 A.2d 1237 \(1983\).](#)

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^[FN7] [Chipman v. Spitznagel, 82 Or. App. 700, 728 P.2d 971 \(1986\).](#)

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^[FN8] [§ 244.](#)

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§ 244. Construction of terms describing beneficiaries—Application to adopted children

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[Adopted child as within class named deed or inter vivos trust instrument, 37 A.L.R.5th 237](#)

Forms

Complaint, petition, or declaration—For declaratory judgment—Whether phrase "my children" includes adopted children. [Am. Jur. Pleading and Practice Forms, Trusts § 182](#).

Answer—Defense—Adopted children not contemplated by trustor. [Am. Jur. Pleading and Practice Forms, Trusts § 185](#)

Model Codes and Restatements

[Restatement, Third-Trusts §§ 43, 45, 46, 48](#)

Historically, a common law presumption existed in some jurisdictions excluding adopted children from the use of such words as "child," "children," or "issue" in a trust instrument.^[FN1] Such presumption has since been abrogated by statute in some jurisdictions,^[FN2] and the statutes in some jurisdictions define "issue" to include adopted children.^[FN3] In fact, a contrary presumption is now recognized in some jurisdictions to the effect that where it cannot be concluded with reasonable certainty whether a settlor has intended to include or exclude

adopted children, the settlor is presumed to include all children, whether children by adoption or by blood descent.[\[FN4\]](#) However, certain statutory constructions may create an exception such that an adopted person so included must have been adopted as a minor or after having been a member of the household of the adoptive parent while a minor.[\[FN5\]](#)

Observation: Consideration may be required to be given to the state of the law at the time of the creation of the trust to determine which presumption applies. Thus, where a trust was created at a time when the law would not presume an adopted child to be included in the term "lawful descendant," then the fact that the law has a contrary modern presumption will not abrogate that intent, even though the alleged right of an adopted child to become a beneficiary to the trust did not arise until after the change in the law; the testator's intent is to be discerned at the creation of the trust.[\[FN6\]](#)

As to adoptions by persons other than the settlor or grantor, an adopted child has not always been deemed to be within the meaning of the word "child" or "children" as employed in a trust instrument.[\[FN7\]](#) However, by statute in some jurisdictions, specified relations—other than children of the settlor—are to be treated the same with regard to their ability to take under a trust, whether adopted or not,[\[FN8\]](#) and in the absence of evidence of the settlors' intent, a presumption of sorts that adopted children of beneficiaries were intended to take under the trust instrument has been applied.[\[FN9\]](#)

Sometimes the particular wording employed by the trusts prevents adopted children from taking as the beneficiary of a trust.[\[FN10\]](#) Nevertheless, a provision of a trust calling for distribution to the settlor's "lawful issue of the blood" may be deemed ambiguous in that it does not indicate a settlor's clear intent to exclude adopted descendants in light of the fact that the settlor's overall scheme of distribution showed an intent to treat each child's line equally and where excluding the adopted members of those lines would impute an element of arbitrariness to the settlor's otherwise evenhanded and methodical scheme of distribution.[\[FN11\]](#) Similarly, even where it is clearly expressed that adoptive children of a class of persons are not to be included as beneficiaries, this express exclusion will not be extended to adopted children of the class of beneficiaries.[\[FN12\]](#)

A presumptive rule—known as the "stranger to adoption" rule—has been applied in some instances to raise a presumption that a grantor would intend to include his or her adopted children within the class of children to receive under a trust instrument, although no intent of the settlor as to adopted children otherwise appears in the trust instrument, whereas a "stranger" to the adoption is not presumed to include adopted children within a designated class.[\[FN13\]](#) However, this rule has been abrogated by statute in some jurisdictions.[\[FN14\]](#)

A provision in a trust instrument which defined "issue" as all persons descended from the settlor either by legitimate birth to, or legal adoption by, him or any of his legitimately born or legally adopted descendants includes an adopted-out child legitimately born to the settlor's son.[\[FN15\]](#)

[\[FN1\]](#) [Schapira v. Connecticut Bank and Trust Co., 204 Conn. 450, 528 A.2d 367 \(1987\).](#)

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[\[FN2\]](#) [Schapira v. Connecticut Bank and Trust Co., 204 Conn. 450, 528 A.2d 367 \(1987\).](#)

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[\[FN3\]](#) [In re Sollid, 32 Wash. App. 349, 647 P.2d 1033 \(Div. 3 1982\).](#)

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[\[FN4\]](#) [Farmers Trust Co. v. Bashore, 498 Pa. 146, 445 A.2d 492 \(1982\).](#)

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[\[FN5\]](#) [Chipman v. Spitznagel, 82 Or. App. 700, 728 P.2d 971 \(1986\).](#)

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[FN6] [Continental Bank, N.A. v. Herguth, 248 Ill. App. 3d 292, 187 Ill. Dec. 395, 617 N.E.2d 852 \(2d Dist. 1993\).](#)

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[FN7] [Ford v. Newman, 64 Ill. App. 3d 528, 21 Ill. Dec. 283, 381 N.E.2d 392 \(4th Dist. 1978\)](#), judgment aff'd, [77 Ill. 2d 335, 33 Ill. Dec. 150, 396 N.E.2d 539 \(1979\)](#) (adopted child of settlor's son was not included in term "lawful issue"); [Cutrer v. Cutrer, 162 Tex. 166, 345 S.W.2d 513, 86 A.L.R.2d 105 \(1961\)](#); [Makoff v. Makoff, 528 P.2d 797 \(Utah 1974\)](#) (since, at time trust was created, law was well settled that an adoptive child could not inherit from parents of his or her adoptive parents).

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[FN8] [Matter of Maloney Trust, 423 Mich. 632, 377 N.W.2d 791 \(1985\)](#) (statutory presumption that adopted grandchildren would be treated like any other grandchildren would control).

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[FN9] [Wells Fargo Bank v. Huse, 57 Cal. App. 3d 927, 129 Cal. Rptr. 522 \(1st Dist. 1976\)](#); [Chichester v. Wilmington Trust Co., 377 A.2d 11 \(Del. 1977\)](#); [In re Sollid, 32 Wash. App. 349, 647 P.2d 1033 \(Div. 3 1982\)](#); [Wheeling Dollar Sav. & Trust Co. v. Hanes, 160 W. Va. 711, 237 S.E.2d 499 \(1977\).](#)

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[FN10] [Whitfield v. Matthews, 334 So. 2d 876 \(Ala. 1976\)](#) ("children now or later born" to the trustor's son); [Thomas v. Trust Co. Bank, 247 Ga. 693, 279 S.E.2d 440 \(1981\)](#) ("children born or to be born" of the beneficiary, with emphasis in later codicil that adopted children were to be excluded).

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[FN11] [Trust Agreement of Cyrus D. Jones Dated June 24, 1926, 414 Pa. Super. 361, 607 A.2d 265 \(1992\).](#)

-

[FN12] [In re Trust Created by von Gontard, 279 A.D.2d 438, 720 N.Y.S.2d 111 \(1st Dep't 2001\)](#) (documents showed that grantor did not wish nieces and nephews of her late husband that were adopted or born out of wedlock to benefit from her estate; these had no practical significance, since none had in fact been adopted or born out of wedlock, and while some of issue of nieces and nephews had, nothing indicated that the limitation extended as well to their issue).

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[FN13] [In re Nicol's Trust, 19 N.Y.2d 207, 278 N.Y.S.2d 830, 225 N.E.2d 530 \(1967\)](#); [Ohio Citizens Bank v. Mills, 45 Ohio St. 3d 153, 543 N.E.2d 1206 \(1989\).](#)

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[FN14] [Ohio Citizens Bank v. Mills, 45 Ohio St. 3d 153, 543 N.E.2d 1206 \(1989\).](#)

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[FN15] [Matter of Trust Created Under Agreement With McLaughlin, 361 N.W.2d 43 \(Minn. 1985\).](#)

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§ 245. Time as of which status as beneficiary is determined

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[Time of ascertaining persons to take, under deed or inter vivos trust, where designated as the "heirs," "next of kin," "children," "relations," etc., of life tenant or remainderman, 65 A.L.R.2d 1408](#)

[Time as of which members of class described as grantor's or settlor's "heirs," "next of kin," "relations," and the like to whom a future gift is made, are to be ascertained, 38 A.L.R.2d 327](#)

Generally, a beneficiary's share in a revocable trust vests when the settlor creates the trust where the settlor does not make a class gift and where the event that terminates the settlor's preceding interest (typically, the settlor's death), is certain to happen;^[FN1] the trust's spendthrift provisions affect when and whether a beneficiary will actually take possession of a vested interest upon the settlor's death, not the vesting of the interest.^[FN2]

In the absence of language or circumstances indicating a contrary intention, membership in a class described as the settlor's "heirs" or "next of kin," designated to take a future interest in his or her property, will normally be ascertained as of the ancestor's death.^[FN3] However, notwithstanding this general rule, some courts have found and given effect to an intention on the settlor's part to postpone the ascertainment of membership in such a class until the appearance of the event—as, for instance, the death of a life tenant—which permits the future interest to vest in enjoyment.^[FN4] Thus, for example, under a trust instrument providing, inter alia, that upon the life tenant's death, the income would go to the life tenant's children or their issue, or if there were no issue, to the life tenant's heirs at law, and that 21 years after the life tenant's death, the trust would terminate and the corpus be paid over to the children or issue; the date for determining those entitled to the corpus of the trust is the date of the life tenant's death.^[FN5]

Of course, the trust instrument may also clearly indicate the time of ascertainment of the beneficiary's status.^[FN6] Thus, under a deed conveying land to trustees for the benefit of the trustor's wife and children, and "on their decease to such child or children or representatives of child or children as her said children may leave in life," the grandchildren's remainders became indefeasibly vested only at the time fixed for the distribution of the property, the death of the last life tenant.^[FN7]

[\[FN1\] Baldwin v. Branch, 2004 WL 407157 \(Ala. 2004\).](#)

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[\[FN2\] Baldwin v. Branch, 2004 WL 407157 \(Ala. 2004\).](#)

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[\[FN3\] Trugman v. Klein, 82 Ill. App. 2d 389, 226 N.E.2d 521 \(1st Dist. 1967\).](#)

-

[\[FN4\] Estate of Miner, 214 Cal. App. 2d 533, 29 Cal. Rptr. 601 \(1st Dist. 1963\); In re Herrick's Will, 10 Misc. 2d 213, 169 N.Y.S.2d 835 \(Sup 1957\).](#)

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[\[FN5\] Wilmington Trust Co. v. Coyne, 373 A.2d 867 \(Del. Ch. 1977\).](#)

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[\[FN6\] Wilmington Trust Co. v. Coyne, 373 A.2d 867 \(Del. Ch. 1977\).](#)

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[\[FN7\] Hack v. Woodward, 248 Ga. 504, 284 S.E.2d 411 \(1981\).](#)

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§ 246. Rights, duties, and liabilities among beneficiaries

West's Key Number Digest

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Trusts providing for two or more beneficiaries may create a joint interest in property.[\[FN1\]](#)

Where one of many parties having a common interest in trust property or funds takes proper proceedings at his or her own expense to preserve such property or funds or to restore the same to the purposes of the trust, he or she is entitled to reimbursement, either out of the trust property or funds or by proportional contribution from those who accept the benefit of these efforts, for costs, necessary expenses of litigation, and reasonable counsel fees, and other necessary and reasonable expenses incurred in the course of such litigation.[FN2]

A trust beneficiary who prevents a wrongful disposition of trust assets renders a benefit to the trust estate as much as one who recovers back property wrongfully disposed of.[FN3]

Absent an effective designation of a trustee and a trust, any attempted designation will fail, and the property sought to be placed in trust will be distributed outright to the beneficiary or grantee.[FN4]

To remedy a trustee's abuse of discretion, a beneficiary of the trust can maintain a suit:[FN5]

- to compel the trustee to perform his duties as trustee

- to enjoin the trustee from committing a breach of trust

- to compel the trustee to redress a breach of trust

- to appoint a receiver to take possession of the trust property and administer the trust

- to remove the trustee

[\[FN1\] § 265.](#)

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[\[FN2\] *Hobbs v. McLean*, 117 U.S. 567, 6 S. Ct. 870, 29 L. Ed. 940 \(1886\); *Moore v. Cavett*, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\).](#)

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[\[FN3\] *Jesser v. Mayfair Hotel, Inc.*, 360 S.W.2d 652, 15 A.L.R.3d 389 \(Mo. 1962\).](#)

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[\[FN4\] *Estate of Stewart*, 158 Misc. 2d 349, 601 N.Y.S.2d 400 \(Sur. Ct. 1993\); *Gammarino v. Hamilton Cty. Bd. of Revision*, 84 Ohio St. 3d 155, 1998-Ohio-715, 702 N.E.2d 415 \(1998\).](#)

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[\[FN5\] *Morrison v. Doyle*, 582 N.W.2d 237 \(Minn. 1998\).](#)

- As to removal of the trustee, see §§ 224 to 226.

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VI. Trust Property or Res
A. In General

[Topic Summary](#) [Correlation Table](#)

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Forms

[Am. Jur. Legal Forms 2d, Trusts §§ 251:16 to 251:38](#)

Model Codes and Restatements

[Restatement Third, Trusts §§ 40, 41](#)

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VI. Trust Property or Res
A. In General

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§ 247. Types of property trust may hold, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [129](#), [171](#)

Forms

Transfers or Conveyances in Trust. [Am. Jur. Legal Forms 2d, Trusts §§ 251:16 to 251:38](#)

Model Codes and Restatements

[Restatement Third, Trusts § 41](#)

Any kind of property,[\[FN1\]](#) whether real or personal, freehold or leasehold, and any interest therein, whether legal or enquirable, may be impressed with a trust.[\[FN2\]](#) While the question of what property is made subject to a trust is determined by the terms of the trust,[\[FN3\]](#) as a general proposition a property interest must be transferable to be the subject of an express trust.[\[FN4\]](#)

Observation: The Restatement Third of Trusts recognizes that a trust's property can not include property which has ceased to exist.[\[FN5\]](#)

Observation: Trust property may consist of a fractional interest in property.[\[FN6\]](#)

Nontransferrable property may be held in trust under certain conditions.[\[FN7\]](#)

[\[FN1\]](#) [Restatement Third, Trusts § 40.](#)

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[\[FN2\]](#) [Christopher v. Davis, 284 S.W. 253 \(Tex. Civ. App. Dallas 1926\)](#), writ refused, (Oct. 20, 1926).

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[\[FN3\]](#) [Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 A. 139, 73 A.L.R. 201 \(1929\).](#)

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[\[FN4\] Strauss v. Summerhays, 157 Cal. App. 3d 806, 204 Cal. Rptr. 227 \(4th Dist. 1984\).](#)

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[\[FN5\] Restatement Third, Trusts § 41.](#)

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[\[FN6\] Restatement Third, Trusts § 40](#), comment b.

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[\[FN7\] Restatement Third, Trusts § 40](#), comment b.

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VI. Trust Property or Res
A. In General

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§ 248. Particular classes of property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [129](#), [171](#)

Forms

Transfers or Conveyances in Trust. [Am. Jur. Legal Forms 2d, Trusts §§ 251:16 to 251:38](#)

Model Codes and Restatements

[Restatement Third, Trusts § 40](#)

Trust property may be real or personal, tangible or intangible.[FN1]

Such items as realty,[FN2] legal or equitable present interests in real or personal property for life or a term of years,[FN3] bank accounts,[FN4] corporate stock,[FN5] trademark,[FN6] patent or unpatented invention,[FN7] copyright or uncopyrighted literary work,[FN8] rights of action or rights to participate in the settlement proceeds of an action,[FN9] and proceeds of an insurance policy[FN10] have been impressed with a trust.

In some instances, conveyances of real property into trusts is governed by statute; the fundamental purpose of a statute which governs conveyances of real property to trusts is to provide notice to an interested party, whether the property has been conveyed to a trust.[FN11] Such a notice statute enhances the alienability of property.[FN12] The failure of a deed to meet the statutory requirements will result in a failure of the grant into the trust, and title will vest in the grantees as individuals rather than as trustees.[FN13] Similarly, a deed of realty in trust signed only by the grantee is invalid to place realty in trust where the grantee has no legal interest or authority in the property which would authorize such a transfer.[FN14]

[FN1] [Restatement Third, Trusts § 40](#), comment b.

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[FN2] [Paine/Wetzel Associates, Inc. v. Gitles](#), 174 Ill. App. 3d 389, 123 Ill. Dec. 813, 528 N.E.2d 358 (1st Dist. 1988).

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[FN3] [Restatement Third, Trusts § 40](#), comment b.

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[FN4] [Barker v. Aiello](#), 84 Md. App. 629, 581 A.2d 462 (1990).

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[FN5] [Schroeder v. Herbert C. Coe Trust](#), 437 N.W.2d 178 (S.D. 1989).

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[FN6] [Restatement Third, Trusts § 40](#), comment b.

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[FN7] [Restatement Third, Trusts § 40](#), comment b.

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[FN8] [Restatement Third, Trusts § 40](#), comment b.

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[FN9] [Robinson v. Robinson](#), 805 So. 2d 94 (Fla. Dist. Ct. App. 4th Dist. 2002).

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[FN10] [Brault v. Bigham](#), 493 S.W.2d 576 (Tex. Civ. App. Waco 1973), writ refused n.r.e., (July 18, 1973).

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[FN11] [In re Estate of Kiser](#), 72 P.3d 425 (Colo. Ct. App. 2003).

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[FN12] [In re Estate of Kiser](#), 72 P.3d 425 (Colo. Ct. App. 2003).

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[FN13] [In re Estate of Kiser](#), 72 P.3d 425 (Colo. Ct. App. 2003) (deed did not identify the statute, trust agreement, or court appointment under which the grantee was acting or refer to the recorded document in the real property records).

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[\[FN14\] Johnson v. Johnson, 845 So. 2d 217 \(Fla. Dist. Ct. App. 2d Dist. 2003\).](#)

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§ 249. Addition of property to trust estate

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [129](#), [171](#)

Forms

Transfers of additional property. Am. Jur. Legal Forms 2d, Trusts §§ [251:23](#), [251:24](#)

Property subject to a trust may, under certain circumstances, be augmented by contributions to it by a beneficiary.[\[FN1\]](#)

Observation: Where an asset of a subtrust, which is a residual beneficiary of the primary or main trust, is a right of action in common with the primary trust, the subtrust does not waive its rights to the proceeds of such action merely by virtue of the subtrustee's opposition to the commencement of the action.[\[FN2\]](#)

[\[FN1\] First Nat. Bank v. Mulholland, 123 Miss. 13, 85 So. 111, 13 A.L.R. 1000 \(1920\)](#) (where the beneficiary expressly waived his right to reimbursement for contribution to the price of property purchased for a trust).

[\[FN2\] Robinson v. Robinson, 805 So. 2d 94 \(Fla. Dist. Ct. App. 4th Dist. 2002\).](#)

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§ 250. Property to be acquired in future; promise to transfer in the future

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [129](#), [171](#)

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[Comment Note.—Creation of express trust in property to be acquired in future, 3 A.L.R.3d 1416](#)

Model Codes and Restatements

[Restatement Third, Trusts § 41](#)

In various circumstances, a person who hopes or expects to acquire property, although he or she has no present interest therein, may manifest an intention or make a promise to create a trust in such property.[\[FN1\]](#) As a general proposition, the mere fact that one declares a trust in property which may be acquired in the future does not automatically give rise to a trust in the property when it is acquired.[\[FN2\]](#) Similarly, where the transfer

of property into a trust is made contingent on the future acquisition of other property by the trust, then the property does not become part of the trust where all of the other property is not so transferred.[FN3]

However, where one declares a trust in property to be acquired in the future and, upon or after acquiring the property, confirms this previously manifested intention to create the trust or repeatedly manifests an intention to the same effect, a trust is then created in the property.[FN4] Similarly, a trust is created at the time the settlor confirms a previously manifested intention to create a trust by making the intended transfer or at the time the settlor's will recognizing the promise takes effect.[FN5]

Where a promise to create a trust in property to be acquired in the future is made for valuable consideration[FN6] and is enforceable under the law of contracts,[FN7] a trust may be created, not of the after-acquired property, but of the rights arising out of the contract.[FN8]

Observation: The Restatement Third of Trusts recognizes that a trust's property does not include an expectation or hope of receiving property in the future, nor an interest that has not come into existence.[FN9]

[FN1] § 45.

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[FN2] In re Ingram's Estate, 212 Kan. 218, 510 P.2d 597 (1973); Edgar v. Fitzpatrick, 377 S.W.2d 314 (Mo. 1964); Riggs v. Coble, 37 N.C. App. 266, 245 S.E.2d 831 (1978); Crews v. Overbey, 645 S.W.2d 388 (Tenn. 1983).

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[FN3] Schroeder v. Herbert C. Coe Trust, 437 N.W.2d 178 (S.D. 1989).

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[FN4] Estate of Brenner, 37 Colo. App. 271, 547 P.2d 938 (1976); In re Ingram's Estate, 212 Kan. 218, 510 P.2d 597 (1973); Riggs v. Coble, 37 N.C. App. 266, 245 S.E.2d 831 (1978).

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[FN5] Edgar v. Fitzpatrick, 377 S.W.2d 314 (Mo. 1964).

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[FN6] Brainard v. Commissioner of Internal Revenue, 91 F.2d 880 (C.C.A. 7th Cir. 1937).

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[FN7] McClendon v. Dean, 45 N.M. 496, 117 P.2d 250 (1941).

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[FN8] Memphis Memorial Park v. McCann, 133 F. Supp. 293 (M.D. Tenn. 1955); Edgar v. Fitzpatrick, 377 S.W.2d 314 (Mo. 1964).

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[FN9] Restatement Third, Trusts § 41.

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A.L.R. Index: Trusts and Trustees

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Forms

[Am. Jur. Legal Forms 2d, Trusts § 251:25, 251:46 to 251:68, 251:625 to 251:632](#)

24 Am. Jur. Pleading and Practice Forms, Trusts § 322, 332

Model Codes and Restatements

[Restatement Third, Trusts §§ 42, 56, 69](#)

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§ 251. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [129](#)

While a trustor or settlor may be a beneficiary of a trust,[\[FN1\]](#) and may reserve a power of revocation as to property interests of the various beneficiaries,[\[FN2\]](#) he or she is without interest in the trust property after the trust has been settled.[\[FN3\]](#) Thus, a settlor who creates an irrevocable inter vivos trust with himself or herself named as sole beneficiary donates the title in the trust property to the trustee, not to the settlor as beneficiary.[\[FN4\]](#)

[\[FN1\]](#) [§ 240.](#)

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[\[FN2\]](#) [§ 25.](#)

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[\[FN3\]](#) [Hall v. Hall, 109 Va. 117, 63 S.E. 420 \(1909\).](#)

- As to separation of legal title and equitable ownership of trust property as an element of express trust, generally, see [§ 43.](#)

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[\[FN4\]](#) [In re Guidry Trust, 713 So. 2d 631 \(La. Ct. App. 3d Cir. 1998\).](#)

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§ 252. Retained and remainder interests; rights of settlor's creditors

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [129](#), [151](#)

Forms

General revocable trusts. [Am. Jur. Legal Forms 2d, Trusts § 251:46 to 251:68](#)

Any amount which the trustees are empowered to pay to the settlor of a trust, under any circumstance, is within the reach of the settlor's creditors.^[FN1] Stated otherwise, when a trust is created for the settlor's own benefit, the settlor's creditors can reach any trust assets available to the settlor, regardless of whether the settlor intends to defraud his or her creditors, or is solvent at the time of the creation of the trust.^[FN2]

The settlor may reserve to himself or herself a beneficial interest in the proceeds from the property for his or her life and the power to revoke the trust in whole or in part at any time.^[FN3] For example, the creation of a "qualified personal residence trust" (QPRT) results in a possessory interest, or the right retained by grantor to use the residence for a term of years, as well as a reversionary interest, which would be the value of the interest that could potentially come back to grantor.^[FN4] However, a person cannot, by placing his or her property in trust for his or her own benefit, keep it beyond the reach of his or her creditors.^[FN5] Thus, a decedent who had reserved a right to alter, amend, or revoke in whole or in part a living trust to which the entire estate was bequeathed, remained the absolute owner of specific property that the trust instrument stated would be given as gifts to certain persons if the decedent predeceased his or her spouse, and thus, that property would not be beyond the reach of creditors of the decedent's estate if the estate was found to be insolvent.^[FN6]

A remainder interest in an irrevocable trust represents a present fixed right to future enjoyment that gives rise to a vested property interest in the trust property even if that interest is subject to complete divestment or defeasance.^[FN7] If the trustor retains a reversionary interest in the trust property, this interest may be attached by the trustor's creditors.^[FN8]

Where a decedent retained a general power of appointment[[FN9](#)] over the assets transferred by him or her to a revocable inter vivos trust, the trust assets are subject to the claims of creditors.[[FN10](#)] If the donee's owned interest under a trust is subject to a spendthrift provision, this fact does not convert what otherwise would be a general power of appointment under which the donee could appoint to the donee's creditors into a nongeneral power under which no appointment could be made to the donee's creditors.[[FN11](#)] However, where the grantor's power of appointment under a trust instrument is not exercisable for the benefit of the grantor, his or her estate, creditors, or the creditors of his or her estate, it is a nongeneral power of appointment.[[FN12](#)]

While the power to revoke a trust, although a potential source of wealth, having the attributes of property,[[FN13](#)] is not an interest which can be reached by the settlor's creditors,[[FN14](#)] a disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.[[FN15](#)]

The assets of a living revocable trust, which are rendered irrevocable upon the settlor's death, can be reached to satisfy a wrongful death claim asserted by the executor of the estate of another person, despite trust language providing for payment of "any indebtedness owed by the trustor," which should not be interpreted to mean that the debt has to have arisen during the settlor's lifetime for the trust's assets to be reached; while the tort claim is not reduced to judgment before the settlor's death, the facts precipitating it occur during the settlor's lifetime.[[FN16](#)]

[[FN1](#)] [Case v. Fagnoli, 182 Misc. 2d 996, 702 N.Y.S.2d 764 \(Sup 1999\).](#)

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[[FN2](#)] [Matter of Estate of Nagel, 580 N.W.2d 810 \(Iowa 1998\).](#)

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[[FN3](#)] [Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 \(2001\).](#)

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[[FN4](#)] [Skokos v. Skokos, 344 Ark. 420, 40 S.W.3d 768 \(2001\).](#)

- A "Qualified Personal Residence Trust" (QPRT) is an estate planning device where the settlor/transferor places his or her residence in an irrevocable trust for a set time period, and after that time period has lapsed, the res of the trust reverts to the beneficiaries of the trust; the settlor of the trust may rent the property from the beneficiaries of the trust after the trust has terminated. [Del Broccolo v. Torres, 4 Misc.3d 510 \(N.Y.Sup.,2004\).](#)

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[[FN5](#)] [Sylvia v. Johnson, 44 Mass. App. Ct. 483, 691 N.E.2d 608 \(1998\).](#)

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[[FN6](#)] [In re Estate of Martin, 259 A.D.2d 809, 686 N.Y.S.2d 195 \(3d Dep't 1999\).](#)

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[[FN7](#)] [In re Marriage of Guinn, 93 P.3d 568 \(Colo. Ct. App. 2004\), cert. denied, 2004 WL 1615237 \(Colo. 2004\).](#)

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[[FN8](#)] [Am. Jur. 2d, Attachment and Garnishment §§ 187 to 194.](#)

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[[FN9](#)] [Am. Jur. 2d, Powers of Appointment and Alienation.](#)

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[[FN10](#)] [Walgren v. Dolan, 226 Cal. App. 3d 572, 276 Cal. Rptr. 554 \(4th Dist. 1990\).](#)

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[[FN11](#)] [Dickinson v. Wilmington Trust Co., 734 A.2d 605 \(Del. Ch. 1999\), aff'd, 734 A.2d 642 \(Del. 1999\).](#)

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[\[FN12\] Ahern v. Thomas, 248 Conn. 708, 733 A.2d 756 \(1999\).](#)

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[\[FN13\] Graves v. Elliott, 307 U.S. 383, 59 S. Ct. 913, 83 L. Ed. 1356 \(1939\).](#)

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[\[FN14\] Clark v. Freeman, 121 N.J. Eq. 35, 188 A. 493 \(Ch. 1936\).](#)

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[\[FN15\] Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA, 100 A.D.2d 544, 473 N.Y.S.2d 242 \(2d Dep't 1984\).](#)

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[\[FN16\] Matter of Estate of Nagel, 580 N.W.2d 810 \(Iowa 1998\).](#)

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§ 253. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [133](#) to [136](#)

Model Codes and Restatements

[Restatement Third, Trusts § 42](#)

It is a fundamental essential of a trust that the legal estate be separated from the equitable estate, or from beneficial enjoyment.^[FN1] A trustee is vested with a legal,^[FN2] as distinguished from an equitable, estate, which legal estate equity recognizes but compels to be used by the trustee in accordance with the terms of the trust and for the benefit of all beneficiaries,^[FN3] present and future.^[FN4] Although under some land trusts, the trustee holds both legal and equitable title,^[FN5] in other land trusts, the beneficiary retains equitable title to the trust property.^[FN6]

When a deed of trust is made to trustees for an unincorporated association, the title remains in the trustees.^[FN7]

Observation: The Restatement Third of Trusts describes the trustee's interest in the trust property as a nonbeneficial interest of unlimited duration, not limited to the duration of the trust; such definition is subject to a different definition if a different intention is manifested, and will constitute a lesser interest if a lesser interest is held by the grantor.^[FN8]

CUMULATIVE SUPPLEMENT

Cases:

A trustee holds legal title to trust property. [Swenson v. Nickaboine, 793 N.W.2d 738 \(Minn. 2011\)](#).

Legal title to assets in a trust is lodged in the trustees. [In re Estate of Pope, 666 S.E.2d 140 \(N.C. Ct. App. 2008\)](#).

[END OF SUPPLEMENT]

[\[FN1\] § 43.](#)

[\[FN2\] Gibson v. Resolution Trust Corp., 750 F. Supp. 1565, 13 U.C.C. Rep. Serv. 2d 1298 \(S.D. Fla. 1990\), aff'd, 51 F.3d 1016, 26 U.C.C. Rep. Serv. 2d 547 \(11th Cir. 1995\); City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613, 82 Cal. Rptr. 2d 859 \(4th Dist. 1999\); Cohen v. Friedland, 450 So. 2d 905 \(Fla. Dist. Ct. App. 3d Dist. 1984\); Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 348 \(2002\); Albrecht v. Brais, 324 Ill. App. 3d 188, 257 Ill. Dec. 738, 754 N.E.2d 396 \(3d Dist. 2001\); Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 \(Iowa 2001\); In re Guidry Trust, 713 So. 2d 631 \(La. Ct. App. 3d Cir. 1998\); McBee v. Gustaaf Vandecnocke Revocable Trust, 986 S.W.2d 170 \(Mo. 1999\); In re Appalachian Student Housing Corp., 598 S.E.2d 701, 189 Ed. Law Rep. 931 \(N.C. Ct. App. 2004\), appeal dismissed, 2004 WL 2555414 \(N.C. 2004\) \("active trust"\); Owens v. Heisel, 67 Or. App. 537, 679 P.2d 331 \(1984\); Faulkner v. Bost, 137 S.W.3d 254 \(Tex. App. Tyler 2004\); Banks v. Means, 2002 UT 65, 52 P.3d 1190 \(Utah 2002\); O'Steen v. Wineberg's Estate, 30 Wash. App. 923, 640 P.2d 28 \(Div. 2 1982\).](#)

- As to trustees, generally, see §§ [205](#) to [239](#).

[\[FN3\] Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co., 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219 \(1920\); Bliss v. Allentown Public Library, 534 F. Supp. 356, 3 Ed. Law Rep. 549 \(E.D. Pa. 1982\).](#)

- Trustees hold title in the res of a trust in their names, but do so on behalf of the trust beneficiaries, not themselves. [Capital Assets Financial Services v. Maxwell, 2000 UT 9, 994 P.2d 201 \(Utah 2000\)](#).

[\[FN4\] Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 \(1936\).](#)

- As to the futurity of beneficial interests under a trust, see [§ 45](#).

[\[FN5\] Wagemann Oil Co. v. Marathon Oil Co., 306 Ill. App. 3d 562, 239 Ill. Dec. 549, 714 N.E.2d 107 \(1st Dist. 1999\); In re Raymond W. George Trust, 1999 MT 223, 296 Mont. 56, 986 P.2d 427 \(1999\).](#)

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[\[FN6\] §§ 258 to 271.](#)

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[\[FN7\] Walters v. Stewart, 838 So. 2d 1047 \(Ala. Civ. App. 2002\).](#)

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[\[FN8\] Restatement Third, Trusts § 42.](#)

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§ 254. Time of vesting

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [133](#) to [136](#)

The time of vesting of the legal estate in the trustee occurs when the property is delivered over to him or her.[\[FN1\]](#) Where real property is the subject of a trust, it is sufficient to vest title in the trustee that a deed be executed and delivered to the trustee.[\[FN2\]](#) Finally, title may also vest in a trustee, under a trust deed, until the trustee's disclaimer, although the trustee has no knowledge of the trust deed.[\[FN3\]](#)

[\[FN1\] First American Bank of Virginia v. Reilly, 563 N.E.2d 142 \(Ind. Ct. App. 1st Dist. 1990\).](#)

- As to delivery as requisite element of trust, see [§ 47](#).

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[\[FN2\] Golleher v. Horton, 148 Ariz. 537, 715 P.2d 1225 \(Ct. App. Div. 1 1985\).](#)

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[\[FN3\] Adams v. Adams, 88 U.S. 185, 22 L. Ed. 504 \(1874\).](#)

- As to acceptance or disclaimer of a trust by a trustee, see [§ 220](#).

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§ 255. Extent of trustee's interest; rights of trustee's creditors against trust property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [133](#) to [136.5](#)

Model Codes and Restatements

[Restatement Third, Trusts § 56](#)

Generally, a trustee having legal title to real estate, together with the right of possession, is regarded as the owner of the property and is subject to all the liabilities of ownership.[\[FN1\]](#) Thus, for example, the trustee, as the legal owner of the trust property, is a proper party against whom suit can be filed and a judgment affecting the title to the trust property can be entered.[\[FN2\]](#)

When property is conveyed in trust, the trustees generally take such an estate as is necessary to enable them to perform the trust.[FN3] The legal estate of a trustee is measured by the purposes of the trust and their performance.[FN4]

The legal estate of cotrustees is held in joint tenancy.[FN5]

As a general rule a trustee's interest in the trust property is not subject to liability for his or her private, as distinguished from his or her official, debts and obligations.[FN6]

Caution: A trustee is not generally personally liable on the debts of a trust, and is also not personally liable on a judgment entered against a trust.[FN7]

Observation: For prescriptive title to ripen in favor of a trustee, the trustee must deny the trust, and his or her possession must become adverse, tortious and wrongful, and must be open, continued and notorious, so as to preclude all doubt as to the character of the holding of the property, or the want of knowledge on the part of the cestui que trust.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Remainder interest in trust estate would be vested in settlor's daughter upon settlor's death, not upon death of life beneficiary of family bypass trust, although upon life beneficiary's death the remainder of trust estate in family bypass trust would be distributed to another trust for benefit of, and distribution of trust assets to, daughter and daughter's stepsisters; sole source of funds for each trust was trust estate that originally funded irrevocable family trust, and although amount of daughter's share of trust assets and time that she might receive it were contingent, daughter's right to receive property was not. [Lewis v. Clifton, 837 N.E.2d 1016 \(Ind. Ct. App. 2005\)](#).

[END OF SUPPLEMENT]

[FN1] [Campos v. Campos, 342 Ill. App. 3d 1053, 277 Ill. Dec. 735, 796 N.E.2d 1101 \(1st Dist. 2003\)](#); [Norwest Bank Minnesota, N.A. v. Ode, 615 N.W.2d 91 \(Minn. Ct. App. 2000\)](#).

[FN2] [McBee v. Gustaaf Vandecnocke Revocable Trust, 986 S.W.2d 170 \(Mo. 1999\)](#).

[FN3] [Harrison v. Marcus, 396 Mass. 424, 486 N.E.2d 710 \(1985\)](#).

[FN4] [Young v. Bradley, 101 U.S. 782, 25 L. Ed. 1044 \(1879\)](#); [Estes v. Estes, 267 S.W. 709 \(Tex. Comm'n App. 1924\)](#).

[FN5] [First Nat. Bank v. Cash, 220 Ala. 319, 125 So. 28 \(1929\)](#); [Conrad v. Hawk, 122 Cal. App. 649, 10 P.2d 534 \(4th Dist. 1932\)](#); [In re Dorrance's Will, 333 Pa. 162, 3 A.2d 682, 127 A.L.R. 366 \(1939\)](#).

[FN6] [Sturm v. Boker, 150 U.S. 312, 14 S. Ct. 99, 37 L. Ed. 1093 \(1893\)](#); [Lagae v. Lackner, 996 P.2d 1281 \(Colo. 2000\)](#) (a fundamental tenet of trust law is the protection of the trust estate from a trustee's personal creditors); [Holmes v. Wooley, 792 A.2d 1018 \(Del. Super. Ct. 2001\)](#) (even where funds are commingled).

- As to a lien of a trustee for expenditures, see [§ 23](#).

- As to protection of bona fide purchasers, see §§ [290](#) to [299](#).

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[\[FN7\] Ovrevik v. Ovrevik, 242 Ga. App. 95, 527 S.E.2d 586 \(2000\).](#)

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[\[FN8\] Reasor v. Peoples Financial Services, Inc., 276 Ga. 534, 579 S.E.2d 742 \(2003\).](#)

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§ 256. Duration and termination of trustee's interest

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [131](#), [133](#) to [136](#)

A trust estate is vested in the trustee, but its duration and extent are governed by the requirements of the trust.[\[FN1\]](#)

Where the statute of uses is applicable,[\[FN2\]](#) it executes the trust and effects legal title in the beneficiary, where the purposes of the trust are completed and discharged.[\[FN3\]](#) To illustrate, in a trust where the trustee is instructed to use the property for the benefit of another, the statute of uses executes to vest legal title with the beneficiary if the beneficiary is capable of taking legal title and the trustee has no active duties.[\[FN4\]](#)

Even where the statute of uses is not applicable to a trust, termination of its purposes, resulting in termination of the trust,[\[FN5\]](#) terminates the title and estate of the trustee,[\[FN6\]](#) and the whole property, both legal and equitable, is vested in the person or persons entitled to it,[\[FN7\]](#) even though it remains for the trustee to execute a conveyance or turn over possession of the trust property to them.[\[FN8\]](#) Where a trust fails for any

reason, the trustee is not ordinarily entitled to the trust property for his or her own benefit.[FN9] It follows that if, at the termination of the trust, the trustee is entitled to the beneficial estate, his or her legal and beneficial titles merge, and the trustee becomes vested in his or her own right with the entire interest in the property.[FN10]

[FN1] [Macaulay v. Wachovia Bank of South Carolina, N.A., 333 S.C. 201, 508 S.E.2d 46 \(Ct. App. 1998\).](#)

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[FN2] [§ 10.](#)

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[FN3] [§ § 11, 85.](#)

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[FN4] [All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina, 358 S.C. 209, 595 S.E.2d 253 \(Ct. App. 2004\).](#)

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[FN5] [§ 86.](#)

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[FN6] [Macaulay v. Wachovia Bank of South Carolina, N.A., 333 S.C. 201, 508 S.E.2d 46 \(Ct. App. 1998\)](#) (when the purposes of trust are accomplished, the trust estate ceases to exist and the trustee's title becomes extinct).

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[FN7] [Mercantile Trust Co., N.A. v. Hardie, 39 S.W.3d 907 \(Mo. Ct. App. S.D. 2001\)](#) (once a trust terminates, the legal title, which was vested in the trustee, then vests in the equitable title holder, the two titles merge, and the equitable title holder becomes the owner of a full fee interest).

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[FN8] [In re Consupak, Inc., 87 B.R. 529 \(Bankr. N.D. Ill. 1988\); Estate of Downing, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 \(2d Dist. 1982\).](#)

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[FN9] [SSA Baltimore Federal Credit Union v. Bizon, 42 B.R. 338 \(D. Md. 1984\).](#)

- As to resulting trusts, see §§ [135](#) to [167](#).

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[FN10] [Estate of Lonneker v. Lonneker, 45 Wash. App. 222, 724 P.2d 1088 \(Div. 3 1986\).](#)

- As to the merger of legal and equitable title in the same person as terminating a trust, generally, see [§ 90](#).

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§ 257. Succession of trustee's title

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 133 to 136

Model Codes and Restatements

[Restatement Third, Trusts § 42](#)

Trustees, to whom the grantor conveys the trust property, do not become the individual owners of the trust property simply by resigning as trustees.[FN1]

A successor trustee may hold the trust property subject to the claims of the settlor's creditors to the extent that the settlor retained an interest during his or her lifetime as trustee and sole beneficiary of a revocable trust, under which the settlor enjoyed all indicia of ownership of the trust property.[FN2]

In the absence of a statutory provision to the contrary, the legal title of a sole or last-surviving trustee descends, in the case of realty, to his or her heirs,[FN3] passes in the case of personalty to his or her personal representative,[FN4] or devolves in accordance with his or her testamentary disposition thereof,[FN5] subject to the trust.[FN6]

In the case of cotrustees, a trust survives as, or like, a joint tenancy to the surviving cotrustees or cotrustee,[FN7] who may administer it,[FN8] except with respect to personal and confidential powers vested in all the cotrustees and to be exercised by them in unison and by no one else, or not at all.[FN9]

A judicial appointment of a new trustee cannot confer upon the new trustee legal title to land situated outside the jurisdiction of the court.[FN10]

[FN1] [Keitel v. Heubel](#), 103 Cal. App. 4th 324, 126 Cal. Rptr. 2d 763 (1st Dist. 2002), review denied, (Jan. 15, 2003).

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[FN2] [Nile v. Nile](#), 432 Mass. 390, 734 N.E.2d 1153 (2000).

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[FN3] [Oakland County v. Mack](#), 243 Mich. 279, 220 N.W. 801 (1928); [Blake v. O'Neal](#), 63 W. Va. 483, 61 S.E. 410 (1908).

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[\[FN4\] Olney Bank & Trust Co., Case of, 116 Pa. Super. 438, 176 A. 837 \(1935\).](#)

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[\[FN5\] Seymour v. Freer, 75 U.S. 202, 19 L. Ed. 306 \(1868\).](#)

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[\[FN6\] Seymour v. Freer, 75 U.S. 202, 19 L. Ed. 306 \(1868\); Oakland County v. Mack, 243 Mich. 279, 220 N.W. 801 \(1928\); Olney Bank & Trust Co., Case of, 116 Pa. Super. 438, 176 A. 837 \(1935\).](#)

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[\[FN7\] Sadler v. Sadler, 65 F. Supp. 120 \(D. Nev. 1946\).](#)

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[\[FN8\] § 323.](#)

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[\[FN9\] § § 319, 323.](#)

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[\[FN10\] Corbett v. Nutt, 77 U.S. 464, 19 L. Ed. 976 \(1870\).](#)

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§ 258. Equitable interest, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [139](#) to [144](#)

As a general proposition, the creation of a trust divides title to the trust property, placing legal title in the trustee[[FN1](#)] and equitable title in the beneficiary.[[FN2](#)] Moreover, this equitable estate does not depend upon formal acceptance of the trust by the trustee, and the beneficiary will be protected by an equity court, even though the trustee declines to act.[[FN3](#)] Their title is equitable—not legal—in nature, and such title, right, or interest exists by express virtue of the trust itself,[[FN4](#)] and consists essentially in a right to performance of the trust.[[FN5](#)] When a trust is passive, title passes to the beneficiaries and the trustee merely has a duty to deliver possession to them.[[FN6](#)]

The settlor's intent is crucial in determining the nature and extent of the beneficiary's interest in the trust.[[FN7](#)] The nature and extent of the interest given to trust beneficiaries is to be determined from the whole trust instrument and not from an isolated phrase.[[FN8](#)]

[\[FN1\] § 253.](#)

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[\[FN2\] City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613, 82 Cal. Rptr. 2d 859 \(4th Dist. 1999\); Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 348 \(2002\); Albrecht v. Brais, 324 Ill. App. 3d 188, 257 Ill. Dec. 738, 754 N.E.2d 396 \(3d Dist. 2001\); Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 \(Iowa 2001\); Moore v. Moore, 111 S.W.3d 530 \(Mo. Ct. App. S.D. 2003\), reh'g and/or transfer denied, \(July 22, 2003\) and transfer denied, \(Aug. 26, 2003\); Sorrel v. Sorrel, 1 S.W.3d 867 \(Tex. App. Corpus Christi 1999\); Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 48 S.W.3d 865 \(Tex. App. Houston 14th Dist. 2001\); O'Steen v. Wineberg's Estate, 30 Wash. App. 923, 640 P.2d 28 \(Div. 2 1982\).](#)

- In an active trust, the legal and equitable titles to the trust property do not merge. [In re Appalachian Student Housing Corp., 598 S.E.2d 701, 189 Ed. Law Rep. 931 \(N.C. Ct. App. 2004\)](#), appeal dismissed, [2004 WL 2555414 \(N.C. 2004\)](#).

- As to the fundamental essential of a trust that the legal estate and the equitable estate be separated, see [§ 33](#).
- As to beneficiaries, generally, see §§ [240](#) to [246](#).

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[\[FN3\] Avery v. Cleary, 132 U.S. 604, 10 S. Ct. 220, 33 L. Ed. 469 \(1890\).](#)

- As to appointment of a trustee to administer the trust, see §§ [217](#), [238](#).

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[\[FN4\] Maguire v. Trefry, 253 U.S. 12, 40 S. Ct. 417, 64 L. Ed. 739 \(1920\).](#)

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[\[FN5\] State ex rel. Carmichael v. Bibb, 234 Ala. 46, 173 So. 74 \(1937\).](#)

- Generally, as to performance of trust, see §§ [321](#) to [364](#).

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[\[FN6\] Govern v. Hall, 430 N.W.2d 874 \(Minn. Ct. App. 1988\).](#)

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[\[FN7\] Eckes v. Richland County Social Services, 2001 ND 16, 621 N.W.2d 851 \(N.D. 2001\).](#)

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[\[FN8\] In re Trust by Dumaine, 146 N.H. 679, 781 A.2d 999 \(2001\).](#)

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§ 259. Nature of interest as chose in action or vested interest

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [139.1](#)

While a beneficiary's purely equitable title, estate, or interest in the trust property has sometimes been analyzed as a chose in action, or a right to enforce in equity the performance of the trust,^[FN1] a beneficiary's interest constitutes a vested interest in the property itself and not merely a chose in action or a right to profits^[FN2] and is generally regarded as something more than a chose in action.^[FN3] Such property is vested in the beneficiary,^[FN4] although it is a future interest^[FN5] and contingent in character.^[FN6] This vested interest does not necessarily include a right to possession,^[FN7] and a beneficiary has no present ownership of, or lien upon, the general assets of his or her trustee^[FN8] except, according to some authority, where the trust property has been commingled by a trustee with his or her general assets and, while present in his or her general assets, has passed into the hands of a successor, such as an administrator or a receiver.^[FN9]

In some jurisdictions, the interest of an income beneficiary of a trust is properly characterized as an "incorporeal movable."^[FN10]

^[FN1] [Whiting v. Hudson Trust Co., 234 N.Y. 394, 138 N.E. 33, 25 A.L.R. 1470 \(1923\).](#)

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^[FN2] [Dunlap Investors Ltd. v. Hogan, 133 Ariz. 130, 650 P.2d 432 \(1982\).](#)

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^[FN3] [Blair v. Commissioner of Internal Revenue, 300 U.S. 5, 57 S. Ct. 330, 81 L. Ed. 465 \(1937\).](#)

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^[FN4] [Bowen v. Chase, 94 U.S. 812, 24 L. Ed. 184 \(1876\).](#)

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[\[FN5\] Coolidge v. Long, 282 U.S. 582, 51 S. Ct. 306, 75 L. Ed. 562 \(1931\); First Galesburg Nat. Bank and Trust Co. v. Robinson, 149 Ill. App. 3d 584, 102 Ill. Dec. 894, 500 N.E.2d 995 \(3d Dist. 1986\); First Nat. Bank of Bar Harbor v. Anthony, 557 A.2d 957 \(Me. 1989\).](#)

- As to the future interest of a beneficiary in the corpus or remainder of a trust, see [§ 263](#).

[\[FN6\] Coolidge v. Long, 282 U.S. 582, 51 S. Ct. 306, 75 L. Ed. 562 \(1931\).](#)

[\[FN7\] Bailey v. Bailey, 142 Ind. App. 119, 232 N.E.2d 372 \(Div. 1 1967\).](#)

[\[FN8\] Colby v. Riggs Nat. Bank, 92 F.2d 183, 114 A.L.R. 1065 \(App. D.C. 1937\).](#)

[\[FN9\] § 280.](#)

[\[FN10\] In re Howard Marshall Charitable Remainder Annuity Trust, 709 So. 2d 662 \(La. 1998\).](#)

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§ 260. Land trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [139.1](#), [140\(1\)](#)

While under some land trusts both the legal and equitable title to the trust property lie with the land trust trustee,[FN1] in other land trusts, the beneficiary retains equitable title to the trust property.[FN2] The land trust beneficiary retains a personal property interest; he or she does not possess a direct interest in the real estate res of the trust.[FN3]

Observation: A land trust beneficiary has the exclusive right to direct the trustee in dealing with the title, and the owner of the beneficial interest is empowered to transfer his or her beneficial interest through an assignment.[FN4]

[\[FN1\] § 253.](#)

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[\[FN2\] Citicorp v. Bank of Lansing, 604 F. Supp. 585 \(N.D. Ind. 1985\).](#)

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[\[FN3\] Citicorp v. Bank of Lansing, 604 F. Supp. 585 \(N.D. Ind. 1985\); LaSalle Bank, N.I. v. First American Bank, 316 Ill. App. 3d 515, 249 Ill. Dec. 425, 736 N.E.2d 619 \(1st Dist. 2000\).](#)

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[\[FN4\] Wagemann Oil Co. v. Marathon Oil Co., 306 Ill. App. 3d 562, 239 Ill. Dec. 549, 714 N.E.2d 107 \(1st Dist. 1999\).](#)

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§ 261. Time when interest becomes effective and duration and termination of interest

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 139 to 143

Whether trust income is available to or due a beneficiary depends on the grantor's intent.[\[FN1\]](#)

Testamentary trusts vest their interests at death.[\[FN2\]](#) The beneficiary of a testamentary trust who is given the income from the trust fund is entitled to the income from the time of the testator's death, unless the will expressly provides otherwise or its provisions—such as those regarding the time and amount of payments—indicate a contrary intention on the part of the testator.[\[FN3\]](#)

Caution: Where a trust provides that the entire net income of the trust is to be paid to the taxpayer-beneficiary for his or her lifetime, and the taxpayer does not renounce his or her rights under the trust, the taxpayer is liable on the income of the trust even though the income was not distributed to him or her.[\[FN4\]](#)

A trust's terms may postpone the vesting of a beneficiary's interest to the happening of some future event, including a contingency or condition that the beneficiary must survive to a designated future distribution date;[\[FN5\]](#) when the trust's terms show the intention of the trustor is to so postpone vesting, the beneficiary obtains no vested interest in the trust unless the contingency occurs and vesting is said to rest on the condition precedent.[\[FN6\]](#)

A purchase-money beneficiary of a resulting trust acquires at once a vested interest.[\[FN7\]](#)

The existence of an implied trust is sufficient to establish an ownership interest in a trust's beneficiary.[\[FN8\]](#)

[\[FN1\]](#) [State ex rel. Nixon v. Turpin, 994 S.W.2d 53 \(Mo. Ct. App. W.D. 1999\).](#)

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[\[FN2\]](#) [Burkett v. Capovilla, 112 Cal. App. 4th 1444, 5 Cal. Rptr. 3d 817 \(2d Dist. 2003\).](#)

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[\[FN3\]](#) [State Bank of Chicago v. Gross, 344 Ill. 512, 176 N.E. 739, 75 A.L.R. 172 \(1931\).](#)

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[\[FN4\]](#) [Seligson v. C.I.R., 15 F.3d 1089 \(9th Cir. 1994\).](#)

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[\[FN5\]](#) [§ 264.](#)

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[\[FN6\]](#) [Summers v. Garland, 352 Ark. 29, 98 S.W.3d 23 \(2003\); TeGrotenhuis v. Rice, 744 So. 2d 1057 \(Fla. Dist. Ct. App. 4th Dist. 1999\); Hulett v. First Nat. Bank and Trust Co. in Clinton, 1998 OK 21, 956 P.2d 879 \(Okla. 1998\).](#)

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[\[FN7\]](#) [Woodard v. Funderburk, 846 So. 2d 363 \(Ala. Civ. App. 2002\).](#)

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[\[FN8\]](#) [McFarley v. State, 268 Ga. App. 621, 602 S.E.2d 341 \(2004\).](#)

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§ 262. Time when interest becomes effective and duration and termination of interest—Merger of interests on termination

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [154](#)

Model Codes and Restatements

[Restatement Third, Trusts § 69](#)

Merger is an equitable doctrine.[FN1] Under the doctrine of merger, a trust need not be continued where all equitable and legal interests in trust realty are held by the same person.[FN2] Once a trust terminates, the legal title, which was vested in the trustee, then vests in the equitable title holder, the two titles merge, and the equitable title holder becomes the owner of a full fee interest.[FN3]

Under the merger doctrine, the beneficiary's equitable interest is terminated when the sole beneficiary is also the sole trustee, as in this situation the legal and equitable titles merge and the trust is terminated.[FN4] The doctrine of merger does not apply to property held in trust where there is more than one trustee and beneficiary, even if all the trustees are also the beneficiaries.[FN5]

[FN1] [Tretola v. Tretola, 61 Mass.App.Ct. 518 \(Mass.App.,2004\).](#)

[FN2] [In re Testamentary Trust of Hasch, 131 Ohio App. 3d 143, 721 N.E.2d 1111 \(3d Dist. Paulding County 1999\).](#)

[FN3] [Moore v. Moore](#), 111 S.W.3d 530 (Mo. Ct. App. S.D. 2003), reh'g and/or transfer denied, (July 22, 2003) and transfer denied, (Aug. 26, 2003); [Sorrel v. Sorrel](#), 1 S.W.3d 867 (Tex. App. Corpus Christi 1999).

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[FN4] [Matter of Will of Sackler](#), 145 Misc. 2d 950, 548 N.Y.S.2d 866 (Sur. Ct. 1989).

- As to merger of legal and equitable interests terminating express trust, see [§ 90](#).

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[FN5] [Auerbach v. Great Western Bank](#), 74 Cal. App. 4th 1172, 88 Cal. Rptr. 2d 718 (2d Dist. 1999).

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§ 263. Future interest

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [140\(2\)](#)

When a trust permits the trustee to distribute to a beneficiary so much, if any, of the income as the trustee in its discretion sees fit, a beneficiary has no property interest or rights in the undistributed funds; the rights held by the beneficiary are merely an expectancy.[FN1] Thus, the income beneficiary of discretionary trust has no contractual or enforceable right to the corpus and cannot force any action by the trustee unless the trustee performs dishonestly or does not act at all; the income received from a discretionary trust is a gift.[FN2] So long as a trust is revocable, a beneficiary's rights are merely potential, rather than vested.[FN3]

The beneficiary of a trust may be vested with a future interest in the property subject to the trust.[FN4] While the beneficial use in property transferred to an inter vivos trust may be delayed until some future date, the actual beneficial interest in that property starts immediately.[FN5]

The realization of a status of present possession or enjoyment by the beneficiary of a trust may be accelerated for the owner of a future interest by the failure of the preceding estate.[FN6] However, the intent to prohibit acceleration of a trust need not be express, but can be implied from the four corners of the agreement.[FN7]

[FN1] [In re Marriage of Guinn, 93 P.3d 568 \(Colo. Ct. App. 2004\)](#), cert. denied, [2004 WL 1615237 \(Colo. 2004\)](#); [Ingram v. Cates, 74 S.W.3d 783 \(Ky. Ct. App. 2002\)](#).

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[FN2] [In re Marriage of Guinn, 93 P.3d 568 \(Colo. Ct. App. 2004\)](#), cert. denied, [2004 WL 1615237 \(Colo. 2004\)](#).

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[FN3] [Head v. Wachovia Bank of Georgia, N.A., 88 S.W.3d 180 \(Tenn. Ct. App. 2002\)](#), appeal denied, (Oct. 21, 2002).

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[FN4] [First Nat. Bank of Cincinnati v. Tenney, 165 Ohio St. 513, 60 Ohio Op. 481, 138 N.E.2d 15, 61 A.L.R.2d 470 \(1956\)](#).

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[FN5] [Matter of Walz, 423 N.E.2d 729 \(Ind. Ct. App. 3d Dist. 1981\)](#).

- As to the delay of vesting until occurrence of a contingency, see [§ 264](#).

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[FN6] [Weinstein v. Mackey, 408 So. 2d 849 \(Fla. Dist. Ct. App. 3d Dist. 1982\)](#).

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[FN7] [Linkous v. Candler, 270 Ga. 284, 508 S.E.2d 657 \(1998\)](#).

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§ 264. Effect of beneficiary's failing to meet vesting contingency; effect of termination of trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [140\(2\)](#)

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[Anti-lapse statute as applicable to interest of beneficiary under inter vivos trust who predeceases life-tenant settlor, 47 A.L.R.3d 358](#)

A trust's terms may postpone the vesting of a beneficiary's interest to the happening of some future event,^[FN1] including a contingency or condition that the beneficiary must survive a particular person,^[FN2] or must survive to a designated future distribution date;^[FN3] when the trust's terms show the intention of the trustor is to so postpone vesting, the beneficiary obtains no vested interest in the trust unless the contingency occurs and vesting is said to rest on the condition precedent.^[FN4]

Observation: The policy of the law favors the vesting of interests and, where possible, will construe a trust provision as a condition subsequent in preference to a condition precedent.^[FN5] Thus, for example, the exercise of a power of appointment over the corpus of a trust is viewed as operating as a condition subsequent on the remainder in default of appointment.^[FN6]

In considering what becomes of the beneficiary's interest when the beneficiary predeceases a trustor who has retained a life estate in the trust property, by virtue of an anti-lapse statute, a beneficiary's interest given by an inter vivos trust may be preserved to the beneficiary's heirs where the beneficiary's death precedes the death of the settlor.^[FN7] Where a settlor grants the beneficiaries a remainder interest in an inter vivos trust, the beneficiaries receive a present, vested interest at the time of the creation of the trust, and this interest does not lapse as a result of the beneficiary's death prior to the death of the settlor.^[FN8]

With regard to the interpretation of certain language in a trust instrument, a provision that, upon the death of the life beneficiary, the remaining assets of the trust would be divided into equal shares for each of settlor's "surviving children or for the then surviving issue of each deceased child," does not create a condition precedent of surviving the life beneficiary.^[FN9]

Observation: Some states' antilapse statutes do not apply to trusts.^[FN10]

^[FN1] [Summers v. Garland, 352 Ark. 29, 98 S.W.3d 23 \(2003\); Hulett v. First Nat. Bank and Trust Co. in Clinton, 1998 OK 21, 956 P.2d 879 \(Okla. 1998\).](#)

^[FN2] [TeGrotenhuis v. Rice, 744 So. 2d 1057 \(Fla. Dist. Ct. App. 4th Dist. 1999\).](#)

[\[FN3\] Hulett v. First Nat. Bank and Trust Co. in Clinton, 1998 OK 21, 956 P.2d 879 \(Okla. 1998\).](#)

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[\[FN4\] § 261.](#)

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[\[FN5\] Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 \(2001\).](#)

- As to construction of trusts generally, see §§ [28](#) to [39](#).

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[\[FN6\] Swanson v. Swanson, 270 Ga. 733, 514 S.E.2d 822 \(1999\)](#) (where a trust instrument provides that the settlor's wife, the life beneficiary, will dispose of the corpus by appointment during her lifetime or by will upon her death, but provides that the corpus will pass to the settlor's nine children in the event that the wife does not make such a disposition, each child has a vested remainder interest, subject to defeasance upon the occurrence of the conditions subsequent).

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[\[FN7\] In re Button's Estate, 79 Wash. 2d 849, 490 P.2d 731, 47 A.L.R.3d 352 \(1971\).](#)

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[\[FN8\] First Nat. Bank of Bar Harbor v. Anthony, 557 A.2d 957 \(Me. 1989\); Detroit Bank and Trust Co. v. Grout, 95 Mich. App. 253, 289 N.W.2d 898 \(1980\); Matter of Estate of Sprinchorn, 151 A.D.2d 27, 546 N.Y.S.2d 256 \(3d Dep't 1989\).](#)

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[\[FN9\] Swanson v. Swanson, 270 Ga. 733, 514 S.E.2d 822 \(1999\).](#)

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[\[FN10\] Baldwin v. Branch, 2004 WL 407157 \(Ala. 2004\); Burkett v. Capovilla, 112 Cal. App. 4th 1444, 5 Cal. Rptr. 3d 817 \(2d Dist. 2003\).](#)

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VI. Trust Property or Res
B. Estates and Interests in Trust Property
3. Beneficiary's Estates and Interests
a. In General

§ 265. Estates and interests of multiple or joint beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [145](#)

Generally, notwithstanding that one of the beneficiaries is the settlor of the trust, where it is declared that the trust property is held for the joint benefit of named beneficiaries, they hold as co-tenants.[\[FN1\]](#) Where a grant or conveyance is expressed to be to one "and his children" or to one and his children, naming them, and there are children living, children of the beneficiary will take either as joint tenants, if the trust instrument so provides, or as tenants in common where the trust instrument is silent as to the interest the beneficiary's children are to receive.[\[FN2\]](#) This is not to suggest that a child who has not been born or conceived at the time of creation of a trust cannot be a beneficiary of a trust.[\[FN3\]](#)

Observation: In the absence of language showing an intent to create a survivorship interest in the proceeds of a Totten trust, the proceeds are not subject to the general presumption that the disposition of monies in bank accounts to two or more persons creates in them a tenancy in common.[\[FN4\]](#)

Where one of many parties having a common interest in a trust fund, at his or her own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he or she is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of these efforts.[\[FN5\]](#)

[\[FN1\]](#) [Maxwell v. Barringer, 110 N.C. 76, 14 S.E. 516 \(1892\).](#)

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[\[FN2\]](#) [Trust Agreement of Westervelt v. First Interstate Bank of Northern Indiana, 551 N.E.2d 1180 \(Ind. Ct. App. 4th Dist. 1990\).](#)

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[\[FN3\]](#) [§ 240.](#)

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[\[FN4\]](#) [Matter of Wozniak, 244 A.D.2d 148, 672 N.Y.S.2d 428 \(2d Dep't 1998\).](#)

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[\[FN5\]](#) [Kenneth F. White, Chtd. v. St. Alphonsus Regional Medical Center, 136 Idaho 238, 31 P.3d 926 \(Ct. App. 2001\).](#)

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§ 266. Waiver of interest in trust; effect of "no contest" provisions

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 140

An in terrorem or no contest clause in a trust instrument creates a condition upon gifts and dispositions provided therein.^[FN1] Such a clause conditions a beneficiary's right to take the share provided to that beneficiary under such an instrument upon the beneficiary's agreement to acquiesce to the terms of the instrument.^[FN2] A no contest clause is enforceable against beneficiary who brings a contest within the terms of the clause.^[FN3]

In some jurisdictions, a no contest or forfeiture provision in a trust is to be enforced where it is clear that the settlor intended that the conduct in question should result in the forfeiture of a beneficiary's interest under the trust.^[FN4] Other jurisdictions allow good faith challenges to trusts based on probable cause, as an implied exception to no contest clauses in trusts, on the basis that the failure to recognize such an exception by implication would chill the assertion of legitimate claims.^[FN5]

Courts must strictly construe in terrorem provisions in a trust instrument.^[FN6] However, a no contest clause that is extremely broad evidences a purpose on the part of the settlor to expansively prohibit any attempt to set aside any provision of a trust.^[FN7]

A trust beneficiary's proposed complaint, alleging that the trustee's demands breached an oral agreement previously made with the trustor, amounts to a "contest," and thus violates a no contest clause in the trust instrument.^[FN8] Conversely, a beneficiary's objection to the trustee's proposed apportionment of estate taxes is not such a contest.^[FN9]

Observation: In some jurisdictions, statutes governing irrevocable instruments may permit a trust beneficiary to obtain a judicial declaration as to whether a proposed petition would be a contest within the meaning of a no contest clause.^[FN10]

^[FN1] [Estate of Kaila, 94 Cal. App. 4th 1122, 114 Cal. Rptr. 2d 865 \(4th Dist. 2001\).](#)

[\[FN2\] Estate of Kaila, 94 Cal. App. 4th 1122, 114 Cal. Rptr. 2d 865 \(4th Dist. 2001\).](#)

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[\[FN3\] Estate of Pittman, 63 Cal. App. 4th 290, 73 Cal. Rptr. 2d 622 \(5th Dist. 1998\); Tobias v. Korman, 141 S.W.3d 468 \(Mo. Ct. App. E.D. 2004\).](#)

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[\[FN4\] Tobias v. Korman, 141 S.W.3d 468 \(Mo. Ct. App. E.D. 2004\).](#)

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[\[FN5\] Hannam v. Brown, 114 Nev. 350, 956 P.2d 794 \(1998\).](#)

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[\[FN6\] Conte v. Conte, 56 S.W.3d 830 \(Tex. App. Houston 1st Dist. 2001\).](#)

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[\[FN7\] Estate of Pittman, 63 Cal. App. 4th 290, 73 Cal. Rptr. 2d 622 \(5th Dist. 1998\).](#)

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[\[FN8\] Nairne v. Jessop-Humblet, 101 Cal. App. 4th 1124, 124 Cal. Rptr. 2d 726 \(4th Dist. 2002\)](#) (where trust specified that such parcel was included in trust and was intended to be disposed of by trust's terms, and no contest clause was broadly worded, providing for forfeiture if any beneficiary "directly or indirectly, voluntarily participates in any proceeding or action in which such person seeks to void, nullify, or set aside" any provision).

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[\[FN9\] PNC Bank, Ohio, N.A. v. Roy, 2003 Ohio 1542 \(Ohio.App.1.Dist.Hamilton.,2003\).](#)

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[\[FN10\] Hermanson v. Hermanson, 108 Cal. App. 4th 441, 133 Cal. Rptr. 2d 486 \(4th Dist. 2003\)](#), as modified on denial of reh'g, (May 30, 2003).

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§ 267. Transfer of interests, generally

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Forms

Assignment or Transfer of Interest in Trust Property. [Am. Jur. Legal Forms 2d, Trusts §§ 251:625 to 251:632](#)

Model Codes and Restatements

[Restatement Third, Trusts § 56](#)

With the exception of spendthrift trusts which place certain restraints on alienation,[\[FN1\]](#) as a rule the beneficiary of an ordinary trust is empowered to convey his or her beneficial interest in the trust property.[\[FN2\]](#) Whether the interest of a trust beneficiary, other than a beneficiary of a spendthrift trust,[\[FN3\]](#) is subject to alienation, be it voluntary or involuntary alienation—liability to debts and seizure on judicial process[\[FN4\]](#) depends upon the precise terms of the trust,[\[FN5\]](#) and upon statutory provisions which may restrain or, on the other hand, prohibit restraint of, alienation.[\[FN6\]](#) Where there is no restraining statute[\[FN7\]](#) or spendthrift, support, discretionary, or similar trust, the general rule is that the right of a beneficiary to income from the corpus of the trust[\[FN8\]](#) is alienable by him or her.[\[FN9\]](#)

Property subject to a passive trust is fully alienable by the beneficiary[\[FN10\]](#) who is fully liable for his or her debts.[\[FN11\]](#) While, as a general rule, the beneficiaries of trust property who are sui juris and whose rights are vested may dispose of their equitable interests in the trust property, a different rule applies where the interest of a beneficiary is made defeasible upon his or her dying with children to whom the interest passes by substitution.[\[FN12\]](#)

Beneficial interests in trusts are generally assignable,[\[FN13\]](#) although assignments of such interests are invalid when they are subject to a spendthrift provision in the trust.[\[FN14\]](#) An assignment of an interest in a trust is a transfer of right, title, and estate in and to property, and it is customarily considered as more than an assignment of a chose in action.[\[FN15\]](#)

Where the beneficiary's interest is alienable, a transfer of it, properly made, operates to vest in the transferee the right to receive from the trustee the legal title or other benefit of the trust in accordance with the terms of the trust.[\[FN16\]](#) The transferee succeeds to the beneficiary's right of suit to enforce the trust.[\[FN17\]](#)

A beneficiary may transfer a part of his or her interest as well as the whole.[\[FN18\]](#)

Observation: Only the beneficiary may transfer his or her interest in the trust property; neither the trustee nor a court can effect a transfer of trust property in derogation of the trust's terms.[\[FN19\]](#)

Even in the case of a spendthrift trust, once the beneficiary receives the income, the beneficiary is free to dispose of it without repercussion from the trust document.[\[FN20\]](#)

[\[FN1\]](#) §§ [113](#) to [123](#).

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[\[FN2\]](#) [Walgren v. Dolan](#), 226 Cal. App. 3d 572, 276 Cal. Rptr. 554 (4th Dist. 1990); [Guerriero v. Commissioner of the Div. of Medical Assistance](#), 433 Mass. 628, 745 N.E.2d 324 (2001).

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[\[FN3\]](#) §§ [94](#) to [127](#).

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[\[FN4\]](#) § [271](#).

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[\[FN5\]](#) [Hartsfield v. Lescher](#), 721 F. Supp. 1052 (E.D. Ark. 1989) (stating that it is elementary that when the terms of a trust preclude a beneficiary from alienating his interest in the trust, he cannot release his interest after he has once accepted it); [Faulkner v. Bost](#), 137 S.W.3d 254 (Tex. App. Tyler 2004).

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[\[FN6\]](#) § [268](#).

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[\[FN7\]](#) § [268](#).

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[\[FN8\]](#) [Blair v. Commissioner of Internal Revenue](#), 300 U.S. 5, 57 S. Ct. 330, 81 L. Ed. 465 (1937).

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[\[FN9\]](#) [Croxall v. Shererd](#), 72 U.S. 268, 18 L. Ed. 572 (1866); [Rappold v. Rappold](#), 224 Md. 131, 166 A.2d 897 (1961); [In re Moulton's Estate](#), 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 (1951).

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[\[FN10\]](#) [McGoon v. Scales](#), 76 U.S. 23, 19 L. Ed. 545 (1869).

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[\[FN11\]](#) § [271](#).

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[\[FN12\]](#) [Smyth v. McKissick](#), 222 N.C. 644, 24 S.E.2d 621 (1943).

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[\[FN13\]](#) [Faulkner v. Bost](#), 137 S.W.3d 254 (Tex. App. Tyler 2004).

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[\[FN14\]](#) § [268](#).

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[\[FN15\]](#) [Blair v. Commissioner of Internal Revenue](#), 300 U.S. 5, 57 S. Ct. 330, 81 L. Ed. 465 (1937); [Columbia Bank for Cooperatives v. Okeelanta Sugar Co-op.](#), 52 So. 2d 670 (Fla. 1951).

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[\[FN16\]](#) [Croxall v. Shererd](#), 72 U.S. 268, 18 L. Ed. 572 (1866); [Nelson v. Wood](#), 199 Ark. 1019, 137 S.W.2d 929 (1940).

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[\[FN17\]](#) § [615](#).

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[\[FN18\]](#) [Blair v. Commissioner of Internal Revenue](#), 300 U.S. 5, 57 S. Ct. 330, 81 L. Ed. 465 (1937).

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[FN19] [Spencer v. Spencer, 71 Conn.App. 475 \(Conn.App.,2002\)](#) (in dissolution of marriage proceeding, court could not order trustee of trust created by former husband's mother to allocate any portion of the trust for benefit of former wife, where trust instrument specifically stated that it was for benefit of former husband and his descendants, and nothing within trust instrument indicated that mother had intended former wife to benefit from trust).

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[FN20] [State ex rel. Nixon v. Turpin, 994 S.W.2d 53 \(Mo. Ct. App. W.D. 1999\)](#).

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§ 268. Effect of statutory provisions on alienability of interest; spendthrift provisions

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [148](#), [152](#)

Statutory provisions, other than those which relate to spendthrift trusts,[FN1] may impose restraints on the alienation, voluntary or involuntary, of certain interests in trust estates, thus making such trusts, in effect, spendthrift trusts or indestructible to the extent of such restraint.[FN2] Such a restraint on alienation may apply only to future income to be received by an income beneficiary.[FN3] While a statute may impose a restraint on the alienation of certain interests in trusts,[FN4] it may not prevent liability of the interest of a beneficiary for his or her debts.[FN5] Thus, for example, where a court may not permit the direct seizure of trust property to satisfy the claim of a beneficiary's judgment creditor, the court may authorize the creditor to seize the

beneficiary's interest in the trust relationship and allow the creditor to step into the shoes of the beneficiary.[\[FN6\]](#)

No title in the income passes to the beneficiary of a spendthrift trust unless and until it is appropriated to the beneficiary by the trustee, and then only to the amount determined by the trustee.[\[FN7\]](#) Thus, a trustee of a trust with a spendthrift provision cannot assign to a creditor the beneficial interest of a beneficiary, even at the direction of the beneficiary.[\[FN8\]](#)

Reminder: When a settlor creates a trust for his or her own benefit and inserts a spendthrift clause, the entire spendthrift clause is void as to the settlor's creditors.[\[FN9\]](#)

Observation: Spendthrift trust clauses are not enforceable against claims by the United States against a beneficiary.[\[FN10\]](#)

[\[FN1\]](#) §§ [94](#) to [127](#).

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[\[FN2\]](#) [In re Bass](#), 171 F.3d 1016 (5th Cir. 1999) (applying Texas law); [Matter of Link's Will](#), 119 Misc. 2d 181, 462 N.Y.S.2d 582 (Sur. Ct. 1983).

- As to spendthrift and other protective trusts, generally, see §§ [94](#) to [127](#).

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[\[FN3\]](#) [Matter of Link's Will](#), 119 Misc. 2d 181, 462 N.Y.S.2d 582 (Sur. Ct. 1983).

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[\[FN4\]](#) [Koelliker v. Denkinger](#), 148 Kan. 503, 83 P.2d 703, 119 A.L.R. 1 (1938), on reh'g, [149 Kan. 259](#), 86 P.2d 740, 119 A.L.R. 1525 (1938).

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[\[FN5\]](#) § [271](#).

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[\[FN6\]](#) [Read v. U.S. ex rel. Dept. of Treasury](#), 169 F.3d 243 (5th Cir. 1999).

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[\[FN7\]](#) [Spencer v. Spencer](#), 71 Conn.App. 475 (Conn.App.,2002); [State ex rel. Nixon v. Turpin](#), 994 S.W.2d 53 (Mo. Ct. App. W.D. 1999).

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[\[FN8\]](#) [Gershaw v. Gershfield](#), 52 Mass.App.Ct. 81 (Mass.App.,2001).

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[\[FN9\]](#) [In re Bogetti](#), 73 Fed. Appx. 266 (9th Cir. 2003) (applying California law); [In re Brown](#), 303 F.3d 1261 (11th Cir. 2002) (applying Florida law); [In re Cohen](#), 8 P.3d 429 (Colo. 1999).

- As to the rights of settlor's creditors, see § [252](#).

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[\[FN10\]](#) [U.S. v. Murray](#), 217 F.3d 59 (1st Cir. 2000).

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§ 269. Land trusts

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Forms

Assignment or Transfer of Interest in Trust Property. [Am. Jur. Legal Forms 2d, Trusts §§ 251:625 to 251:632](#)

Model Codes and Restatements

[Restatement Third, Trusts § 56](#)

A land trust beneficiary has the exclusive right to direct the trustee in dealing with the title, and the owner of the beneficial interest is empowered to transfer his or her beneficial interest through an assignment.^[FN1] Thus, a land trust beneficiary may, under certain circumstances, contract to sell the real property and may even, under certain circumstances, encumber the trust property with a lien.^[FN2] However, the assignee of a beneficial interest in a land trust acquires only an interest in personal property, and the transaction does not give the assignee a direct interest or lien against the realty which is the res of the trust.^[FN3]

^[FN1] [Wagemann Oil Co. v. Marathon Oil Co., 306 Ill. App. 3d 562, 239 Ill. Dec. 549, 714 N.E.2d 107 \(1st Dist. 1999\).](#)

[\[FN2\] LaSalle Bank, N.I. v. First American Bank, 316 Ill. App. 3d 515, 249 Ill. Dec. 425, 736 N.E.2d 619 \(1st Dist. 2000\).](#)

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[\[FN3\] Wagemann Oil Co. v. Marathon Oil Co., 306 Ill. App. 3d 562, 239 Ill. Dec. 549, 714 N.E.2d 107 \(1st Dist. 1999\).](#)

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§ 270. Requisites to transfer of interest; compliance with statute of frauds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [146.1](#) to [149](#)

Forms

Assignment or Transfer of Interest in Trust Property. [Am. Jur. Legal Forms 2d, Trusts §§ 251:625 to 251:632](#)

Transfer of corporate stock—General form. [Am. Jur. Legal Forms 2d, Trusts § 251:25](#)

The operation of the law as to transfers of property is ordinarily complicated in the case of the interests of trust beneficiaries by the fact that legal and record title is in the trustee.[\[FN1\]](#)

As to land trusts, a financial statement need not be filed to perfect an assignment of the beneficiary's beneficial interest.^[FN2] Moreover, the assignment of an interest in an Illinois land trust need not be witnessed by the same number of witnesses as required by other statutes relating to assignment of property interests.^[FN3]

For the most part, provisions of statutes of fraud relating to the transfer by a beneficiary of his or her interest in a trust relate only to such transfers where the trust is in realty.^[FN4] The sufficiency of a writing where the interest of the beneficiary is transferred is generally governed by those rules and principles governing the sufficiency of a writing in the creation of a trust.^[FN5] A surrender or release by a beneficiary of his or her interest in a trust by operation of law has been deemed to be outside the application of the statute of frauds,^[FN6] although there is authority to the contrary.^[FN7]

^[FN1] §§ 290 to 299, 500 to 537.

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^[FN2] *In re Loop Hosp. Partnership*, 50 B.R. 565 (Bankr. N.D. Ill. 1985).

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^[FN3] *Goldman v. Mandell*, 403 So. 2d 511 (Fla. Dist. Ct. App. 5th Dist. 1981).

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^[FN4] *IMM Acceptance Corp. v. First Nat. Bank and Trust Co. of Evanston*, 148 Ill. App. 3d 949, 102 Ill. Dec. 232, 499 N.E.2d 1012 (2d Dist. 1986).

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^[FN5] § 60.

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^[FN6] *Moses v. Moses*, 140 N.J. Eq. 575, 53 A.2d 805, 173 A.L.R. 273 (Ct. Err. & App. 1947).

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^[FN7] *Hughes v. Moore*, 11 U.S. 176, 3 L. Ed. 307 (1812).

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§ 271. Liability for beneficiary's debts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [150](#) to [152](#)

Forms

Complaint, petition, or declaration—By judgment creditor of beneficiary—Against beneficiary and trustee—To reach trust income payable to beneficiary. 24 Am. Jur. Pleading and Practice Forms, Trusts § 322

Judgment or order—In creditor's action—To subject excess income from trust property to creditor's claim. 24 Am. Jur. Pleading and Practice Forms, Trusts § 332

Model Codes and Restatements

[Restatement Third, Trusts § 56](#)

The interest of a beneficiary in trust property is liable to be taken in satisfaction of his or her debts and obligations,^[FN1] at least to the extent it is subject to voluntary alienation by the beneficiary or if the trust is self-settled.^[FN2] Conversely stated, trusts that contain valid spendthrift provisions are protected from the reach of creditors, as long as the trust beneficiaries cannot exercise dominion over the trust assets.^[FN3]

Observation: Of course, to be entitled to recovery under a statute permitting judgment creditors to recover against a trust, the creditor must establish his or her status as a judgment creditor of the appropriate entity, such as of the beneficiary.^[FN4] The creditor may be further required to demonstrate that the beneficiary/debtor has failed to seek a court-ordered distribution from the trust, or that the trustee has failed to obey an order to distribute the trust income or principle to the creditor.^[FN5]

While a statute may impose a restraint on the alienation of certain interests in trusts,^[FN6] it may not prevent liability of the interest of a beneficiary for his or her debts.^[FN7] Under some statutory provisions, the creditors of a life beneficiary of a trust may be satisfied out of the principal of the trust where all beneficiaries agree to such an invasion or without the consent of the other beneficiaries where it is clear from the trust instrument that the trustor intended that such an invasion be permitted under certain circumstances.^[FN8]

Caution: Basic and fundamental differences may exist among the laws of several states as to the effect of judgment liens on beneficial interests where a land trust is concerned, which differences center around whether the beneficiary's interest is deemed equitable, legal or neither, and whether such an interest is subject to a judgment lien.^[FN9]

If considered a support trust, the interest of the beneficiary can be reached in satisfaction of an enforceable claim for necessary services rendered to the beneficiary.^[FN10] In this regard, only that portion of the

discretionary support trust's assets necessary for the core needs of the beneficiary may be attached by third party creditors.[FN11]

If considered a true discretionary trust, a creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.[FN12]

Observation: Although normally, a discretionary trust cannot be reached by creditors because the beneficiary has no ascertainable interest in the assets, where the beneficiary is also the settlor of the trust, creditors can reach the assets of the trust.[FN13]

Creditors may be prevented from reaching in equity the interests of beneficiaries when the trust has been created by, or the fund so held in trust has proceeded from, some person other than the debtor.[FN14]

[FN1] [Nichols v. Levy, 72 U.S. 433, 18 L. Ed. 596 \(1866\); State for Use of Colorado State Hosp. v. First Interstate Bank of Denver, N.A. for Use of Tralles, 743 P.2d 449 \(Colo. Ct. App. 1987\); In re Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667, 24 A.L.R.2d 1092 \(1951\).](#)

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[FN2] [Kurzweg v. Marple, 841 F.2d 635, 10 Fed. R. Serv. 3d 1084 \(5th Cir. 1988\).](#)

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[FN3] [In re Brown, 303 F.3d 1261 \(11th Cir. 2002\) \(applying Florida law\).](#)

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[FN4] [Estate of Read v. A.D.K. Properties, 766 So. 2d 393 \(Fla. Dist. Ct. App. 2d Dist. 2000\).](#)

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[FN5] [Grohmann v. Grohmann, 180 Wis. 2d 690, 511 N.W.2d 312 \(Ct. App. 1993\), decision aff'd, 189 Wis. 2d 532, 525 N.W.2d 261 \(1995\)](#) (wife who sought trust distribution to pay support owed by husband/beneficiary failed to establish status as judgment creditor).

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[FN6] [§ 119.](#)

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[FN7] [Koelliker v. Denkinger, 148 Kan. 503, 83 P.2d 703, 119 A.L.R. 1 \(1938\), on reh'g on other grounds, 149 Kan. 259, 86 P.2d 740, 119 A.L.R. 1525 \(1938\).](#)

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[FN8] [Estate of Escher, 94 Misc. 2d 952, 407 N.Y.S.2d 106 \(Sur. Ct. 1978\), decree aff'd by, 75 A.D.2d 531, 426 N.Y.S.2d 1008 \(1st Dep't 1980\), order aff'd, 52 N.Y.2d 1006, 438 N.Y.S.2d 293, 420 N.E.2d 91 \(1981\).](#)

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[FN9] [Citicorp v. Bank of Lansing, 604 F. Supp. 585 \(N.D. Ind. 1985\) \(applying Ind. and Illinois law\).](#)

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[FN10] [Strojek ex rel. Mills v. Hardin County Bd. of Supervisors, 602 N.W.2d 566 \(Iowa Ct. App. 1999\).](#)

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[FN11] [Strojek ex rel. Mills v. Hardin County Bd. of Supervisors, 602 N.W.2d 566 \(Iowa Ct. App. 1999\).](#)

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[FN12] [Strojek ex rel. Mills v. Hardin County Bd. of Supervisors, 602 N.W.2d 566 \(Iowa Ct. App. 1999\); In re Hertsberg Inter Vivos Trust, 457 Mich. 430, 578 N.W.2d 289 \(1998\).](#)

- A wife could not reach the income and principal of a gift trust, of which her husband was a beneficiary, to satisfy child support arrearages, where the husband was not the sole beneficiary and was not entitled to withdraw the principal. [In re Marriage of Chapman, 297 Ill. App. 3d 611, 231 Ill. Dec. 811, 697 N.E.2d 365 \(1st](#)

[Dist. 1998](#)).

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[FN13] [In re Hertsberg Inter Vivos Trust, 457 Mich. 430, 578 N.W.2d 289 \(1998\)](#); [United Presbyterian House at Syosset, Inc. v. Lincks, 2003 WL 2004182 \(N.Y. Sup 2003\)](#) (as to spendthrift trust).

- As to settlor's creditors, see § 252.

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[FN14] [Spindle v. Shreve, 111 U.S. 542, 4 S. Ct. 522, 28 L. Ed. 512 \(1884\)](#) (involving Illinois statute).

- As to statutes providing for inalienability of interest of beneficiary of spendthrift trust, see [§ 106](#).

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§ 272. Pursuit rule, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [349](#) to [358](#)

When a fiduciary misappropriates trust funds for personal use, he or she has converted the funds[FN1] rather than obtained a voidable title by fraud; one who obtains property by conversion acquires no title, voidable or otherwise, to the property converted.[FN2] Where property entrusted to an agent, and impressed by law with a trust in favor of the principal, is wrongfully diverted by the agent, such trust follows the property in the hands

of a third person and the principal is ordinarily entitled to pursue and recover it so long as the property can be traced and identified and no superior equities have intervened.[FN3] Otherwise stated, when a trustee in breach of his or her fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he or she has purchased the property for value and without notice of the fiduciary's breach of duty.[FN4]

The foregoing rule is actually one of trusts, since the wrongful conversion gives rise to a constructive trust[FN5] which pursues the trust property, its product, or proceeds, and permits the beneficiary to recover the property or obtain damages for the wrongful conversion of the property.[FN6] The rule that wrongfully converted property will be followed may be called "the trust pursuit rule" or "the rule of trust pursuit,"[FN7] and applies where a constructive[FN8] or a resulting trust[FN9] has once affixed itself to property in a certain state or form. Under the rule, a trust will follow property through all changes in its state and form,[FN10] so long as such property, its product, or its proceeds are capable of identification.[FN11] It will follow the property into the hands of a transferee[FN12] other than a bona fide purchaser for value,[FN13] or restitution will be enforced, at the election of a beneficiary, through recourse against the trustee or the transferee personally,[FN14] or through compelling the transferee to perform the trust,[FN15] except insofar as the transferee is protected as a bona fide purchaser for value.[FN16]

Observation: To recover damages for an alleged conversion of rents from trust property by a trustee who is also a beneficiary of the trust, the remaining beneficiaries are required to prove that the amounts the trustee took from the properties exceeded the amount to which the trustee was entitled under the trust.[FN17]

[FN1] [In re Cannon, 277 F.3d 838, 2002 FED App. 0026P \(6th Cir. 2002\) \(applying Tennessee law\); In re Conservatorship of Estate of Loyd, 868 So. 2d 363 \(Miss. Ct. App. 2003\), cert. denied, 868 So. 2d 345 \(Miss. 2004\).](#)

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[FN2] [In re Cannon, 277 F.3d 838, 2002 FED App. 0026P \(6th Cir. 2002\) \(applying Tennessee law\).](#)

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[FN3] [Sprague v. Farm Credit Services of Central Kansas PCA, 28 Kan. App. 2d 872, 22 P.3d 608 \(2001\); Baldwin v. Adkerson, 156 Va. 447, 158 S.E. 864, 103 A.L.R. 644 \(1931\).](#)

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[FN4] [Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 120 S. Ct. 2180, 147 L. Ed. 2d 187 \(2000\).](#)

- As to bona fide purchasers, see [§ 290](#).

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[FN5] [John R. Boyce Family Trust v. Snyder, 128 S.W.3d 630 \(Mo. Ct. App. E.D. 2004\).](#)

- As to constructive trusts, see [§ 194](#).

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[FN6] [§§ 274 to 277.](#)

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[FN7] [Sprague v. Farm Credit Services of Central Kansas PCA, 28 Kan. App. 2d 872, 22 P.3d 608 \(2001\).](#)

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[FN8] [Independent Coal & Coke Co. v. U.S., 274 U.S. 640, 47 S. Ct. 714, 71 L. Ed. 1270 \(1927\); Cox v. Waudby, 433 N.W.2d 716 \(Iowa 1988\); Sauer v. Hicks, 662 S.W.2d 310 \(Mo. Ct. App. S.D. 1983\).](#)

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[FN9] [Gerace v. Gerace, 301 Mass. 14, 16 N.E.2d 6, 117 A.L.R. 1459 \(1938\).](#)

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[\[FN10\] Independent Coal & Coke Co. v. U.S., 274 U.S. 640, 47 S. Ct. 714, 71 L. Ed. 1270 \(1927\); In re Specialized Installers, Inc., 12 B.R. 546 \(Bankr. D. Colo. 1981\); Sadacca v. Monhart, 128 Ill. App. 3d 250, 83 Ill. Dec. 463, 470 N.E.2d 589 \(1st Dist. 1984\); Sprague v. Farm Credit Services of Central Kansas PCA, 28 Kan. App. 2d 872, 22 P.3d 608 \(2001\).](#)

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[\[FN11\] § 275.](#)

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[\[FN12\] §§ 275 to 277.](#)

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[\[FN13\] §§ 290 to 299.](#)

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[\[FN14\] § § 276, 277.](#)

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[\[FN15\] § 277.](#)

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[\[FN16\] §§ 290 to 299.](#)

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[\[FN17\] White v. White, 2002 WL 32341854 \(Tex. App. Eastland 2002\)](#) (remaining beneficiaries had to prove that the fair market value less the amount received from the sale exceeded the amount to which the trustee was entitled under the terms of the family trust).

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§ 273. Necessity of identification of property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 358 to 358(2)

It is necessary to identify trust property or funds or the product or proceeds thereof in order to follow and enforce the trust against the same.[\[FN1\]](#) If the property cannot be identified, the beneficiary has only a right to claim damages or the right of a general creditor.[\[FN2\]](#)

Where money is the asset upon which the constructive trust is based, it is necessary that specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property.[\[FN3\]](#) The trust pursuit does not fail, however, where substantial identification of the trust property or funds or of the proceeds or product from a conversion thereof is possible, and substantial identification of funds within this rule does not mean the identification of specific money, coins, bills, and notes comprising the funds at any one time.[\[FN4\]](#)

[\[FN1\]](#) [Jennings v. U.S. Fidelity & Guaranty Co.](#), 294 U.S. 216, 55 S. Ct. 394, 79 L. Ed. 869, 99 A.L.R. 1248 (1935); [In re Specialized Installers, Inc.](#), 12 B.R. 546 (Bankr. D. Colo. 1981); [Burch & Cracchiolo, P.A. v. Pugliani](#), 144 Ariz. 281, 697 P.2d 674 (1985); [In re Commissioner of Banks and Real Estate](#), 327 Ill. App. 3d 441, 261 Ill. Dec. 775, 764 N.E.2d 66 (1st Dist. 2001), appeal denied, 198 Ill. 2d 592, 262 Ill. Dec. 619, 766 N.E.2d 239 (2002) and appeal denied, 198 Ill. 2d 616, 264 Ill. Dec. 325, 770 N.E.2d 219 (2002); [Brown v. Coleman](#), 318 Md. 56, 566 A.2d 1091 (1989); [Estate of Reece](#), 122 Misc. 2d 517, 470 N.Y.S.2d 974 (Sur. Ct. 1983); [Estate of Cowling v. Estate of Cowling](#), 2004 Ohio 2665 (Ohio.App.9.Dist.Lorain.Co, 2004); [Aebig v. Commercial Bank of Seattle](#), 36 Wash. App. 477, 674 P.2d 696 (Div. 1 1984); [Parge v. Parge](#), 159 Wis. 2d 175, 464 N.W.2d 217 (Ct. App. 1990).

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[\[FN2\]](#) [Cunningham v. Brown](#), 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1924); [First Federal of Michigan v. Barrow](#), 878 F.2d 912, 14 Fed. R. Serv. 3d 899 (6th Cir. 1989); [Estate of Reece](#), 122 Misc. 2d 517, 470 N.Y.S.2d 974 (Sur. Ct. 1983).

- As to beneficiary's remedies, generally, see §§ [274](#) to [277](#).

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[\[FN3\]](#) [Chalupa v. Chalupa](#), 254 Neb. 59, 574 N.W.2d 509 (1998).

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[\[FN4\]](#) [In re Preston](#), 76 B.R. 654 (Bankr. C.D. Ill. 1987); [Barr v. Petzhold](#), 77 Ariz. 399, 273 P.2d 161 (1954); [Staley v. Kreinbihl](#), 152 Ohio St. 315, 40 Ohio Op. 361, 89 N.E.2d 593 (1949).

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§ 274. Beneficiary's remedies upon conversion of property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 334 to 348

Forms

Actions for wrongful conversion of trust property. [Am. Jur. Pleading and Practice Forms, Trusts §§ 254 to 258](#)

When a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty.[FN1] The trustee or beneficiaries may maintain an action for restitution of the property, if not already disposed of, or for disgorgement of proceeds, if already disposed of, and for disgorgement of the third person's profits derived therefrom.[FN2]

Observation: The common law of trusts sets limits on restitution actions against defendants other than the principal wrongdoer; only a transferee of ill-gotten trust assets may be held liable, and then only when the transferee, assuming he has purchased for value, knew or should have known of the existence of the trust and the circumstances that rendered the transfer in breach of the trust.[FN3]

The beneficiary of a trust has, in general, an option between following trust property or its proceeds and imposing a constructive trust thereon or recovering damages for its wrongful conversion.[FN4]

The beneficiary may elect to take such product or proceeds or the original trust property where the trustee reacquires the same,[FN5] the intervening equitable protection of a bona fide purchaser for value not inuring to the reacquiring trustee.[FN6]

Election to pursue one remedy may waive and bar pursuit of any inconsistent remedy; however, the view has been expressed that if a beneficiary, upon breach of trust, pursues simultaneously a damages action as well as an action to recover the specific property taken, his remedies will not be deemed inconsistent so long as double compensation is not had.[FN7] Furthermore, an election to pursue the trust property or products thereof, where the pursuit fails in part, does not bar a proceeding to enforce personal liability for the deficiency.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

The court-made "Pro Tanto Rule" dictates that beneficiaries who did not file objections to a fiduciary's conduct are not entitled to share in the surcharge that accrues to the estate or trust when other beneficiaries file successful objections; the rule seeks to prevent non-objecting beneficiaries from being rewarded for their quiescence while their co-beneficiaries defended the estate assets. [In re Hyde, 15 N.Y.3d 179, 906 N.Y.S.2d 796, 933 N.E.2d 194 \(2010\).](#)

[END OF SUPPLEMENT]

[\[FN1\] § 272.](#)

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[\[FN2\] Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 120 S. Ct. 2180, 147 L. Ed. 2d 187 \(2000\).](#)

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[\[FN3\] Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 120 S. Ct. 2180, 147 L. Ed. 2d 187 \(2000\).](#)

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[\[FN4\] Rainbolt v. Johnson, 669 F.2d 767 \(D.C. Cir. 1981\)](#) (may elect to place a constructive trust on the property or obtain a judgment against the trustee's personal assets).

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[\[FN5\] Buffum v. Peter Barceloux Co., 289 U.S. 227, 53 S. Ct. 539, 77 L. Ed. 1140 \(1933\).](#)

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[\[FN6\] § 299.](#)

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[\[FN7\] Campbell v. Webb, 363 Mo. 1192, 258 S.W.2d 595 \(1953\).](#)

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[\[FN8\] U.S. v. Carter, 217 U.S. 286, 30 S. Ct. 515, 54 L. Ed. 769 \(1910\).](#)

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§ 275. Beneficiary's remedies upon conversion of property—Recovery of trust property, product, or proceeds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 334 to 348

Forms

Complaint, petition, or declaration—By beneficiary—For rescission of sale of trust real property by trustee—Collusion between trustee and purchaser—Insufficient consideration paid. [Am. Jur. Pleading and Practice Forms, Trusts § 256](#)

Where the sale of trust property is unauthorized and a breach of trust,[[FN1](#)] the beneficiary may follow such property into the hands of a transferee,[[FN2](#)] unless the transferee is protected as a bona fide purchaser for value.[[FN3](#)] The so-called "trust pursuit rule"[[FN4](#)] permits a true owner of wrongfully converted property to follow it into a subsequent possessor's hands.[[FN5](#)]

A trust follows funds into a bank account[[FN6](#)] even where they are mixed therein with private funds of the trustee.[[FN7](#)]

Once a constructive trust is imposed the trust property or funds will be followed into the proceeds or product of the trust property in order that the beneficiary might recover such proceeds or product,[[FN8](#)] including any profit or increase in value of such proceeds or product over the original trust property.[[FN9](#)] Where funds from a ward's bank account were wrongfully used to make a mortgage payment on the guardian's home, a constructive trust attached to the homestead for payment of the wrongfully diverted funds.[[FN10](#)]

[[FN1](#)] §§ [500](#) to [537](#).

[[FN2](#)] [U.S. v. Dunn](#), 268 U.S. 121, 45 S. Ct. 451, 69 L. Ed. 876 (1925); [LaBarbera v. LaBarbera](#), 116 Ill. App. 3d 959, 72 Ill. Dec. 431, 452 N.E.2d 684 (1st Dist. 1983); [Sprague v. Farm Credit Services of Central Kansas PCA](#), 28 Kan. App. 2d 872, 22 P.3d 608 (2001); [In re Estate of Redpath](#), 224 Neb. 845, 402 N.W.2d 648 (1987).

[[FN3](#)] §§ [290](#) to [299](#).

[[FN4](#)] § [272](#).

[\[FN5\] Sprague v. Farm Credit Services of Central Kansas PCA, 28 Kan. App. 2d 872, 22 P.3d 608 \(2001\).](#)

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[\[FN6\] Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U.S. 54, 26 L. Ed. 693 \(1881\); In re Martin Fein & Co., Inc., 43 B.R. 623 \(Bankr. S.D. N.Y. 1984\); Aebig v. Commercial Bank of Seattle, 36 Wash. App. 477, 674 P.2d 696 \(Div. 1 1984\).](#)

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[\[FN7\] § 298.](#)

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[\[FN8\] U.S. v. Dunn, 268 U.S. 121, 45 S. Ct. 451, 69 L. Ed. 876 \(1925\); Matter of Powe, 75 B.R. 387 \(Bankr. M.D. Fla. 1987\); Sadacca v. Monhart, 128 Ill. App. 3d 250, 83 Ill. Dec. 463, 470 N.E.2d 589 \(1st Dist. 1984\); First Nat. Bank of Jackson v. Huff, 441 So. 2d 1317 \(Miss. 1983\); John R. Boyce Family Trust v. Snyder, 128 S.W.3d 630 \(Mo. Ct. App. E.D. 2004\).](#)

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[\[FN9\] Oliver v. Piatt, 44 U.S. 333, 3 How. 333, 11 L. Ed. 622 \(1845\); Republic of Haiti v. Crown Charters, Inc., 667 F. Supp. 839 \(S.D. Fla. 1987\); In re Marriage of Allen, 724 P.2d 651 \(Colo. 1986\); Cox v. Waudby, 433 N.W.2d 716 \(Iowa 1988\); John R. Boyce Family Trust v. Snyder, 128 S.W.3d 630 \(Mo. Ct. App. E.D. 2004\).](#)

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[\[FN10\] Cox v. Waudby, 433 N.W.2d 716 \(Iowa 1988\).](#)

- As to constructive trusts generally, see §§ [168](#) to [204](#).

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§ 276. Beneficiary's remedies upon conversion of property—Holding trustee liable; compelling

restoration to trust of misappropriated funds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 334 to 348

Where the trustee makes an unauthorized conversion, transfer, or encumbrance of trust property or funds, the beneficiary of the trust may elect to hold the trustee personally liable and accountable for this breach of trust.[\[FN1\]](#)

If, however, the trustee misappropriates money which it is his or her duty to continue to hold in trust, the beneficiary, not being entitled to immediate payment, cannot maintain an action at law against the trustee. The beneficiary's remedy is a suit in equity to compel the trustee to restore the money misappropriated and hold it in trust or to pay it to a new trustee.[\[FN2\]](#)

[\[FN1\] Oliver v. Piatt, 44 U.S. 333, 3 How. 333, 11 L. Ed. 622 \(1845\).](#)

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[\[FN2\] Jefferson Nat. Bank of Miami Beach v. Central Nat. Bank in Chicago, 700 F.2d 1143 \(7th Cir. 1983\).](#)

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§ 277. Beneficiary's remedies upon conversion of property—Holding transferee as constructive trustee

West's Key Number Digest

The person to whom a transfer of trust property constituting a wrongful conversion of the trust property and a breach of trust is made, when not protected as a bona fide purchaser for value,[\[FN1\]](#) is liable and accountable as a constructive trustee[\[FN2\]](#) without consent[\[FN3\]](#) and from wrongdoing[\[FN4\]](#) or by reason of one's own wrong,[\[FN5\]](#) and the transferee who has taken trust funds may be proceeded against for money had and received.[\[FN6\]](#) It is not prerequisite to holding the transferee liable as a trustee that there be an adjudication of the account of the original trustee.[\[FN7\]](#) Since the transferee merely takes the place of his or her transferor, and becomes chargeable with the execution of the trust to the same extent that such grantor was chargeable before the transfer,[\[FN8\]](#) he or she can deal with the trust property or funds only as a trustee thereof.[\[FN9\]](#)

The liability of the transferee is not determined by the amount of the original trust fund, but is limited to the amount received by him or her.[\[FN10\]](#)

[\[FN1\]](#) §§ [290](#) to [299](#)

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[\[FN2\]](#) [Whitney v. Hay](#), 181 U.S. 77, 21 S. Ct. 537, 45 L. Ed. 758 (1901); [In re Marriage of Allen](#), 724 P.2d 651 (Colo. 1986); [Viewcrest Co-op. Ass'n, Inc. v. Deer](#), 70 Wash. 2d 290, 422 P.2d 832 (1967).

- As to constructive trusts generally, see §§ [168](#) to [204](#).

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[\[FN3\]](#) [Leach v. Gray](#), 201 Ala. 47, 77 So. 341, 7 A.L.R. 890 (1917).

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[\[FN4\]](#) [U.S. v. Dunn](#), 268 U.S. 121, 45 S. Ct. 451, 69 L. Ed. 876 (1925); [Missouri-Kansas-Texas R. Co. v. Maltzberger](#), 1941 OK 226, 189 Okla. 363, 116 P.2d 977 (1941).

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[\[FN5\]](#) [Central Stock & Grain Exchange of Chicago v. Bendinger](#), 109 F. 926 (C.C.A. 7th Cir. 1901).

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[\[FN6\]](#) § [595](#).

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[\[FN7\]](#) [Tierney v. Coolidge](#), 308 Mass. 255, 32 N.E.2d 198, 132 A.L.R. 1349 (1941).

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[\[FN8\]](#) [Seymour v. Freer](#), 75 U.S. 202, 19 L. Ed. 306 (1868).

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[\[FN9\]](#) [Petroleum Royalties Co. of Okl. v. Hartford Acc. & Indem. Co.](#), 106 F.2d 440, 124 A.L.R. 1403 (C.C.A. 10th Cir. 1939).

- Generally, as to the obligations incurred by a constructive trustee, see § [131](#).

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[\[FN10\]](#) [Jacobs v. Jacobs](#), 130 Iowa 10, 104 N.W. 489 (1905); [Campbell v. Webb](#), 363 Mo. 1192, 258 S.W.2d 595 (1953).

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§ 278. Effect of commingling on identity of trust property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(2\)](#)

The commingling of trust property or funds with other property or funds does not in itself destroy the identity of the trust property or funds.[\[FN1\]](#) Indeed, it is a broad and fundamental rule that equity will follow money and take out of an indistinguishable mass the amount involved.[\[FN2\]](#) Furthermore, the conversion, at least where wrongful, involved in the commingling gives rise to a constructive trust.[\[FN3\]](#)

[\[FN1\]](#) [Webb v. Newhall, 274 Pa. 135, 117 A. 793, 26 A.L.R. 1 \(1922\); Federal Reserve Bank of Richmond v. Peters, 139 Va. 45, 123 S.E. 379, 42 A.L.R. 742 \(1924\).](#)

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[\[FN2\]](#) [Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U.S. 54, 26 L. Ed. 693 \(1881\).](#)

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[\[FN3\]](#) [§ 194.](#)

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§ 279. Satisfaction of trust pursuit rule

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

The trust pursuit rule that a trust follows the trust property or funds through all changes in their state and condition so long, and only so long, as they can be traced,[\[FN1\]](#) fully applies where trust property or funds are commingled by a trustee with other property or funds.[\[FN2\]](#) It is sufficient, for the purposes of the requirement of tracing trust property or funds, that they can be traced into a specific mass in which they have been commingled with other property or funds and in which mass the trust property or funds still exist.[\[FN3\]](#)

If the property is commingled and the trustee does not establish which is his, the entire fund is considered to be subject to a trust provided the party asserting the trust can establish that the funds were commingled and that the commingled funds were used to purchase the property against which the trust is asserted.[\[FN4\]](#)

The general rule is that a mixed bank account in which a trustee has deposited both trust and other funds may constitute a commingled mass within the rule of trust pursuit, with the consequence that tracing trust funds or the proceeds of trust property into such an account constitutes sufficient identification of the same to permit the enforcement of the trust or of an equitable lien against the mixed account for recovery of the funds therefrom.[\[FN5\]](#)

[\[FN1\]](#) § § [272](#), [273](#).

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[\[FN2\]](#) [St. Louis & S.F.R. Co. v. Spiller](#), 274 U.S. 304, 47 S. Ct. 635, 71 L. Ed. 1060 (1927); [Farmers' Bank of White Plains v. Bailey](#), 221 Ky. 55, 297 S.W. 938 (1927).

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[\[FN3\]](#) [Central Nat. Bank v. Connecticut Mut. Life Ins. Co.](#), 104 U.S. 54, 26 L. Ed. 693 (1881); [Federal Reserve Bank of Richmond v. Peters](#), 139 Va. 45, 123 S.E. 379, 42 A.L.R. 742 (1924).

- As to general estate of trustee as sufficient specific mass within the rule, see [§ 280](#).

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[\[FN4\] Sheldon Petroleum Co. v. Peirce, 546 S.W.2d 954 \(Tex. Civ. App. Dallas 1977\).](#)

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[\[FN5\] Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U.S. 54, 26 L. Ed. 693 \(1881\); Sadacca v. Monhart, 128 Ill. App. 3d 250, 83 Ill. Dec. 463, 470 N.E.2d 589 \(1st Dist. 1984\).](#)

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§ 280. Satisfaction of trust pursuit rule—Where trust funds or property commingled in entire estate or general funds of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

Forms

Complaint, petition, or declaration—By beneficiary under oral trust agreement—To recover trust property and income commingled in estate of deceased trustee. [24 Am. Jur. Pleading and Practice Forms, Trusts § 255](#)

Under one view, where the entire general estate or general funds of a trustee, or of a transferee of trust property chargeable as a constructive trustee, pass to an assignee, representative, or other successor, it will be

considered a specific mass or fund, within the requirement that in order for trust property or funds to continue to be bound specifically by the trust, they must be traced into a specific mass or fund, where the trust property or funds can be said to have been present in the general estate or funds at the time the general estate or funds passed to the assignee, representative, or successor.[FN1] The entire estate or general funds of a trustee passing to such a successor may be considered a mingled mass containing trust funds, and charged with a trust to the extent of such trust funds commingled therein, where it appears that the trustee received such trust funds, that such trust funds were commingled with the estate or funds generally and augmented them, and that the estate or funds, thus augmented, passed into the hands of such successor.[FN2] Cases adhering to this view do not, at least theoretically, contradict the rule that trust property or funds must be identified to be successfully traced.[FN3] In such cases it must be made to appear that the trust property or funds are actually represented in the assets of the estate as it passes to such a successor,[FN4] and the burden of proof is on the one asserting the trust, who must establish his or her position by a preponderance of the evidence.[FN5]

By one view, strict identification is required for tracing trust fund money to property; the claimant must prove that his or her specific funds were used to purchase a specific subsequent asset, and it is not enough to show only that the property may have been a product of the trust fund.[FN6]

According to the theory of some cases, an entire estate of a trustee, at least where it is not contained in a single piece of property or a single account, and especially where such an estate is diverse, cannot be regarded as subject to a trust in the hands of an assignee, representative, or other successor, to the extent of trust property or funds converted by the trustee into his or her general estate or funds.[FN7] In support of this rule it is said that although the converted property may be identified to the point of its wrongful receipt by one thus taking it as a constructive trustee, there can be no presumption that it remained in the trustee's general assets to the time that it passed into the hands of such a successor,[FN8] and the cestui que trust has the affirmative burden of tracing and identifying the trust fund or property into a specific fund or property and of identifying that specific fund or property in the hands of such a successor.[FN9] A mere showing that a trustee wrongfully used trust property or funds, as in discharging his or her private indebtedness, does not suffice to trace the trust property or funds into his or her estate in the hands of such a successor of the trustee, so that the same may be specifically recovered therefrom as the property of the beneficiary of the trust.[FN10]

[FN1] [Holbrook Irr. Dist. v. First State Bank of Cheraw](#), 84 Colo. 157, 268 P. 523 (1928); [Sargent v. Whitfield & Co.](#), 226 Ky. 754, 11 S.W.2d 926 (1928); [Reichert v. United Sav. Bank](#), 255 Mich. 685, 239 N.W. 393, 82 A.L.R. 33 (1931); [State v. Farmers' State Bank of Polk](#), 121 Neb. 532, 237 N.W. 857, 82 A.L.R. 7 (1931).

[FN2] [People ex rel. Nelson v. People's Bank & Trust Co. of Rockford](#), 353 Ill. 479, 187 N.E. 522, 89 A.L.R. 1328 (1933) (apparently following rule); [Poweshiek County v. Merchants' Nat. Bank of Grinnell](#), 209 Iowa 467, 228 N.W. 32, 82 A.L.R. 39 (1929); [Blythe v. Kujawa](#), 175 Minn. 88, 220 N.W. 168, 60 A.L.R. 330 (1928); [State v. Farmers' State Bank of Polk](#), 121 Neb. 532, 237 N.W. 857, 82 A.L.R. 7 (1931).

[FN3] [Farmers' Bank of White Plains v. Bailey](#), 221 Ky. 55, 297 S.W. 938 (1927).

- As to the necessity that the property must be identified to be successfully traced, see [§ 273](#).

[FN4] [Farmers' Bank of White Plains v. Bailey](#), 221 Ky. 55, 297 S.W. 938 (1927) (trust funds must reside in assets as they pass to assignee).

[FN5] [§ 629](#).

[FN6] [In re Commissioner of Banks and Real Estate](#), 327 Ill. App. 3d 441, 261 Ill. Dec. 775, 764 N.E.2d 66 (1st Dist. 2001), appeal denied, 198 Ill. 2d 592, 262 Ill. Dec. 619, 766 N.E.2d 239 (2002) and appeal denied, 198 Ill.

[2d 616, 264 Ill. Dec. 325, 770 N.E.2d 219 \(2002\).](#)

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[FN7] [St. Louis & S.F.R. Co. v. Spiller, 274 U.S. 304, 47 S. Ct. 635, 71 L. Ed. 1060 \(1927\); Hornick, More & Porterfield v. Farmers' & Merchants' Bank, 56 S.D. 18, 227 N.W. 375, 82 A.L.R. 16 \(1929\); Tyler County State Bank v. Shivers, 6 S.W.2d 108 \(Tex. Comm'n App. 1928\).](#)

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[FN8] [Schuyler v. Littlefield, 232 U.S. 707, 34 S. Ct. 466, 58 L. Ed. 806 \(1914\); Hornick, More & Porterfield v. Farmers' & Merchants' Bank, 56 S.D. 18, 227 N.W. 375, 82 A.L.R. 16 \(1929\).](#)

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[FN9] [§ 629.](#)

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[FN10] [Hoffman v. Rauch, 300 U.S. 255, 57 S. Ct. 446, 81 L. Ed. 629 \(1937\).](#)

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§ 281. Effect of inability to distinguish trust property from other property in commingled mass

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

In endeavoring to ascertain how much trust property or money went into a commingled mass, and how much was the trustee's own, every reasonable resolution as to which property is the beneficiary's should be

made against the trustee through whose fault the truth in the matter has become obscure; indeed, the rule has been followed that where the commingling is through the fault of the trustee, the entire mass will be treated as trust property or funds except insofar as the trustee may be able to distinguish what is his or hers.[FN1] Stated otherwise, if the commingling of the funds was wrongful, then the burden is on the trustee to distinguish his funds from the trust funds.[FN2]

[FN1] [Central Nat. Bank v. Connecticut Mut. Life Ins. Co.](#), 104 U.S. 54, 26 L. Ed. 693 (1881); [Hurst v. Hurst](#), 1 [Ariz. App.](#) 603, 405 P.2d 913 (1965); [Edgecombe Bank & Trust Co. v. Barrett](#), 238 N.C. 579, 78 S.E.2d 730 (1953).

[FN2] [In re Country Junction, Inc.](#), 41 B.R. 425 (W.D. Tex. 1984), judgment aff'd, [798 F.2d 1410](#) (5th Cir. 1986).

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§ 282. Effect of increase of value of commingled mass

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

Where a commingled mass of trust property or funds and other property or funds, commingled by a trustee wrongfully, increases in value, the beneficiary should share in the increase at least in proportion to his or her contribution to the mingled mass in its original condition.[FN1]

[FN1] [Bird v. Stein, 258 F.2d 168 \(5th Cir. 1958\)](#); [Regal Ins. Co. v. Summit Guar. Corp., 324 N.W.2d 697 \(Iowa 1982\)](#).

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§ 283. Remedies of beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

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[Liability of trustee for payments or conveyances under a trust subsequently held to be invalid, 77 A.L.R.4th 1177](#)

Equity impresses a trust, lien, or charge on the mass for the restitution of the trust property or funds commingled therein until the trust property or fund is separated from the mass and, where such separation is not

possible, until adequate restitution in some form authorized by law is made.[FN1] Ordinarily, good faith and value constitute a defense only to a transferee of trust property.[FN2]

[FN1] [Texas & P. Ry. Co. v. Manton](#), 164 U.S. 636, 17 S. Ct. 216, 41 L. Ed. 580 (1897); [Krusen Land & Timber Co. v. Tampa Suburban Corp.](#), 118 Fla. 173, 158 So. 712 (1935); [Cross v. Cross](#), 362 Mo. 1098, 246 S.W.2d 801 (1952).

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[FN2] §§ [290](#) to [299](#).
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§ 284. Presumption that first withdrawals are not from trust property or funds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

It is a broad and fundamental rule that withdrawals by a trustee for other than trust purposes from a mass, fund, bank account, or estate in which trust property or funds have been commingled, will be presumed to be made from other property and funds before they are made from the trust property and funds commingled therein.[FN1] This rule is directly contrary to the rule governing the presumption as to order of withdrawals from a mass, fund, or account in which a trustee has mixed funds of several trusts.[FN2] The basis of the rule is the underlying presumption that a person is innocent of crime or wrong,[FN3] and that it is reasonable to think

that a trustee ordinarily will withdraw for his or her private purposes money belonging to him or her rather than that belonging to the trust.[\[FN4\]](#) However, the rule has been called a fiction which is to be limited in its application.[\[FN5\]](#)

[\[FN1\]](#) Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U.S. 54, 26 L. Ed. 693 (1881); U.S. v. Elias-Rivera, 848 F.2d 16 (1st Cir. 1988); In re Property Leasing & Management, Inc., 46 B.R. 903 (Bankr. E.D. Tenn. 1985); Brown v. Coleman, 318 Md. 56, 566 A.2d 1091 (1989); In re Estate of Redpath, 224 Neb. 845, 402 N.W.2d 648 (1987); Moody v. Pitts, 708 S.W.2d 930 (Tex. App. Corpus Christi 1986).

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[\[FN2\]](#) [§ 289](#).

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[\[FN3\]](#) People v. California Safe Deposit & Trust Co., 175 Cal. 756, 167 P. 388 (1917); Andrew v. State Bank of New Hampton, 205 Iowa 1064, 217 N.W. 250 (1928).

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[\[FN4\]](#) In re Kountze Bros., 79 F.2d 98, 102 A.L.R. 367 (C.C.A. 2d Cir. 1935); Johnson v. Johnson, 268 S.W.2d 439 (Mo. Ct. App. 1954); Maynard v. Central Nat. Bank of Okmulgee, 1939 OK 223, 185 Okla. 272, 91 P.2d 653 (1939).

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[\[FN5\]](#) Cunningham v. Brown, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1924).

- As to the inapplicability of the rule where the trustee has only a defeasible title to moneys of several beneficiaries in a mixed account, see [§ 289](#).

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§ 285. Presumption that first withdrawals are not from trust property or funds—Rebuttal of presumption

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

Whereas some courts take the position that the presumption that a trustee will withdraw other property or funds from a commingled mass or a mixed account before trust property or funds will be withdrawn therefrom is conclusive in equity,[[FN1](#)] others take the view that the presumption is a rebuttable one.[[FN2](#)] With respect to the position that the presumption is rebuttable where withdrawals from the commingled mass never cause it to fall below an amount equal to the trust property or funds therein, the burden is on one, such as a receiver of the trustee, to establish that withdrawals were from, and dissipated, the trust property or funds in the commingled mass.[[FN3](#)] The size of the withdrawals from the commingled mass, losses by the trustee in business transactions, and diminution in total assets of a trustee during the existence of a commingled fund or account are not circumstances tending in themselves to rebut the presumption that the withdrawals were from the trustee's own funds first for his or her private purposes.[[FN4](#)] Mere book entries in themselves will not rebut the presumption.[[FN5](#)]

[[FN1](#)] [People ex rel. Nelson v. People's Bank & Trust Co. of Rockford, 353 Ill. 479, 187 N.E. 522, 89 A.L.R. 1328 \(1933\).](#)

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[[FN2](#)] [Andrew v. State Bank of New Hampton, 205 Iowa 1064, 217 N.W. 250 \(1928\).](#)

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[[FN3](#)] [Andrew v. State Bank of New Hampton, 205 Iowa 1064, 217 N.W. 250 \(1928\).](#)

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[[FN4](#)] [Austin v. Hough, 10 S.W.2d 655 \(Mo. Ct. App. 1928\) \(applying Texas law\).](#)

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[[FN5](#)] [Nichols v. Bank of Syracuse, 220 Mo. App. 1019, 278 S.W. 793 \(1925\).](#)

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§ 286. Effect of diminution or depletion of commingled mass

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

The consequence of the presumption that first withdrawals are not from trust property or funds^[FN1] is that to the extent that any portion of a mingled mass into which funds of a beneficiary or innocent party have entered remains in any form, such mass is subject to the trust or equitable lien or charge binding it in favor of such beneficiary or innocent party.^[FN2] Thus, if the fund or account in which the trust funds have been commingled is never thereafter reduced by withdrawals below the amount of the trust funds, they are preserved in toto and can be recovered.^[FN3] However, if the commingled fund or account is reduced below the amount of trust funds, the trust funds are dissipated to such extent, and if the entire commingled fund or account is completely withdrawn, the trust funds are dissipated and lost unless they can be further traced and identified.^[FN4] In fact, it is generally held that only the lowest balance in a commingled or mixed mass, fund, or bank account of a trustee at any time after the mingling of trust funds therein is subject to the trust, subsequent deposits not replacing as trust funds those trust funds withdrawn therefrom.^[FN5]

^[FN1] § 284.

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^[FN2] [City of Lincoln v. Morrison](#), 64 Neb. 822, 90 N.W. 905 (1902).

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^[FN3] [Connecticut General Life Ins. Co. v. Universal Ins. Co.](#), 838 F.2d 612 (1st Cir. 1988); [Blair v. Trafco Products, Inc.](#), 142 Mich. App. 349, 369 N.W.2d 900 (1985).

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^[FN4] [Schuyler v. Littlefield](#), 232 U.S. 707, 34 S. Ct. 466, 58 L. Ed. 806 (1914); [In re U.S. Lines, Inc.](#), 79 B.R. 542 (Bankr. S.D. N.Y. 1987); [First Nat. Bank of Amarillo v. Martin](#), 48 B.R. 317, 40 U.C.C. Rep. Serv. 1521 (N.D. Tex. 1985).

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^[FN5] [Cunningham v. Brown](#), 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1924); [In re Mahan & Rowsey, Inc.](#), 817 F.2d 682 (10th Cir. 1987); [Barrs v. Barrs Rent-A-Car Co.](#), 71 Ohio App. 465, 26 Ohio Op. 378, 38 Ohio L. Abs. 389, 50 N.E.2d 388 (1st Dist. Hamilton County 1943); [Maynard v. Central Nat. Bank of Okmulgee](#), 1939

[OK 223, 185 Okla. 272, 91 P.2d 653 \(1939\).](#)

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West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

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[Distribution of funds where funds of more than one trust have been commingled by trustee and balance is insufficient to satisfy all trust claims, 17 A.L.R.3d 937](#)

As a general rule, the commingling of trust funds with other funds does not destroy the identification of the trust funds.[FN1]

Where a trustee of different trusts commingles the properties or funds of the several trusts with each other but not with his or her own funds, restitution will generally be made to the innocent beneficiaries in proportion to the commingling, insofar as possible, out of the trust in which the properties and funds of the other trusts have been commingled.[FN2] The beneficiaries may maintain a suit in equity to have the mass charged with equitable liens and sold for their benefit, and the distribution of the proceeds made to the extent of the liens adjudicated in the cause.[FN3] In the event that the commingled funds are insufficient to satisfy all claims, the

beneficiaries are entitled to be paid in the inverse order in which their moneys went into the account,[FN4] and the proportion to be distributed to the beneficiary of each trust is to be reduced by the amount of any withdrawals made after the trust fund was deposited in the trustee.[FN5]

Where the trustee was a financial institution which commingled funds of more than one trust with its own funds, courts have made a proportionate distribution among the trust beneficiaries,[FN6] applied the first-in-first-out doctrine,[FN7] or relegated trust beneficiaries to the status of general creditors.[FN8]

[FN1] [In re Commissioner of Banks and Real Estate](#), 327 Ill. App. 3d 441, 261 Ill. Dec. 775, 764 N.E.2d 66 (1st Dist. 2001), appeal denied, [198 Ill. 2d 592](#), 262 Ill. Dec. 619, 766 N.E.2d 239 (2002) and appeal denied, [198 Ill. 2d 616](#), 264 Ill. Dec. 325, 770 N.E.2d 219 (2002).

[FN2] [Ruddle v. Moore](#), 411 F.2d 718 (D.C. Cir. 1969); [Murry v. Hale](#), 203 F. Supp. 583 (E.D. Ark. 1962); [In re Lemons & Associates, Inc.](#), 67 B.R. 198 (Bankr. D. Nev. 1986).

[FN3] [Murry v. Hale](#), 203 F. Supp. 583 (E.D. Ark. 1962).

[FN4] § 289.

[FN5] [Gibbs v. Gerberich](#), 1 Ohio App. 2d 93, 30 Ohio Op. 2d 113, 203 N.E.2d 851, 2 U.C.C. Rep. Serv. 369, 17 A.L.R.3d 928 (9th Dist. Medina County 1964).

[FN6] [Andrew v. State Bank of New Hampton](#), 205 Iowa 1064, 217 N.W. 250 (1928).

[FN7] [Walker & Gilbert v. First State Bank of Alamogordo, N. M.](#), 33 N.M. 565, 273 P. 764 (1928).

[FN8] [Reichert v. Fidelity Bank & Trust Co.](#), 261 Mich. 107, 245 N.W. 808 (1932).

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§ 288. Diversion from one trust estate into another

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [358\(1\)](#), [358\(2\)](#)

As a general proposition, trust property or funds wrongfully diverted from one trust estate by the trustee to make good his or her deficiency in another trust estate may be followed into such other trust estate, and may be specifically recovered if they are still within the latter estate.[\[FN1\]](#)

[\[FN1\] Newell v. Hadley, 206 Mass. 335, 92 N.E. 507 \(1910\); Whiting v. Hudson Trust Co., 234 N.Y. 394, 138 N.E. 33, 25 A.L.R. 1470 \(1923\).](#)

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§ 289. Presumption as to order of withdrawals

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 358(1), 358(2)

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[Distribution of funds where funds of more than one trust have been commingled by trustee and balance is insufficient to satisfy all trust claims, 17 A.L.R.3d 937](#)

In case the fund in which several trusts have been commingled is insufficient to satisfy them all, the courts have sometimes followed the rule that the first withdrawals are to be charged against the first deposits, and the claimants are entitled to be paid in the inverse order in which their moneys went into the account.[\[FN1\]](#) A rule which is perhaps a fairer one is that withdrawals made by the trustee for his or her own benefit, or for the benefit of others not beneficiaries of the trust, are to be charged to the several trusts in proportion to their interest in the cash credit or other property at the time of withdrawal.[\[FN2\]](#)

The presumption that a trustee will withdraw his or her own funds first from an account in which the trustee has mixed trust funds[\[FN3\]](#) is without application where all the money in an account of the trustee is that of numerous beneficiaries and the title of the trustee to all the money is only a defeasible title.[\[FN4\]](#) Moreover, the rule that the first withdrawals are to be charged against the first deposits has no application where a trustee, after commingling the funds of several beneficiaries in his or her account, has exhausted the account by withdrawals which, by virtue of his or her defeasible title to the money, the trustee could legally make.[\[FN5\]](#)

[\[FN1\] Cunningham v. Brown, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 \(1924\).](#)

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[\[FN2\] Murry v. Hale, 203 F. Supp. 583 \(E.D. Ark. 1962\); Gibbs v. Gerberich, 1 Ohio App. 2d 93, 30 Ohio Op. 2d 113, 203 N.E.2d 851, 2 U.C.C. Rep. Serv. 369, 17 A.L.R.3d 928 \(9th Dist. Medina County 1964\).](#)

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[\[FN3\] § 284.](#)

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[\[FN4\] Cunningham v. Brown, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 \(1924\).](#)

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[\[FN5\] Cunningham v. Brown, 265 U.S. 1, 44 S. Ct. 424, 68 L. Ed. 873 \(1924\).](#)

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§ 290. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 355 to [357\(3\)](#)

Forms

Complaint, petition, or declaration—By beneficiary—For rescission of sale of trust real property by trustee—
Collusion between trustee and purchaser—Insufficient consideration paid. [24 Am. Jur. Pleading and Practice Forms, Trusts § 256](#)

The right of a beneficiary of a trust to reclaim trust property in the hands of a third person or to charge such third person as a constructive trustee is primarily a question of the status of such third person as a bona fide purchaser for value and without notice.^[FN1] The equitable interest of the beneficiary in the property or funds of the trust are cut off by the trustee's alienation or encumbrance of such trust property or funds to a purchaser for value and in good faith who has no actual or constructive notice of any breach of trust in the alienation or encumbrance.^[FN2] One who does not acquire trust property in good faith is not protected as against equities of the beneficiary, but takes the property or funds charged or impressed with the trust,^[FN3] notwithstanding that he or she gives full value in the transaction.^[FN4] Moreover, one who has taken in good faith and without notice of any breach of trust is not protected if he or she gave no value.^[FN5] The rationale for the bona fide purchaser defense to the imposition of a constructive trust is simply that a person who has obtained the title to property for value and without notice of the claim of another to the property is not unjustly enriched if he or she is permitted to retain it.^[FN6] The bona fide purchaser rule does not, of course, deprive the beneficiary of his remedies of enforcing the trust against the proceeds in the hands of the trustee or against the trustee personally.^[FN7]

^[FN1] [Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.](#), 530 U.S. 238, 120 S. Ct. 2180, 147 L. Ed. 2d 187 (2000); [Cox v. Waudby](#), 433 N.W.2d 716 (Iowa 1988); [John R. Boyce Family Trust v. Snyder](#), 128 S.W.3d 630 (Mo. Ct. App. E.D. 2004); [Huber v. Coast Inv. Co., Inc.](#), 30 Wash. App. 804, 638 P.2d 609 (Div. 2 1981).
- As to what constitutes purchaser for value, see [§ 293](#).

^[FN2] [Moore v. Crawford](#), 130 U.S. 122, 9 S. Ct. 447, 32 L. Ed. 878 (1889); [In re Williams Bros. Asphalt Paving Co.](#), 59 B.R. 71, 1 U.C.C. Rep. Serv. 2d 794 (Bankr. W.D. Mich. 1986); [In re Marriage of Allen](#), 724

[P.2d 651 \(Colo. 1986\)](#); [Cox v. Waudby, 433 N.W.2d 716 \(Iowa 1988\)](#); [Huber v. Coast Inv. Co., Inc., 30 Wash. App. 804, 638 P.2d 609 \(Div. 2 1981\)](#).

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[\[FN3\] U.S. v. Dunn, 268 U.S. 121, 45 S. Ct. 451, 69 L. Ed. 876 \(1925\)](#); [In re Gherman, 103 B.R. 326 \(Bankr. S.D. Fla. 1989\)](#).

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[\[FN4\] Jones v. Van Doren, 130 U.S. 684, 9 S. Ct. 685, 32 L. Ed. 1077 \(1889\)](#); [Lewis v. Akerberg, 100 Ohio App. 209, 60 Ohio Op. 192, 136 N.E.2d 372 \(2d Dist. Franklin County 1954\)](#).

- As to what constitutes good faith, see [§ 291](#).

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[\[FN5\] Namow Corp. v. Egger, 99 Nev. 590, 668 P.2d 265 \(1983\)](#); [Huber v. Coast Inv. Co., Inc., 30 Wash. App. 804, 638 P.2d 609 \(Div. 2 1981\)](#).

- As to what constitutes value, see [§ 293](#).

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[\[FN6\] In re Marriage of Allen, 724 P.2d 651 \(Colo. 1986\)](#).

- As to constructive trusts, generally, see §§ [168](#) to [204](#).

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[\[FN7\] § § 275, 276](#).

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§ 291. What constitutes good faith; supervening equities

West's Key Number Digest

The general rule is that good faith in one taking a transfer or encumbrance of trust property or funds exists where the transferee has no notice, actual or constructive, of any breach of trust in the transaction.^[FN1] A third party is not required to have changed its position or acted in reliance to its detriment upon receipt of the proceeds from the unauthorized sale or encumbrance of trust property by the trustee, other than whatever change or reliance is inherent in the giving of consideration, to take the proceeds free of the trust.^[FN2] One taking a transfer or encumbrance of trust property or funds does not act in good faith, where he or she has failed to exercise such duty of inquiry as the law imposes under the circumstances.^[FN3] To illustrate, if a trustee, in violation of his or her duty, uses trust money or proceeds from sale of trust assets to pay an antecedent debt of his or her own, and the creditor has no notice that the money is subject to the trust or that the trust is being violated, the creditor takes free of the trust, and the money cannot be followed by the beneficiary into the hands of the creditor, because superior equities have intervened under the trust pursuit rule.^[FN4]

The Uniform Fiduciaries' Act provides that a thing is done "in good faith" when it is in fact done honestly, whether it is done negligently or not;^[FN5] the expression in the Act to the effect that acts done with knowledge of such facts that taking a check from or paying a check drawn by a fiduciary amounts to bad faith means acts done dishonestly within the meaning of [§ 9 of the Uniform Fiduciaries Act](#).^[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Transfer of real property from transferor's trust to family limited partnership did not provide and had no potential to provide any nontax benefit to transferor, for purposes of determining whether transfer was bona fide sale for adequate and full consideration; transferring property to partnership did not give transferor's trust any additional protection from creditors because transferor's trust was sole general partner, there was no change in continuity of management of property after transferor's trust transferred it to partnership, and reduction of taxes and facilitation of gift giving was not considered in this context to be bona fide purpose. [Bigelow v. C.I.R., T.C. Memo. 2005-65, T.C.M. \(RIA\) P 2005-065 \(2005\)](#)

For purposes of the Uniform Fiduciaries Law (UFL), a thing is done in "bad faith" when it is in fact done dishonestly and not merely negligently. [Hendren v. Farmers State Bank, S.B., 272 S.W.3d 345 \(Mo. Ct. App. W.D. 2008\)](#), reh'g and/or transfer denied, (Dec. 23, 2008) and transfer denied, (Jan. 27, 2009).

[END OF SUPPLEMENT]

^[FN1] As to what constitutes notice, see [§ 292](#).

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^[FN2] [Sprague v. Farm Credit Services of Central Kansas PCA, 28 Kan. App. 2d 872, 22 P.3d 608 \(2001\)](#).

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^[FN3] [Rafkind v. Beer, 426 So. 2d 1097 \(Fla. Dist. Ct. App. 3d Dist. 1983\)](#); [Shotwell v. Sioux Falls Savings Bank, 34 S.D. 109, 147 N.W. 288 \(1914\)](#).

- As to the duty of inquiry generally, see [§ 295](#).

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[FN4] [Sprague v. Farm Credit Services of Central Kansas PCA, 28 Kan. App. 2d 872, 22 P.3d 608 \(2001\)](#)
(lender did not act in bad faith or with notice of cattle owner's interest, but rather was itself victim of fraud).

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[FN5] [Uniform Fiduciaries Act § 1\(2\)](#).

- For a general discussion of the effect of the Uniform Fiduciaries' Act on transfers by a fiduciary, see [§ 292](#).

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[FN6] [Colby v. Riggs Nat. Bank, 92 F.2d 183, 114 A.L.R. 1065 \(App. D.C. 1937\)](#).

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§ 292. What constitutes notice

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [357\(2\)](#)

Notice which will charge the purchaser with the equities of the beneficiary may be constructive notice[FN1] such as exists where a trust instrument containing a limitation on the power of a trustee to convey has been duly recorded.[FN2] Such notice may also exist where title papers provide full means of ascertaining such a limitation.[FN3]

Where a transferee has reason to question the authority of a trustee to sell trust property and the knowledge of the requisite facts would be obtained by ordinary diligence, the transferee is considered to have knowledge of a want of authority in the trustee.[FN4] However, as a general rule, where there are facts imposing a duty to

inquire, but the inquiry would not have disclosed the existence of an equity, the purchaser is not charged with notice of it.[FN5]

The Uniform Fiduciaries' Act, is designed to establish uniformity and certainty as to constructive notice of a breach of trust, where trust property or funds are transferred or encumbered.[FN6] The expression "actual knowledge of the breach of his obligation as fiduciary" as used in the Act to refer to a payee or transferee from a trustee is to be read to mean actual knowledge of misappropriation.[FN7]

[FN1] [Wilson v. Wall, 73 U.S. 83, 18 L. Ed. 727 \(1867\)](#); [Paolino v. Channel Home Centers, 668 F.2d 721 \(3d Cir. 1981\)](#); [In re Ehrlich, 59 B.R. 646 \(Bankr. N.D. Ill. 1986\)](#).

[FN2] [Petroleum Royalties Co. of Okl. v. Hartford Acc. & Indem. Co., 106 F.2d 440, 124 A.L.R. 1403 \(C.C.A. 10th Cir. 1939\)](#).

[FN3] [Oliver v. Piatt, 44 U.S. 333, 3 How. 333, 11 L. Ed. 622 \(1845\)](#); [In re Ehrlich, 59 B.R. 646 \(Bankr. N.D. Ill. 1986\)](#).

[FN4] [In re Ehrlich, 59 B.R. 646 \(Bankr. N.D. Ill. 1986\)](#).

[FN5] [In re Bell & Beckwith, 838 F.2d 844 \(6th Cir. 1988\)](#).

[FN6] [Colby v. Riggs Nat. Bank, 92 F.2d 183, 114 A.L.R. 1065 \(App. D.C. 1937\)](#).

[FN7] [Colby v. Riggs Nat. Bank, 92 F.2d 183, 114 A.L.R. 1065 \(App. D.C. 1937\)](#).

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§ 293. What constitutes value

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [357\(3\)](#)

As a general proposition, a bona fide purchaser is protected only to the extent that he gave value for the property conveyed.[FN1] Value given by a purchaser or encumbrancer of trust property cutting off the equities of beneficiaries may consist in a detriment suffered in good faith,[FN2] and such detriment may be found in a change of position[FN3] as, for example, where a bank, at the request of a depositor, pays out trust funds with no knowledge of their character.[FN4] Value cutting off the equities of beneficiaries has also been found in the detriment of not discovering embezzlements by an agent through his or her use of trust funds to conceal his misconduct.[FN5]

[FN1] § 290.

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[FN2] [Aetna Cas. & Sur. Co. of Hartford, Conn. v. Local Bldg. & Loan Ass'n, 1933 OK 137, 162 Okla. 141, 19 P.2d 612, 86 A.L.R. 526 \(1933\).](#)

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[FN3] [Aetna Cas. & Sur. Co. of Hartford, Conn. v. Local Bldg. & Loan Ass'n, 1933 OK 137, 162 Okla. 141, 19 P.2d 612, 86 A.L.R. 526 \(1933\); Shotwell v. Sioux Falls Savings Bank, 34 S.D. 109, 147 N.W. 288 \(1914\).](#)

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[FN4] [Aetna Cas. & Sur. Co. of Hartford, Conn. v. Local Bldg. & Loan Ass'n, 1933 OK 137, 162 Okla. 141, 19 P.2d 612, 86 A.L.R. 526 \(1933\).](#)

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[FN5] [Aetna Cas. & Sur. Co. of Hartford, Conn. v. Local Bldg. & Loan Ass'n, 1933 OK 137, 162 Okla. 141, 19 P.2d 612, 86 A.L.R. 526 \(1933\).](#)

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§ 294. What constitutes value—Effect of familial or like relationship between trustee and transferee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [357\(3\)](#)

A marriage relationship between a trustee and his transferee does not constitute such value as to cut off equities of a beneficiary in trust property or funds in the hands of the transferee.[\[FN1\]](#) Thus, the spouse of a person who acquires property with stolen or misappropriated funds does not occupy the position of a bona fide purchaser, and the spouse's interest cannot cut off the interest of beneficiaries unless he or she gives consideration for his or her acquisition of the property.[\[FN2\]](#) Moreover, although agreeing to accept a specified amount of money, maintenance, and child support may be adequate consideration to support a property settlement agreement, it does not constitute value sufficient to make this individual a bona fide purchaser for purposes of defending against equitable claims that would result in a constructive trust.[\[FN3\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Transfer of real property from transferor's trust to family limited partnership had adverse financial effect on transferor, for purposes of determining whether transfer was bona fide sale for adequate and full consideration, and thus, whether that property was included in transferor's gross estate; transfer of property to partnership left transferor unable to meet her financial obligations because her reduced income of \$5,800 was insufficient to pay her reduced expenses of \$7,000, and when she died, she had only \$8,505 of liquid assets left to supplement her inadequate monthly income. [Bigelow v. C.I.R., T.C. Memo. 2005-65, T.C.M. \(RIA\) P 2005-065 \(2005\)](#)

[END OF SUPPLEMENT]

[\[FN1\] Hungerford v. Curtis, 43 R.I. 124, 110 A. 650, 12 A.L.R. 1040 \(1920\)](#) (disapproved of on other grounds by, [Westerly Community Credit Union v. Industrial Nat. Bank of Providence, 103 R.I. 662, 240 A.2d 586 \(1968\)](#)).

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[\[FN2\] Cox v. Waudby, 433 N.W.2d 716 \(Iowa 1988\)](#).

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[\[FN3\] In re Marriage of Allen, 724 P.2d 651 \(Colo. 1986\)](#).

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§ 295. Duty of inquiry

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [357\(2\)](#)

The transferee must, when possessed of knowledge of a fact sufficient to put one on inquiry as to the terms and conditions of the trust and the authority of the trustee, make such an inquiry to be protected as a bona fide purchaser for value.[\[FN1\]](#) In the situation where a person has an independent equity arising from his purchase from persons holding the relation of trustee and cestui que trust, there is no need for any inquiry into the consideration or motives that operated upon such parties to assume their relation of trustee and cestui que trust.[\[FN2\]](#) Where a transferee has reason to question the authority of a trustee to sell trust property and the knowledge of the requisite facts would be obtained by ordinary diligence, the transferee is considered to have knowledge of a want of authority in the trustee.[\[FN3\]](#)

The Uniform Fiduciaries' Act is designed to establish uniformity and certainty as to the duty of inquiry, where trust property or funds are transferred or encumbered.[\[FN4\]](#)

[\[FN1\] Paolino v. Channel Home Centers, 668 F.2d 721 \(3d Cir. 1981\); Soule v. Johnson, 34 Idaho 439, 201 P. 834 \(1921\).](#)

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[\[FN2\] Gridley v. Wynant, 64 U.S. 500, 23 How. 500, 16 L. Ed. 411 \(1859\).](#)

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[\[FN3\] § 292.](#)

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[\[FN4\] Colby v. Riggs Nat. Bank, 92 F.2d 183, 114 A.L.R. 1065 \(App. D.C. 1937\).](#)

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§ 296. Duty of inquiry—Effect of party's knowledge that second party is trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [357\(2\)](#)

Where one taking a transfer or encumbrance of property knows that it is trust property and that the grantor is a trustee, he or she should inquire into the scope of authority of the trustee, having due regard to the character of the trust property involved in the transaction.[\[FN1\]](#) It is presumed that a trustee has no power to sell or mortgage the trust estate, and prospective purchasers and mortgagees must therefore exercise reasonable diligence to ascertain the authority of the trustee.[\[FN2\]](#)

While the fact that a grantee in a deed is described as "trustee" gives no notice of the name of the beneficiary or of the character of the trust, it does give notice of a trust of some description, and imposes on a subsequent purchaser the duty of inquiry as to its character and limitations.[\[FN3\]](#)

[\[FN1\] Shotwell v. Sioux Falls Savings Bank, 34 S.D. 109, 147 N.W. 288 \(1914\).](#)

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[\[FN2\] Geysler-Marion Gold-Min. Co. v. Stark, 106 F. 558 \(C.C.A. 8th Cir. 1901\); Snyder v. Collier, 85 Neb. 552, 123 N.W. 1023 \(1909\).](#)

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[\[FN3\] Union Pac. R. Co. v. Durant, 95 U.S. 576, 24 L. Ed. 391 \(1877\); Geysler-Marion Gold-Min. Co. v. Stark, 106 F. 558 \(C.C.A. 8th Cir. 1901\); Snyder v. Collier, 85 Neb. 552, 123 N.W. 1023 \(1909\).](#)

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§ 297. Duty of inquiry—Effect of trustee's authorization to sell

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [357\(2\)](#)

Where the trustee, by the terms of the trust, has power to transfer or encumber property of the trust estate, one dealing with him or her in good faith is not bound to go further and ascertain whether in fact the act of the trustee is justified, and that no breach of trust is intended,[\[FN1\]](#) unless the transaction in view of the trust relation is an unusual one, as where one who is both the owner of land and the trustee of a mortgage on that land for the benefit of another satisfies the mortgage before the loan matures.[\[FN2\]](#)

[\[FN1\] Dodge v. Stone, 76 R.I. 318, 69 A.2d 632 \(1949\).](#)

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[\[FN2\] Kirsch v. Tozier, 143 N.Y. 390, 38 N.E. 375 \(1894\).](#)

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§ 298. Rules applicable where trust property is applied to trustee's private debts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [351](#) to [353](#)

A trust follows trust property or funds where the trustee applies or encumbers such property or funds to the satisfaction of his or her private debts, at least where the creditor has actual or constructive notice of the breach of trust involved in the transaction.[\[FN1\]](#) In the absence of a statute to the contrary, a purchaser knowing of the trust and that the trustee is applying the trust property to his own debts is bound to inquire into the authority of the trustee; in other words, he takes at his peril.[\[FN2\]](#)

[\[FN1\] Union Stock-Yards Nat. Bank v. Gillespie, 137 U.S. 411, 11 S. Ct. 118, 34 L. Ed. 724 \(1890\); Hill v. Flemming, 128 Ky. 201, 32 Ky. L. Rptr. 1065, 107 S.W. 764 \(1908\).](#)

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[\[FN2\] Duncan v. Jaudon, 82 U.S. 165, 21 L. Ed. 142 \(1872\).](#)

- As to a duty of inquiry where one party knows that the other party is a trustee, see [§ 296](#).

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§ 299. Subsequent transfers by bona fide purchaser

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 355 to [357\(3\)](#)

Purchasers with notice of a trust who purchase from a bona fide purchaser for value take the title of their vendor free from the trust.^[FN1] A trustee who reacquires trust property, however, after it passes through a bona fide purchaser for value, takes subject to the trust,^[FN2] the beneficiary having an election to take either the original trust property that has been reacquired or to hold the trustee for the proceeds that he received when he sold the property before reacquiring it.^[FN3]

^[FN1] [Alexander v. Pendleton, 12 U.S. 462, 3 L. Ed. 624 \(1814\).](#)

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^[FN2] [Independent Coal & Coke Co. v. U.S., 274 U.S. 640, 47 S. Ct. 714, 71 L. Ed. 1270 \(1927\).](#)

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^[FN3] [§ 274.](#)

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Forms

[Am. Jur. Legal Forms 2d, Trusts § 251:565](#)

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§ 300. Intent of trustor as controlling

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [172](#)

In the administration of a trust, the discovered intent of the trustor is of controlling importance,[\[FN1\]](#) and the trust is to be administered in the manner laid down by the grantor.[\[FN2\]](#) Neither the court,[\[FN3\]](#) nor a beneficiary,[\[FN4\]](#) nor the legislature[\[FN5\]](#) is competent to violate such intent and to substitute its discretion for that of the trustor.[\[FN6\]](#)

The administration of a trust involves methods of accomplishing the purposes of the trust.[\[FN7\]](#)

[\[FN1\]](#) [Ventura County Dept. of Child Support Services v. Brown](#), 117 Cal. App. 4th 144, 11 Cal. Rptr. 3d 489 (2d Dist. 2004), as modified on denial of reh'g, (Apr. 28, 2004); [In re Trusteeship Created by City of Sheridan](#), 593 N.W.2d 702 (Minn. Ct. App. 1999) (applying Colo. law); [Wachovia Bank of Georgia v. Namik](#), 265 Ga. App. 80, 593 S.E.2d 35 (2003), cert. granted, (May 24, 2004); [Matter of Lopez](#), 64 Haw. 44, 636 P.2d 731 (1981); [Harris Trust and Sav. Bank v. Beach](#), 118 Ill. 2d 1, 112 Ill. Dec. 224, 513 N.E.2d 833 (1987); [In re Ruth Easton Fund](#), 680 N.W.2d 541 (Minn. Ct. App. 2004); [In re Estate of Berthot](#), 312 Mont. 366 (Mont., 2002); [Page v. Page](#), 243 S.C. 312, 133 S.E.2d 829 (1963); [Hurley v. Moody Nat. Bank of Galveston](#), 98 S.W.3d 307 (Tex. App. Houston 1st Dist. 2003); [Ward v. NationsBank of Virginia, N.A.](#), 256 Va. 427, 507 S.E.2d 616 (1998).

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[\[FN2\]](#) [Copley v. Copley](#), 126 Cal. App. 3d 248, 178 Cal. Rptr. 842 (4th Dist. 1981).

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[\[FN3\]](#) §§ [291](#) to [294](#).

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[\[FN4\]](#) [Upham v. Plankinton](#), 152 Wis. 275, 140 N.W. 5 (1913).

[\[FN5\] Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[\[FN6\] In re Jones' Will, 221 Minn. 524, 22 N.W.2d 633 \(1946\).](#)

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[\[FN7\] Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 79 Ohio St. 3d 98, 1997-Ohio-402, 679 N.E.2d 1084 \(1997\).](#)

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§ 301. Law and place of administration

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#)

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Governing law. [Am. Jur. Legal Forms 2d, Trusts § 251:565](#)

Generally, in order to determine the place of the administration of a trust, consideration is to be given to the provisions of the trust instrument, the residences of the trustee, the residences, if any, of the beneficiaries, the location of the properties, and the location where the business of the trust is to be carried on.[\[FN1\]](#) Additionally, the personal jurisdiction acquired over the parties interested in the trust through personal service may be considered.[\[FN2\]](#)

The administration of a trust may, of course, involve the performance of acts in more than one place. It may, indeed, involve acts in several states which must be performed legally according to the respective laws of such states. But this fact does not determine the place of administration, within the legal sense, for the purpose of determining jurisdiction and the generally applicable law.[\[FN3\]](#) To illustrate, the validity of an oil lease is to be determined by the law of the situs of the property, but the distribution by testamentary trustees of funds derived therefrom as corpus or income is to be determined by the law of the state where the decedent resided and the estate is administered.[\[FN4\]](#) While the place of administration of a trust of real estate is where the real estate is situated,[\[FN5\]](#) the terms of a trust may provide for a change of situs of a trust of other than real property.[\[FN6\]](#)

[\[FN1\] People v. First Nat. Bank, 364 Ill. 262, 4 N.E.2d 378, 108 A.L.R. 277 \(1936\); Doerr v. Warner, 247 Minn. 98, 76 N.W.2d 505 \(1956\); In re Risher's Will, 227 Wis. 104, 277 N.W. 160, 115 A.L.R. 790 \(1938\).](#)

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[\[FN2\] Doerr v. Warner, 247 Minn. 98, 76 N.W.2d 505 \(1956\).](#)

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[\[FN3\] People v. First Nat. Bank, 364 Ill. 262, 4 N.E.2d 378, 108 A.L.R. 277 \(1936\).](#)

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[\[FN4\] In re Bruner's Will, 363 Pa. 552, 70 A.2d 222, 18 A.L.R.2d 92 \(1950\).](#)

- As to conflicts of laws with respect to trusts, see § § [37](#) to [39](#).

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[\[FN5\] Hartsfield v. Lescher, 721 F. Supp. 1052 \(E.D. Ark. 1989\).](#)

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[\[FN6\] Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309, 139 A.L.R. 1117 \(1942\).](#)

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§ 302. Equity jurisdiction, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [158](#)

Courts of equity have original, general, and inherent jurisdiction over trusts[[FN1](#)] and the administration thereof,[[FN2](#)] to the end that beneficiaries incapable of looking out for themselves may be protected against the fraud, incompetency, or neglect of the trustee.[[FN3](#)] Generally, a court of equity, as part of its general supervisory powers over trusts, has the authority to instruct and advise trustees about their powers and duties.[[FN4](#)]

While the jurisdiction of equity courts may be exclusive,[[FN5](#)] except insofar as other courts are invested therewith by statute,[[FN6](#)] there are limited instances in which the beneficiary may maintain an action at law against the trustee.[[FN7](#)]

The scope of an equity court's supervisory control includes, of necessity, any matter which concerns the integrity of the trust res—its administration, its preservation, and its disposition, and any other matter wherein its officers (trustees) are affected in the discharge of their duties.[[FN8](#)]

Observation: A trial court may still have jurisdiction to tax costs to the trust beneficiaries, in an action to remove the trustee, even though the court dismisses the action for lack of subject-matter jurisdiction.[[FN9](#)]

[\[FN1\] § 601.](#)

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[\[FN2\] *Mabry v. Scott*, 51 Cal. App. 2d 245, 124 P.2d 659 \(2d Dist. 1942\); *Reedy v. Johnson's Estate*, 200 Miss. 205, 26 So. 2d 685 \(1946\); *Brock v. Blackwood*, 143 S.W.3d 47 \(Mo. Ct. App. W.D. 2004\), reh'g and/or transfer denied, \(July 27, 2004\) and transfer denied, \(Sept. 28, 2004\); *Rock Springs Land and Timber, Inc. v. Lore*, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN3\] *Flanagan State Bank v. Bromenn Healthcare*, 140 Ill. App. 3d 137, 94 Ill. Dec. 303, 487 N.E.2d 1180 \(4th Dist. 1986\); *Wertin v. Wertin*, 217 Minn. 51, 13 N.W.2d 749, 151 A.L.R. 1302 \(1944\); *Crisman v. Swanson*, 193 Va. 247, 68 S.E.2d 502 \(1952\).](#)

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[\[FN4\] *Brock v. Blackwood*, 143 S.W.3d 47 \(Mo. Ct. App. W.D. 2004\), reh'g and/or transfer denied, \(July 27, 2004\) and transfer denied, \(Sept. 28, 2004\); *Rock Springs Land and Timber, Inc. v. Lore*, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN5\] *Village of Brookfield v. Pentis*, 101 F.2d 516 \(C.C.A. 7th Cir. 1939\); *Felsenheld v. Bloch Bros. Tobacco Co.*, 119 W. Va. 167, 192 S.E. 545, 123 A.L.R. 334 \(1937\).](#)

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[\[FN6\] § 303.](#)

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[\[FN7\] *Jefferson Nat. Bank of Miami Beach v. Central Nat. Bank in Chicago*, 700 F.2d 1143 \(7th Cir. 1983\).](#)

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[\[FN8\] *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\) \(noting Pa. law\); *Benadom v. Colby*, 81 Md. App. 222, 567 A.2d 463 \(1989\); *Centerre Trust Co. v. Jackson Saw Mill Co.*, 736 S.W.2d 486 \(Mo. Ct. App. E.D. 1987\); *Papiernik v. Papiernik*, 45 Ohio St. 3d 337, 544](#)

[N.E.2d 664 \(1989\)](#).

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[FN9] [In re Charnock, 158 N.C. App. 35, 579 S.E.2d 887 \(2003\)](#), cert. denied, [357 N.C. 506, 588 S.E.2d 473 \(2003\)](#) and decision aff'd, [358 N.C. 523, 597 S.E.2d 706 \(2004\)](#).

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§ 303. Probate courts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [158](#)

The jurisdiction of probate courts to administer trusts is often based on constitutional or statutory provisions granting such jurisdiction.[FN1] Such jurisdiction may extend to both inter vivos and testamentary trusts.[FN2] In fact, a probate court may be granted exclusive jurisdiction to administer trusts and instruct trustees.[FN3] Where probate courts possess general equity powers, these powers may include the authority to supervise and control the administration of trusts.[FN4] However, jurisdiction of a probate court over trustees is in some instances limited to testamentary trusts and does not extend to inter vivos trusts.[FN5]

Caution: Where independent grounds exist for the exercise of equity jurisdiction, the fact that a fiduciary will be made to account for his or her administration in a court of probate jurisdiction does not deprive an equity court of jurisdiction.[FN6]

Observation: Proper pleading may be required to bring a petition regarding trust administration within the specific jurisdiction of the probate court.[FN7]

[FN1] [Johnson v. Kotyck](#), 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 (2d Dist. 1999); [Matter of Heisserer](#), 797 S.W.2d 864 (Mo. Ct. App. S.D. 1990); [Martin v. Wayne County Nat. Bank Trust](#), 2004 Ohio 4194 (Ohio.App.9.Dist.Wayne.Co.,2004); [Mobil Oil Corp. v. Shores](#), 128 S.W.3d 718 (Tex. App. Fort Worth 2004) (although finding particular action did not involve a trust); [State v. Underwood](#), 54 Wyo. 1, 86 P.2d 707 (1939).

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[FN2] [Johnson v. Kotyck](#), 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 (2d Dist. 1999).

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[FN3] [Matter of Estate of Butterfield](#), 418 Mich. 241, 341 N.W.2d 453 (1983); [Matter of Green Charitable Trust](#), 172 Mich. App. 298, 431 N.W.2d 492 (1988).

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[FN4] [Matter of Trust of Loeb](#), 492 N.E.2d 40 (Ind. Ct. App. 1st Dist. 1986).

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[FN5] [Dollar Sav. & Trust Co. v. First Nat. Bank of Boston](#), 32 Ohio Misc. 81, 61 Ohio Op. 2d 134, 285 N.E.2d 768 (C.P. 1972).

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[FN6] [Kaltsas v. Kaltsas](#), 22 Mass. App. Ct. 689, 497 N.E.2d 26 (1986).

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[FN7] [Estate of Doyle v. Hunt](#), 60 S.W.3d 838 (Tenn. Ct. App. 2001) (finding that the language in the caption of a petition requesting the removal of a trustee was insufficient to confer jurisdiction on the probate court, where it did not specifically pray for the removal of the trustee, nor did it state any ground for removal).

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§ 304. Territorial jurisdiction

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 158

A.L.R. Library

[Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance, 15 A.L.R.2d 610](#)

Where a trustor intends a trust consisting in an estate largely if not wholly within a certain state to be administered therein, the courts of that state have jurisdiction of the trust.[\[FN1\]](#) The courts of the state of residence of a testator creating a testamentary trust have the power to construe the will and to determine the powers of the testamentary trustee, although the trustee resides in a foreign jurisdiction,[\[FN2\]](#) and acts by the trustee outside the jurisdiction of the court can be enforced or restrained through the power of the court to compel obedience to it.[\[FN3\]](#)

Observation: A trustor may have certain goals regarding the situs of the trust, which are expressed by provisions selecting trustees from a particular state, and by explicit direction that the trust be administered in accordance with the laws of a particular state.[\[FN4\]](#) This indicates that jurisdiction over the trust by the courts of that state is intended by the trustor even where out-of-state successor trustees have been appointed and the trust eligible for non-resident tax treatment by that state.[\[FN5\]](#)

[\[FN1\] In re Risher's Will, 227 Wis. 104, 277 N.W. 160, 115 A.L.R. 790 \(1938\).](#)

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[\[FN2\] Swetland v. Swetland, 105 N.J. Eq. 608, 149 A. 50 \(Ch. 1930\), aff'd, 107 N.J. Eq. 504, 153 A. 907 \(Ct. Err. & App. 1931\).](#)

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[\[FN3\] § 601.](#)

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[\[FN4\] In re Bush, 2 Misc.3d 744 \(N.Y.Sur.,2003\).](#)

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[\[FN5\] In re Bush, 2 Misc.3d 744 \(N.Y.Sur.,2003\).](#)

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§ 305. Exclusive and concurrent jurisdiction

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 158

The jurisdiction of equity courts^[FN1] and probate courts^[FN2] may be exclusive,^[FN3] and a court creating a trust by its decree will have exclusive jurisdiction over the administration of that trust.^[FN4] The court first assuming jurisdiction over trust property or administration may maintain and exercise that jurisdiction to the exclusion of the other, which is not restricted to cases where property has actually been seized.^[FN5] Thus, the probate jurisdiction of a superior court may be sufficient to permit it to exercise subject matter jurisdiction over a petition to amend the trust.^[FN6] However, the exclusive jurisdiction of a court over the administration of a trust, acquired upon the institution of a suit for specific performance of an agreement to create a trust fund by making payments from time to time, ceases when its decree for enforcement of that performance has been fully complied with.^[FN7] Jurisdiction over the administration of a trust does not preclude jurisdiction of another court over a suit or proceeding to establish a claim, and this rule is operative as between a federal and a state court.^[FN8]

Caution: Where a court of general jurisdiction sits as a probate court, caution should be exercised that the court does not exceed its subject matter jurisdiction in addressing trust matters; nevertheless, errors in admitting evidence under the superior court rules rather than the probate evidentiary rules, are not jurisdictional errors.^[FN9]

^[FN1] § 302.

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^[FN2] § 303.

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^[FN3] [In re Testamentary Trust of Charnock, 358 N.C. 523, 597 S.E.2d 706 \(2004\)](#) (exclusive grant of jurisdiction over action for removal of trustee was to Superior Court).

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[\[FN4\] Hutchins v. Commissioner of Corporations and Taxation, 272 Mass. 422, 172 N.E. 605, 71 A.L.R. 677 \(1930\).](#)

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[\[FN5\] Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\).](#)

- The district court had plenary jurisdiction over trust administration. [Woods v. Wells Fargo Bank Wyoming, 2004 WY 61, 90 P.3d 724 \(Wyo. 2004\).](#)

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[\[FN6\] Matter of Wilcox Revocable Trust, 192 Ariz. 337, 965 P.2d 71 \(Ct. App. Div. 1 1998\).](#)

-

[\[FN7\] Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\).](#)

-

[\[FN8\] Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\).](#)

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[\[FN9\] In re Andrews' Appeal from Probate, 78 Conn.App. 429 \(Conn.App., 2003\).](#)

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§ 306. In personam jurisdiction over nonresident trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [158](#), [254](#)

A.L.R. Library

[Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance, 15 A.L.R.2d 610](#)

While a court may have jurisdiction where a trust is to be performed within the court's geographical jurisdiction,[FN1] and may have some power over a trustee who resides in a foreign jurisdiction,[FN2] a question may arise as to whether the court has in personam jurisdiction over the foreign trustee. A nonresident trustee may not be called upon to defend in an action involving the trust unless it has "minimal contacts" with the state in which the suit is brought.[FN3] Thus, to the extent that a nonresident corporate trustee does not purposefully avail itself of state law or the privilege of doing business in a state, the courts of that state can not exercise specific personal jurisdiction over the trustee in an action against the trustee, even though the trustee assumed the trusteeship knowing that all of the beneficiaries reside in that state.[FN4]

A court gains personal jurisdiction over a nonresident trustee who voluntarily appears and testifies in his or her capacity as trustee in the proceeding.[FN5]

A state court lacks in personam jurisdiction over a foreign trustee, and consequently lacks power to bind it, in an action in which the trustee has been constructively served but has not appeared, where the controversy before the state court involves the validity of the trust agreement, by which the settlor retained substantial powers, including the powers of appointment, over the trust assets, and:[FN6]

(1) the trustee has no office in the state and transacts no business there, none of the trust assets have ever been held or administered in the state, and the trustee participated in no solicitation of business within the state either in person or by mail;

(2) the trust instrument was executed in a foreign state in which the trustee was incorporated, and at a time when the settlor was not domiciled in the forum state;

(3) although the settlor carried on several bits of trust administration from the forum state, the trustee performed no acts there which bore any substantial relationship to the trust agreement;

(4) although the settlor executed within the state the powers of appointment, the validity of the appointment is not at issue before the state court; and

(5) although the state court has personal jurisdiction over the executor, legatees, and appointees, applicable state law specifies that the trustee is an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust.

CUMULATIVE SUPPLEMENT

Cases:

Husband of deceased grantor sued by children of grantor as trustees and beneficiaries, alleging improper influence and seeking equitable reform or disposition of trust assets, lacked minimum contacts with Colorado forum sufficient to confer specific personal jurisdiction as to trustees' claims; it was unclear whether contacts between trust and Colorado were relevant to inquiry, husband's contacts with Colorado were minimal, and there was no evidence that husband engaged in any affirmative act to reach into Colorado. [Schneider v. Cate, 405 F. Supp. 2d 1254 \(D. Colo. 2005\)](#).

Husband of deceased grantor sued by children of grantor as trustees and beneficiaries, alleging improper influence and seeking equitable reform or disposition of trust assets, lacked continuous and systematic activities in Colorado forum sufficient to confer general personal jurisdiction; although husband was married in Colorado, he spent most of his time in Wyoming and seldom visited grantor's former home in Colorado, and husband's business activities in Colorado were limited to commercial loans applied for nineteen years prior to action. [Schneider v. Cate, 405 F. Supp. 2d 1254 \(D. Colo. 2005\)](#).

[END OF SUPPLEMENT]

[FN1] [§ 304](#).

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[FN2] [Swetland v. Swetland, 105 N.J. Eq. 608, 149 A. 50 \(Ch. 1930\)](#), aff'd, [107 N.J. Eq. 504, 153 A. 907 \(Ct. Err. & App. 1931\)](#).

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[FN3] [First American Bank of Virginia v. Reilly, 563 N.E.2d 142 \(Ind. Ct. App. 1st Dist. 1990\)](#).

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[FN4] [Rose v. Firststar Bank, 819 A.2d 1247 \(R.I.,2003\)](#) (bank merely assumed control of previously created trust as part of its succession to former trustee bank's interests, following a corporate reorganization, bank did not solicit new or additional trusts business in state, and only contacts between bank and forum were periodic telephone conversations and correspondence with beneficiaries related to administration of trust).

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[FN5] [In re Guardianship and Conservatorship of Miles, 2003 SD 34 \(S.D.,2003\)](#).

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[FN6] [Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 \(1958\)](#).

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§ 307. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [178](#), [271.5](#)

Forms

Petitions for Instructions. [Am. Jur. Pleading and Practice Forms, Trusts §§ 187 to 199](#)

A court of equity in the exercise of its jurisdiction and control of trusts and their administration may assume jurisdiction of a particular trust and direct that thereafter the trust is to be administered under its direction,^[FN1] and in many instances may make appropriate orders and decrees, without having all interested parties before it, so long as they are not prejudiced in any substantive rights.^[FN2] The primary function of a court in exercising jurisdiction over trusts is to preserve them and to secure their administration according to their terms.^[FN3] Equity may interpose its protective authority whenever it appears that the trustee is perverting its powers to the detriment of the cestui que trust.^[FN4]

As a general rule, a court should not exercise its jurisdiction to remake the trust instrument,^[FN5] reduce or increase beneficial interests created thereby, or accord beneficiaries more advantage than the trustor intended,^[FN6] but rather to effect the administration of the trust in accordance with its terms and directions in the manner laid down by the trustor.^[FN7]

Observation: A trial court's assumption of expansive authority over a trust because a trustee or beneficiary has asked for clarification of a narrow question penalizes the trustee.^[FN8]

^[FN1] [McCrary v. Beeler](#), 155 Md. 456, 142 A. 587 (1928).

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^[FN2] [§ 664](#).

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^[FN3] [In re Foley Trust](#), 671 N.W.2d 206 (Minn. Ct. App. 2003).

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^[FN4] [Flanagan State Bank v. Bromenn Healthcare](#), 140 Ill. App. 3d 137, 94 Ill. Dec. 303, 487 N.E.2d 1180 (4th Dist. 1986); [Lightner v. Boone](#), 222 N.C. 205, 22 S.E.2d 426 (1942), decision aff'd, [319 U.S. 561](#), 63 S. Ct. 1223, 87 L. Ed. 1587 (1943).

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^[FN5] [In re Ruth Easton Fund](#), 680 N.W.2d 541 (Minn. Ct. App. 2004).

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^[FN6] [In re Caswell's Will](#), 197 Wis. 327, 222 N.W. 235, 61 A.L.R. 1359 (1928).

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[\[FN7\] Estate of Parrette, 165 Cal. App. 3d 157, 211 Cal. Rptr. 313 \(6th Dist. 1985\); Papiernik v. Papiernik, 45 Ohio St. 3d 337, 544 N.E.2d 664 \(1989\).](#)

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[\[FN8\] Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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§ 308. In case of vacancy in office of trustee or trustee's failure to act

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It is fundamental that no trust shall fail for want of a trustee,[\[FN1\]](#) and a court will not permit a trust to fail for want of exercise by a trustee of a power invested in it, even where the power is a discretionary one,[\[FN2\]](#) unless it is also purely personal and confidential in character.[\[FN3\]](#) Where a trustee neglects, refuses, or becomes incapable of administering a trust, the court itself may act as trustee, but will exercise this prerogative with great caution, and will not displace the trustee from exercising its functions unless, upon a consideration of the reasons and grounds upon which the trustee has acted, it appears that it has abused its trust, and that its acts in the premises have not been within the limits of a sound and honest execution of the trust.[\[FN4\]](#)

A court may intervene where a trustee has declined or failed to exercise a discretionary power.[\[FN5\]](#) However, where a discretionary power conferred on a trustee is so personal in its relation to the trustee that the intention of the trustor unquestionably must have been that such power should under no circumstances be exercised by anyone else,[\[FN6\]](#) a court will not exercise it in the event of the death of the trustee or other impossibility of exercise of the power by it.[\[FN7\]](#)

[\[FN1\] § 217.](#)

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[\[FN2\] Colton v. Colton, 127 U.S. 300, 8 S. Ct. 1164, 32 L. Ed. 138 \(1888\).](#)

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[\[FN3\] § 319.](#)

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[\[FN4\] Flanagan State Bank v. Bromenn Healthcare, 140 Ill. App. 3d 137, 94 Ill. Dec. 303, 487 N.E.2d 1180 \(4th Dist. 1986\).](#)

- Generally, as to the discharge or removal of a trustee by the court, see §§ [224](#) to [239](#).

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[\[FN5\] § 315.](#)

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[\[FN6\] § 319.](#)

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[\[FN7\] Welch v. Wachovia Bank & Trust Co., 226 N.C. 357, 38 S.E.2d 197 \(1946\).](#)

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§ 309. On application of trustee for guidance

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Petitions for Instructions. [24 Am. Jur. Pleading and Practice Forms, Trusts §§ 187 to 199](#)

A court may exercise its jurisdiction over the administration of a trust on an application of a trustee for guidance where necessary to the protection of the trustee.[\[FN1\]](#) While an administration or disposition of the trust estate pursuant to a decree of court, on an application by a trustee for guidance, will generally protect a trustee,[\[FN2\]](#) or at least a third party if not the trustee,[\[FN3\]](#) this is not the case where the trustee's application was made fraudulently or in bad faith.[\[FN4\]](#)

The purpose of such judicial guidance of a trustee is not to provide a substitute for legal advisers, but to protect trustees in the class of cases where the advice of competent lawyers is not sufficient protection, because of the doubtful meaning of the trust instrument, or because of uncertainty as to the proper application of the law to the facts of the case.[\[FN5\]](#) Thus, courts should not serve as legal advisers to trustees.[\[FN6\]](#)

A decree on an application of a trustee for advice is subject to the rules as to res judicata generally.[\[FN7\]](#)

[\[FN1\]](#) [Williams v. Gibbes, 61 U.S. 535, 20 How. 535, 15 L. Ed. 1013 \(1857\); McCarthy v. Tierney, 116 Conn. 588, 165 A. 807 \(1933\); Dumaine v. Dumaine, 301 Mass. 214, 16 N.E.2d 625, 118 A.L.R. 834 \(1938\); City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 93 A.L.R. 598 \(1934\), aff'd, 264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\); Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN2\]](#) [In re Consupak, Inc., 87 B.R. 529 \(Bankr. N.D. Ill. 1988\); Wilcox v. Waldman, 154 Ariz. 532, 744 P.2d 444, 77 A.L.R.4th 1163 \(Ct. App. Div. 1 1987\).](#)

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[\[FN3\]](#) [In re Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement, 297 So. 2d 663 \(La. 1974\).](#)

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[\[FN4\]](#) [In re Lawson's Will, 215 Iowa 752, 244 N.W. 739, 88 A.L.R. 316 \(1932\).](#)

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[\[FN5\]](#) [In re Warner's Trust, 275 Minn. 174, 145 N.W.2d 542 \(1966\); McEntee v. Halloran, 391 S.W.2d 266 \(Mo. 1965\); Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN6\]](#) [State ex rel. Nixon v. Turpin, 994 S.W.2d 53 \(Mo. Ct. App. W.D. 1999\).](#)

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[\[FN7\]](#) [Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\).](#)

- Generally, as to res judicata with respect to decrees in suits involving trusts or trustees, see [§ 669](#).

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§ 310. On application of trustee for guidance—Matters on which guidance may be sought

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Petitions for Instructions. [Am. Jur. Pleading and Practice Forms, Trusts §§ 187 to 199](#)

If there is reasonable doubt with respect to any matter relating to the administration of a trust, the trustee is entitled to be instructed by the court.[FN1]

On proper application, trustees can ask the directions of the court as to the construction of a trust instrument, the extent of their powers and duties, the identity of the beneficiaries, the character and extent of their interests, the allocation of receipts or expenditures between principal and income, and as to the persons entitled to the income or other trust property on termination of the trust.[FN2] A trust is entitled to petition for instructions regarding the trust, where there is a dispute among the beneficiaries of the trust.[FN3]

Where the question of motives and conflict of interest arises when the trust gives discretionary powers to make payments to a trustee who is also the beneficiary of such payments, the beneficiary trustee must petition the court to intercede and take over his or her duties on that issue.[FN4]

A court of equity will not grant the request of a trustee for instructions under a provision of the trust relative to its termination where the interests of those entitled to the income for life are vested, and, so far as it is known, may not terminate for a number of years after the establishment of the trust.[FN5] Similarly, a trustee should not, as a rule, request or be granted instructions, as to its duty upon the happening of future events or contingencies,[FN6] or affecting the rights of persons not in being, and unnecessary to be decided for the present guidance of the trustee.[FN7] The court will not interfere with the administration of a trust based simply on a difference in judgment with respect to what should be done and who in particular should benefit from the trust.[FN8]

[FN1] [Adler v. Adler, 713 N.E.2d 348 \(Ind. Ct. App. 1999\).](#)

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[FN2] [Hawaiian Trust Co. v. Von Holt, 216 U.S. 367, 30 S. Ct. 303, 54 L. Ed. 519 \(1910\); Adams v. Farlow, 516 So. 2d 528 \(Ala. 1987\); Patterson v. Polk, 229 Ark. 272, 317 S.W.2d 286, 67 A.L.R.2d 970 \(1958\); Campbell v. Trust Co. of Georgia, 197 Ga. 37, 28 S.E.2d 471, 152 A.L.R. 1111 \(1943\); Matter of Trust Created Under Agreement Dated September 19, 1983, By Johnson, 469 N.E.2d 768 \(Ind. Ct. App. 2d Dist. 1984\); Rodgers v. Herron, 226 S.C. 317, 85 S.E.2d 104, 48 A.L.R.2d 1241 \(1954\).](#)

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[FN3] [In re Merlin A. Abadie Inter Vivos Trust, 791 So. 2d 181 \(La. Ct. App. 4th Cir. 2001\).](#)

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[FN4] [Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\).](#)

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[FN5] [Citizens' Nat. Bank v. Morgan, 94 N.H. 284, 51 A.2d 841, 170 A.L.R. 1215 \(1947\).](#)

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[FN6] [May v. May, 167 U.S. 310, 17 S. Ct. 824, 42 L. Ed. 179 \(1897\); Himmelfarb v. Horwitz, 536 A.2d 86 \(D.C. 1987\); In re Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement, 297 So. 2d 663 \(La. 1974\).](#)

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[FN7] [May v. May, 167 U.S. 310, 17 S. Ct. 824, 42 L. Ed. 179 \(1897\); Walker v. First Trust & Savings Bank, 12 F.2d 896, 75 A.L.R. 757 \(C.C.A. 8th Cir. 1926\).](#)

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[FN8] [In re Clement Trust, 679 N.W.2d 31 \(Iowa 2004\).](#)

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§ 311. On application of beneficiaries or other interested persons

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Petitions for Instructions. [Am. Jur. Pleading and Practice Forms, Trusts §§ 187 to 199](#)

A court may in general exercise its jurisdiction and control over the administration of a trust on the application of an interested party.^[FN1] Generally, an application to a court to exercise control over a trust administration may be made by a beneficiary and will be acted on in a proper case,^[FN2] at least where the application is made with the consent of the trustee,^[FN3] or where it is made for protection against the trustee.^[FN4] There is authority, however, that a bill for direction and advice as to the administration of a trust is not available to beneficiaries.^[FN5]

^[FN1] [Shaul v. U.S.](#), 161 F.2d 891 (App. D.C. 1947); [Scovill v. Scovill](#), 191 S.C. 323, 4 S.E.2d 286 (1939).

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^[FN2] [Seigle v. First Nat. Co.](#), 338 Mo. 417, 90 S.W.2d 776, 105 A.L.R. 181 (1936).

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^[FN3] [York v. Maryland Trust Co.](#), 149 Md. 608, 131 A. 829 (1926).

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^[FN4] [Abbott v. Wagner](#), 108 Neb. 359, 188 N.W. 113 (1922).

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^[FN5] [Owen v. Busiel](#), 83 N.H. 345, 142 A. 692, 59 A.L.R. 1103 (1928).

- As to application by a beneficiary to compel an accounting, see [§ 391](#).

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§ 312. Power of court to authorize departure from terms of trust—to effect ultimate purpose of trustor

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[Power of trustee and court as regards term of lease of trust property, 67 A.L.R.2d 978](#)

Forms

Petition or application—By Trustee—For grant of additional powers. [24 Am. Jur. Pleading and Practice Forms, Trusts § 195](#)

Order—Granting trustee additional powers. [24 Am. Jur. Pleading and Practice Forms, Trusts § 198](#)

Generally, where the language of a trust is unambiguous and expresses the intention of the maker, a trustee's powers are conferred by the instrument and the courts cannot add to or take away from such powers, but must permit it to stand as written and give it only such construction as the trustor intended.^[FN1]

While generally the administration of a trust must accord strictly with the intent of the settlor^[FN2] and the terms of the trust,^[FN3] and while ordinarily a court has no right to authorize the trustee to depart therefrom,^[FN4] and will do all within its power to see that the trust is executed in accordance with its terms,^[FN5] there is some authority that a court may, upon the occurrence of emergencies^[FN6] or unusual circumstances not anticipated by the settlor,^[FN7] permit the trustee to deal with the trust estate contrary to or in deviation from the express or literal terms of the trust instrument or declaration.^[FN8]

In this connection, the court is required to stand in the place of the creator of the trust and authorize what the settlor would have authorized had he or she anticipated the exigencies rendering some change in his or her scheme necessary in order to prevent the loss of the subject of it^[FN9] where such deviation is necessary to carry out the settlor's ultimate purpose.^[FN10] Nevertheless, a court should be slow in authorizing action in contravention of or deviation from the terms of a trust^[FN11] and should not substitute its judgment for the judgment and wishes of the trustor.^[FN12]

Observation: In this regard, where the trust may be read to effect one of two outcomes, a court may divine that either outcome was so intended so as to give the settlor's intent effect; the court will choose to do so rather than to authorize what is clearly a departure from its terms.[\[FN13\]](#)

A court may permit transfer of the situs of a trust if the transfer is not prohibited by the instrument and would facilitate administration of the trust.[\[FN14\]](#)

CUMULATIVE SUPPLEMENT

Cases:

A trustee's powers are conferred by the instrument, and neither the trustee nor the courts can add to or take away from such powers, but must permit it to stand as written and give to it only such construction as the trustor intended. [Keisling v. Landrum, 218 S.W.3d 737 \(Tex. App. Fort Worth 2007\)](#), reh'g overruled, (Feb. 8, 2007) and review denied, (June 1, 2007).

The word "shall" in a trust instrument means that the trustee must follow the maker's instructions. [Keisling v. Landrum, 218 S.W.3d 737 \(Tex. App. Fort Worth 2007\)](#), reh'g overruled, (Feb. 8, 2007) and review denied, (June 1, 2007).

[END OF SUPPLEMENT]

[\[FN1\] Sorrel v. Sorrel, 1 S.W.3d 867 \(Tex. App. Corpus Christi 1999\).](#)

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[\[FN2\] § 300.](#)

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[\[FN3\] §§ 344 to 348.](#)

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[\[FN4\] Matter of Will of Killin, 703 P.2d 1323 \(Colo. Ct. App. 1985\); Sorrel v. Sorrel, 1 S.W.3d 867 \(Tex. App. Corpus Christi 1999\).](#)

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[\[FN5\] § 307.](#)

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[\[FN6\] Leonardini v. Wells Fargo Bank & Union Trust Co., 131 Cal. App. 2d 9, 280 P.2d 81, 49 A.L.R.2d 1085 \(1st Dist. 1955\); New York Life Ins. Co. v. Conrad, 269 Ky. 359, 107 S.W.2d 248 \(1937\); Petition of Wolcott, 95 N.H. 23, 56 A.2d 641, 1 A.L.R.2d 1323 \(1948\).](#)

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[\[FN7\] Zinsmeister's Trustee v. Long, 250 Ky. 50, 61 S.W.2d 887 \(1933\); Cutter v. American Trust Co., 213 N.C. 686, 197 S.E. 542 \(1938\); In re Stack's Will, 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 \(1935\).](#)

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[\[FN8\] Centerre Trust Co. v. Jackson Saw Mill Co., 736 S.W.2d 486 \(Mo. Ct. App. E.D. 1987\); Toledo Trust Co. v. Toledo Hospital, 117 Ohio App. 425, 24 Ohio Op. 2d 237, 192 N.E.2d 674 \(6th Dist. Lucas County 1962\), judgment aff'd, 174 Ohio St. 124, 21 Ohio Op. 2d 386, 187 N.E.2d 36 \(1962\).](#)

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[\[FN9\] Bolles v. Boatmen's Nat. Bank of St. Louis, 363 Mo. 949, 255 S.W.2d 725 \(1953\).](#)

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[\[FN10\] In re Estate of Scott, 77 P.3d 906 \(Colo. Ct. App. 2003\); Madden v. University Club of Evanston, 97 Ill. App. 3d 330, 52 Ill. Dec. 963, 422 N.E.2d 1172 \(1st Dist. 1981\); Papiernik v. Papiernik, 45 Ohio St. 3d 337, 544 N.E.2d 664 \(1989\).](#)

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[\[FN11\] Leonardini v. Wells Fargo Bank & Union Trust Co., 131 Cal. App. 2d 9, 280 P.2d 81, 49 A.L.R.2d 1085 \(1st Dist. 1955\).](#)

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[\[FN12\] § 307.](#)

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[\[FN13\] Matter of Estate of Donner, 263 N.J. Super. 539, 623 A.2d 307 \(App. Div. 1993\)](#) (because trustor could have merely intended to provide access to trust principal to his daughter in event that death of or divorce from daughter's husband left her in position of widow in need, court would not inquire into trustor's motives, seeking contravention of public policy favoring marriage, and would enforce trust provision restricting daughter's access to principal under other than stated conditions).

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[\[FN14\] In re Bush, 2 Misc.3d 744 \(N.Y.Sur.,2003\).](#)

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[Division of charitable gift among several claimants where named donee is nonexistent, 67 A.L.R.3d 442](#)

[Power of court to authorize modification of trust instrument because of changes in tax law, 57 A.L.R.3d 1044](#)

[Power of court to extend term of trust, 46 A.L.R.2d 907](#)

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Petition or application—By Trustee—For grant of additional powers. [24 Am. Jur. Pleading and Practice Forms, Trusts § 195](#)

Order—Granting trustee additional powers. [24 Am. Jur. Pleading and Practice Forms, Trusts § 198](#)

While mere advantage to beneficiaries or particular beneficiaries does not justify a court's authorization to deviate from the terms of a trust, generally speaking,[FN1] such deviation may be allowed where it is deemed necessary to preserve or protect the trust estate,[FN2] which is ultimately to the benefit of the beneficiaries. Any power of a court to authorize departures from the trust directions should be exercised no further than necessary for the preservation of the trust property.[FN3]

A court may not have the authority to modify a trust in order to allow it to qualify for a charitable deduction for federal estate tax purposes,[FN4] although there is authority to the contrary.[FN5]

In considering whether a trust should be modified to further the interests of the beneficiary, or a particular beneficiary, the prime consideration is the necessity for the preservation of the estate, and not merely the administration of the trust in such a way as to produce a greater benefit for the beneficiaries.[FN6]

The court should not direct modification of a trust merely upon a showing of the inadequacy of the income of the trust for the beneficiary's suitable support and of the beneficiary's desires to purchase a home.[FN7] Nevertheless, where the trust contains a direction to pay taxes and assessments only from income, but also directs that the trust be administered in compliance with tax rules unless contrary to the express terms of the trust, the trust could be reformed to include an exception to the direction that distributions were to be made from income.[FN8]

When a court can see that unforeseen conditions have arisen which make it necessary to change the terms of the trust in order to preserve the rights of beneficiaries, it will not hesitate to direct such necessary modifications as will preserve the trust estate for the use of beneficiaries.[FN9] Under these circumstances, equity considers not only the wishes of the testator, but the safeguarding of the interests of beneficiaries.[FN10]

A court may also, in cases of emergency, for the preservation of the trust estate and the protection of the cestuis, authorize and direct the trustees to do acts which under the terms of the trust agreement and under ordinary circumstances they would have no power to do.[FN11] Indeed, a court may, even in cases not of emergency, authorize such a departure from the trust terms to accomplish a result advantageous to all persons interested.[FN12]

[FN1] [Rogers v. English, 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812 \(1943\)](#); [La Salle Nat. Bank v. MacDonald, 2 Ill. 2d 581, 119 N.E.2d 266, 46 A.L.R.2d 901 \(1954\)](#); [New York Life Ins. Co. v. Conrad, 269](#)

[Ky. 359, 107 S.W.2d 248 \(1937\).](#)

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[\[FN2\] Dallas Art League v. Weaver, 240 Ala. 432, 199 So. 831 \(1941\); Hawaiian Trust Co. v. Gonser, 40 Haw. 245, 1953 WL 7562 \(1953\); Centerre Trust Co. v. Jackson Saw Mill Co., 736 S.W.2d 486 \(Mo. Ct. App. E.D. 1987\); First-Citizens Bank & Trust Co. v. Raspberry, 226 N.C. 586, 39 S.E.2d 601 \(1946\).](#)

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[\[FN3\] Anderson v. Ryland, 232 Ark. 335, 336 S.W.2d 52 \(1960\).](#)

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[\[FN4\] Shriners Hospitals for Crippled Children v. Maryland Nat. Bank, 270 Md. 564, 312 A.2d 546 \(1973\).](#)

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[\[FN5\] Matter of Estate of Glick, 142 Misc. 2d 650, 537 N.Y.S.2d 984 \(Sur. Ct. 1989\).](#)

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[\[FN6\] In re Jones' Will, 221 Minn. 524, 22 N.W.2d 633 \(1946\); Reedy v. Johnson's Estate, 200 Miss. 205, 26 So. 2d 685 \(1946\).](#)

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[\[FN7\] Moxley v. Title Ins. & Trust Co., 27 Cal. 2d 457, 165 P.2d 15, 163 A.L.R. 838 \(1946\).](#)

- For a general discussion of a court's right to modify a trust to preserve the trust estate, see [§ 312](#).

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[\[FN8\] Canal Nat. Bank v. Old Folks' Home Ass'n of Brunswick, 347 A.2d 428 \(Me. 1975\).](#)

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[\[FN9\] Petition of Wolcott, 95 N.H. 23, 56 A.2d 641, 1 A.L.R.2d 1323 \(1948\).](#)

- Generally, as to authorization by the court as to deviation from the terms of a trust in respect to payments or distribution to beneficiaries, see [§ 558](#), [559](#).

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[\[FN10\] Petition of Wolcott, 95 N.H. 23, 56 A.2d 641, 1 A.L.R.2d 1323 \(1948\).](#)

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[\[FN11\] Petition of Wolcott, 95 N.H. 23, 56 A.2d 641, 1 A.L.R.2d 1323 \(1948\); Faulk v. Rosecrans, 1953 OK 358, 264 P.2d 300 \(Okla. 1953\).](#)

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[\[FN12\] Petition of Wolcott, 95 N.H. 23, 56 A.2d 641, 1 A.L.R.2d 1323 \(1948\).](#)

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[Propriety of sale of trust assets without consent despite trust provision requiring consent, 39 A.L.R.4th 158](#)

Forms

Order—Granting trustee additional powers. [24 Am. Jur. Pleading and Practice Forms, Trusts § 198](#)

As a general rule, parties whose interests will be affected by a judicial authorization of a departure from, or deviation of, the terms of a trust in its administration, must either freely consent to such a departure or deviation,^[FN1] or be made parties to the proceedings in which the authorization is obtained, although virtual representation of beneficiaries or interested persons in the matter will suffice in a proper case.^[FN2] Thus, in a proceeding to construe and reform a will which required the funding of a single qualified terminable interest property trust, the court would permit the creation of three separate trusts where such construction of the will was consented to by all beneficiaries of the will and would result in a substantial savings to the beneficiaries under the tax law passed after the death of the testator.^[FN3] On the other hand, in proceedings by a trustee to amend a testamentary trust to qualify the trust for a tax exemption, the requirement that the trustee obtain the consent of all noncharitable beneficiaries before amending the trust was not a statutory condition precedent to the exercise of the court's jurisdiction and the trustee's failure to obtain such consent did not deprive the court of jurisdiction.^[FN4]

^[FN1] [Leonardini v. Wells Fargo Bank & Union Trust Co., 131 Cal. App. 2d 9, 280 P.2d 81, 49 A.L.R.2d 1085 \(1st Dist. 1955\)](#); [Matter of Will of Choate, 141 Misc. 2d 489, 533 N.Y.S.2d 272 \(Sur. Ct. 1988\)](#).

- Where a court could order that the corpus of a trust be distributed to an income beneficiary with the consent of all the beneficiaries, such consent was not properly obtained where Medicaid benefits were withheld or granted only on the condition that the consent be given. [Matter of Will of Surut, 141 Misc. 2d 1005, 535 N.Y.S.2d 922](#)

[\(Sur. Ct. 1988\).](#)

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[\[FN2\] § 617.](#)

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[\[FN3\] Matter of Will of Choate, 141 Misc. 2d 489, 533 N.Y.S.2d 272 \(Sur. Ct. 1988\).](#)

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[\[FN4\] In re Estate of Bishop, 127 Ill. App. 3d 165, 82 Ill. Dec. 244, 468 N.E.2d 506 \(4th Dist. 1984\).](#)

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VII. Administration of Trust, Generally
B. Jurisdiction and Control of Court
2. Exercise of Jurisdiction and Control

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§ 315. Control of trustee's discretion

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [177](#), [178](#), [271.5](#)

As long as a trustee acts in good faith and within the limits of sound execution of the trust vested in him, a court of equity will not undertake to substitute its discretion for that of the trustee, or interfere with that discretion.[\[FN1\]](#) This does not mean, however, that a discretionary power in a trustee is beyond the reach of judicial inquiry.[\[FN2\]](#) A court will interfere whenever the exercise of discretion by the trustee is infected with fraud or bad faith,[\[FN3\]](#) misbehavior[\[FN4\]](#) or misconduct,[\[FN5\]](#) arbitrariness,[\[FN6\]](#) abuse of authority or perversion of the trust,[\[FN7\]](#) or want of ordinary skill or judgment.[\[FN8\]](#) Furthermore, a court will take action although a trustee is vested with discretion where the trustee declines to undertake the duty of exercising discretion,[\[FN9\]](#) or generally where the discretion is mischievously and erroneously exercised.[\[FN10\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Under trust law, trustee may be stripped of deference when he does not exercise his discretion honestly and fairly. [Conkright v. Frommert, 130 S. Ct. 1640 \(2010\)](#).

Where a trustee determines that it is necessary and proper to use trust assets for a certain purpose, the court will not interfere unless the trustee acted in bad faith or in some way abused or unreasonably exercised his discretion. [Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 868 N.E.2d 4 \(Ind. Ct. App. 2007\)](#), opinion corrected on reh'g, [872 N.E.2d 626 \(Ind. Ct. App. 2007\)](#).

[END OF SUPPLEMENT]

[FN1] [Shelton v. King, 229 U.S. 90, 33 S. Ct. 686, 57 L. Ed. 1086 \(1913\)](#); [Dunkley v. Peoples Bank & Trust Co., 728 F. Supp. 547 \(W.D. Ark. 1989\)](#); [State of Del. ex rel. Gebelein v. Belin, 456 So. 2d 1237 \(Fla. Dist. Ct. App. 1st Dist. 1984\)](#); [Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 \(1999\)](#); [Matter of Estate of Sykes, 131 Mich. App. 49, 345 N.W.2d 642 \(1983\)](#); [In re Estate of King, 668 N.W.2d 6 \(Minn. Ct. App. 2003\)](#); [Deutsch v. Wolff, 994 S.W.2d 561 \(Mo. 1999\)](#); [In re Frances M. Johnson Trust, 211 Neb. 750, 320 N.W.2d 466 \(1982\)](#); [Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 \(1986\)](#); [In re Community Service Soc. of New York, 275 A.D.2d 171, 713 N.Y.S.2d 712 \(1st Dep't 2000\)](#); [Finch v. Wachovia Bank & Trust Co., N.A., 156 N.C. App. 343, 577 S.E.2d 306 \(2003\)](#), cert. denied, [577 S.E.2d 626 \(N.C. 2003\)](#); [Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\)](#); [Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\)](#); [Ward v. NationsBank of Virginia, N.A., 256 Va. 427, 507 S.E.2d 616 \(1998\)](#); [In re McGuire Marital Trust, 260 Wis. 2d 815, 2003 WI App 44, 660 N.W.2d 308 \(Ct. App. 2003\)](#), review denied, [265 Wis. 2d 417, 2003 WI 126, 668 N.W.2d 557 \(2003\)](#).

- As to control by the court of discretion of a trustee as to the amount of allowance to a beneficiary under a support or discretionary trust, see § § [119](#), [123](#).

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[FN2] [Estate of Nicholas, 177 Cal. App. 3d 1071, 223 Cal. Rptr. 410 \(3d Dist. 1986\)](#); [Mesler v. Holly, 318 So. 2d 530 \(Fla. Dist. Ct. App. 2d Dist. 1975\)](#); [Powell v. Thorsen, 253 Ga. 572, 322 S.E.2d 261 \(1984\)](#); [Matter of Estate of Thomson, 139 Ill. App. 3d 930, 94 Ill. Dec. 316, 487 N.E.2d 1193 \(4th Dist. 1986\)](#); [In re Charnock, 158 N.C. App. 35, 579 S.E.2d 887 \(2003\)](#), cert. denied, [357 N.C. 506, 588 S.E.2d 473 \(2003\)](#) and decision aff'd, [358 N.C. 523, 597 S.E.2d 706 \(2004\)](#).

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[FN3] [Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\)](#); [Taxy v. Worden, 181 Ill. App. 3d 97, 129 Ill. Dec. 851, 536 N.E.2d 901 \(1st Dist. 1989\)](#); [In re Community Service Soc. of New York, 275 A.D.2d 171, 713 N.Y.S.2d 712 \(1st Dep't 2000\)](#); [In re Charnock, 158 N.C. App. 35, 579 S.E.2d 887 \(2003\)](#), cert. denied, [357 N.C. 506, 588 S.E.2d 473 \(2003\)](#) and decision aff'd, [358 N.C. 523, 597 S.E.2d 706 \(2004\)](#); [Deutsch v. Wolff, 994 S.W.2d 561 \(Mo. 1999\)](#); [Beaty v. Bales, 677 S.W.2d 750 \(Tex. App. San Antonio 1984\)](#), writ refused n.r.e., (Dec. 5, 1984); [Ward v. NationsBank of Virginia, N.A., 256 Va. 427, 507 S.E.2d 616 \(1998\)](#).

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[FN4] [Colton v. Colton, 127 U.S. 300, 8 S. Ct. 1164, 32 L. Ed. 138 \(1888\)](#); [Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\)](#).

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[FN5] [Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\)](#).

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[\[FN6\] Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\); Matter of Heisserer, 797 S.W.2d 864 \(Mo. Ct. App. S.D. 1990\).](#)

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[\[FN7\] Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\); In re Charnock, 158 N.C. App. 35, 579 S.E.2d 887 \(2003\), cert. denied, 357 N.C. 506, 588 S.E.2d 473 \(2003\) and decision aff'd, 358 N.C. 523, 597 S.E.2d 706 \(2004\); In re Trust under Agreement of John H. Ware, III, Dated 12/28/1976, 2002 PA Super 407 \(PASUPER,2002\).](#)

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[\[FN8\] Cates v. Cates, 217 Ga. 626, 124 S.E.2d 375 \(1962\).](#)

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[\[FN9\] Colton v. Colton, 127 U.S. 300, 8 S. Ct. 1164, 32 L. Ed. 138 \(1888\); Dunkley v. Peoples Bank & Trust Co., 728 F. Supp. 547 \(W.D. Ark. 1989\); In re Herskowitz's Estate, 338 So. 2d 210 \(Fla. Dist. Ct. App. 3d Dist. 1976\); Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\); Finch v. Wachovia Bank & Trust Co., N.A., 156 N.C. App. 343, 577 S.E.2d 306 \(2003\), cert. denied, 577 S.E.2d 626 \(N.C. 2003\).](#)

- As to the exercise of power by the court where the trustee fails to act, see § § [217](#), [308](#).

- As to the effect of the personal and confidential nature of the power of discretion in a trustee, see [§ 319](#).

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[\[FN10\] Colton v. Colton, 127 U.S. 300, 8 S. Ct. 1164, 32 L. Ed. 138 \(1888\).](#)

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West's Key Number Digest

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[Am. Jur. Legal Forms 2d, Trusts §§ 251:391, 251:421 to 251:501](#)

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[Uniform Trust Code § 703](#) (2000)

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§ 316. Scope of powers, generally

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Forms

Powers as absolute owner of trust property. [Am. Jur. Legal Forms 2d, Trusts § 251:426](#)

Petition or application—By trustee—For grant of additional powers. [24 Am. Jur. Pleading and Practice Forms, Trusts § 195](#)

Order—Granting trustee additional powers. [24 Am. Jur. Pleading and Practice Forms, Trusts § 198](#)

In ascertaining the powers of a trustee to carry out the purposes of a trust, it is important to analyze the terms of the trust.^[FN1] Nevertheless, a trustee has all powers not denied to him or her by the terms of the trust that are essential to the administration of the trust.^[FN2]

In addition to the trust instrument, the administrative powers of a trustee are in general governed by the statutes of the state,^[FN3] and rules of equity jurisprudence governing trusts and trustees.^[FN4]

A trustee has no administrative authority or powers not expressly or impliedly conferred on him or her by the trust instrument or declaration,^[FN5] and has a duty not to exceed the limitations on the powers so conferred.^[FN6] Such powers are not enlarged by a beneficiary's waiver of the right to object to a breach of trust.^[FN7]

^[FN1] [New Jersey Thoroughbred Horseman's Ass'n v. State, 348 N.J. Super. 125, 791 A.2d 320 \(Ch. Div. 2001\)](#); [In re Trust of Brooke, 82 Ohio St. 3d 553, 1998-Ohio-185, 697 N.E.2d 191 \(1998\)](#); [Sorrel v. Sorrel, 1 S.W.3d 867 \(Tex. App. Corpus Christi 1999\)](#); [Allard v. Pacific Nat. Bank, 99 Wash. 2d 394, 663 P.2d 104 \(1983\)](#).

- As to express powers, see [§ 317](#).

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^[FN2] [Petition of First Interstate Bank of Denver, N.A., 767 P.2d 792 \(Colo. Ct. App. 1988\)](#).

- As to implied powers, generally, see [§ 317](#).

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^[FN3] [Matter of Green Charitable Trust, 172 Mich. App. 298, 431 N.W.2d 492 \(1988\)](#).

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[\[FN4\] In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

- Generally, as to duties of trustee, see §§ [331](#) to [401](#).

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[\[FN5\] Daly's Lessee v. James, 21 U.S. 495, 5 L. Ed. 670 \(1823\); Hoffa v. Fitzsimmons, 673 F.2d 1345 \(D.C. Cir. 1982\).](#)

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[\[FN6\] § 345.](#)

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[\[FN7\] Kaufman v. Kaufman's Adm'r, 292 Ky. 351, 166 S.W.2d 860, 144 A.L.R. 866 \(1942\).](#)

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§ 317. Express or implied

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [271](#)

Forms

Powers and duties of trustee. [Am. Jur. Legal Forms 2d, Trusts §§ 251:421 to 251:501](#)

The powers of a trustee may be either express or implied.[FN1] Any implied powers must be determined by a construction of the trust instrument or declaration in accordance with general rules governing its construction.[FN2] If it appears that the exercise of an implied power is essential to effect the clearly defined intent of the trustor, then it should be held that such implied power arises by necessary implication.[FN3] Although not explicitly identified in the trust agreement, authority to take certain actions may be implied if the intention to create such a power is evident, the power may be appropriate or necessary to carry out the purposes of the trust power, and the power is not forbidden by the trust agreement.[FN4]

There may be circumstances under which a trustee would have power on his or her own initiative and without personal risk to depart from the terms of the trust, in order to save the trust property from destruction and to accomplish the ultimate object of the trustor.[FN5]

[FN1] Thaxter v. Fry, 222 A.2d 686 (Me. 1966); Jackson v. Templin, 66 S.W.2d 666, 92 A.L.R. 873 (Tex. Comm'n App. 1933).

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[FN2] § 28, 29.

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[FN3] Petition of First Interstate Bank of Denver, N.A., 767 P.2d 792 (Colo. Ct. App. 1988); Occidental Life Ins. Co. of Cal. v. Blume, 65 Wash. 2d 643, 399 P.2d 76 (1965).

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[FN4] Ward v. NationsBank of Virginia, N.A., 256 Va. 427, 507 S.E.2d 616 (1998).

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[FN5] Toledo Trust Co. v. Toledo Hospital, 117 Ohio App. 425, 24 Ohio Op. 2d 237, 192 N.E.2d 674 (6th Dist. Lucas County 1962), judgment aff'd, 174 Ohio St. 124, 21 Ohio Op. 2d 386, 187 N.E.2d 36 (1962); President and Fellows of Middlebury College v. Town of Hancock, 115 Vt. 157, 55 A.2d 194 (1947).

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§ 318. Discretionary or imperative

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[Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support, 41 A.L.R.3d 255](#)

Forms

Discretion in exercise of powers. [Am. Jur. Legal Forms 2d, Trusts § 251:423 to 251:425](#)

Where the existence of a power by express or implied provision of a trust instrument or declaration is admitted,[[FN1](#)] the question remains whether it is one that must be executed by the trustee or whether exercise of the power is left to the discretion of the trustee. If it must be exercised, the power is imperative or mandatory,[[FN2](#)] and a court will always compel the trustee to exercise a mandatory power.[[FN3](#)] If the trustee can decide to exercise it or not, within his or her discretion, the power is discretionary.[[FN4](#)]

The use by the settlor of words of permission or option, or reference to the discretion of the trustee, in describing the trustee's power indicates that the settlor intended that the power be discretionary,[[FN5](#)] whereas use of directive or commanding language indicates that a mandatory power was intended.[[FN6](#)]

Giving trustees discretionary or broad powers does not mean that there are no limits on those powers.[[FN7](#)] Questions as to the extent of a discretionary power in a trustee, whether it is absolute and unconditional or limited in some degree or by some condition, must be determined by a construction of the trust instrument or declaration with the object of determining the intent of the trustor.[[FN8](#)] Generally, such a power is limited to the extent at least that a trustee is bound to act in good faith, and even a grant of "absolute discretion" does not relieve a trustee from the duty to exercise good faith or from being judicious administering the trust.[[FN9](#)] Furthermore, even where a trustee is granted discretionary power he or she must act with due care, diligence, and skill.[[FN10](#)]

The limit of the discretion of trustees where their discretion is absolute and uncontrolled is not the test of reasonableness, but rather their honest exercise of judgment in compliance with the trustor's presumed wishes.[[FN11](#)] The facts that the trustee is a corporation and the discretion is given to any succeeding trustee are indicative that the discretion is not uncontrolled[[FN12](#)] and personal.[[FN13](#)]

A trustee's discretionary powers under the terms of a trust instrument may be of limited duration, or apply only with regard to certain beneficiaries or assets.[[FN14](#)]

[\[FN1\] § 317.](#)

[\[FN2\] Patterson v. Polk, 229 Ark. 272, 317 S.W.2d 286, 67 A.L.R.2d 970 \(1958\); Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 \(1986\).](#)

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[\[FN3\] Lineback by Hutchens v. Stout, 79 N.C. App. 292, 339 S.E.2d 103 \(1986\).](#)

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[\[FN4\] Booth v. Krug, 368 Ill. 487, 14 N.E.2d 645, 117 A.L.R. 1193 \(1938\); Welch v. Wachovia Bank & Trust Co., 226 N.C. 357, 38 S.E.2d 197 \(1946\); In re Doe's Will, 232 Wis. 34, 285 N.W. 764, 126 A.L.R. 926 \(1939\).](#)

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[\[FN5\] Anton v. Anton, 763 So. 2d 404 \(Fla. Dist. Ct. App. 4th Dist. 2000\)](#) (use of the word "may").

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[\[FN6\] Lineback by Hutchens v. Stout, 79 N.C. App. 292, 339 S.E.2d 103 \(1986\).](#)

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[\[FN7\] Dunkley v. Peoples Bank & Trust Co., 728 F. Supp. 547 \(W.D. Ark. 1989\); Matter of Green Charitable Trust, 172 Mich. App. 298, 431 N.W.2d 492 \(1988\).](#)

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[\[FN8\] Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 \(1989\).](#)

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[\[FN9\] Dunkley v. Peoples Bank & Trust Co., 728 F. Supp. 547 \(W.D. Ark. 1989\); Estate of Nicholas, 177 Cal. App. 3d 1071, 223 Cal. Rptr. 410 \(3d Dist. 1986\); Mesler v. Holly, 318 So. 2d 530 \(Fla. Dist. Ct. App. 2d Dist. 1975\).](#)

- As to the duty of good faith generally, see [§ 349](#).

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[\[FN10\] § 363.](#)

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[\[FN11\] Industrial Trust Co. v. C.I.R., 151 F.2d 592, 169 A.L.R. 144 \(C.C.A. 1st Cir. 1945\).](#)

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[\[FN12\] Dunkley v. Peoples Bank & Trust Co., 728 F. Supp. 547 \(W.D. Ark. 1989\).](#)

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[\[FN13\] § 319.](#)

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[\[FN14\] Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 79 Ohio St. 3d 98, 1997-Ohio-402, 679 N.E.2d 1084 \(1997\).](#)

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§ 319. Personal or impersonal

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [271](#)

Forms

Powers as absolute owner of trust property. [Am. Jur. Legal Forms 2d, Trusts § 251:426](#)

Some powers of a trustee are personal to him or her and a matter of confidence of the trustor in him or her and in no one else.[\[FN1\]](#) Such confidential powers can be exercised neither by the court[\[FN2\]](#) nor by a successor trustee,[\[FN3\]](#) and do not survive the trustee.[\[FN4\]](#)

Other powers of a trustee are nonpersonal and nonconfidential, and pertain to the office rather than the person of the trustee.[\[FN5\]](#)

Whether a power is confidential or nonconfidential in character is to be determined by the intent of the trustor,[\[FN6\]](#) which is to be gathered from a consideration of the whole instrument or declaration and from the nature and objects of the trust created thereby, in the light of surrounding circumstances.[\[FN7\]](#) The presumption is, however, that powers of a trustee are nonconfidential and impersonal and pertain to the office rather than to the person of a trustee,[\[FN8\]](#) and this presumption is overcome only when the trustor clearly and unmistakably manifests an intent that a power be purely personal to the trustee whom he or she appoints.[\[FN9\]](#)

[\[FN1\]](#) [Colton v. Colton, 127 U.S. 300, 8 S. Ct. 1164, 32 L. Ed. 138 \(1888\); Booth v. Krug, 368 Ill. 487, 14 N.E.2d 645, 117 A.L.R. 1193 \(1938\).](#)

- As to power of trustee to appoint successor, as confidential power, see [§ 238](#).

- As to whether power to pay income for support or benefit within discretion of trustee is confidential or nonconfidential, see [§ 150](#).

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[\[FN2\]](#) [§ 308](#).

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[\[FN3\]](#) [§ 324](#).

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[\[FN4\] Van Roy v. Hoover, 96 Fla. 194, 117 So. 887 \(1928\).](#)

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[\[FN5\] In re Doe's Will, 232 Wis. 34, 285 N.W. 764, 126 A.L.R. 926 \(1939\).](#)

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[\[FN6\] In re Doe's Will, 232 Wis. 34, 285 N.W. 764, 126 A.L.R. 926 \(1939\).](#)

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[\[FN7\] Welch v. Wachovia Bank & Trust Co., 226 N.C. 357, 38 S.E.2d 197 \(1946\).](#)

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[\[FN8\] Booth v. Krug, 368 Ill. 487, 14 N.E.2d 645, 117 A.L.R. 1193 \(1938\).](#)

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[\[FN9\] In re Doe's Will, 232 Wis. 34, 285 N.W. 764, 126 A.L.R. 926 \(1939\).](#)

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§ 320. Generally; necessity of joint action

West's Key Number Digest

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[Right of coexecutor or cotrustee to retain independent legal counsel, 66 A.L.R.2d 1169](#)

Forms

Powers of cotrustees. Am. Jur. Legal Forms 2d, Trusts §§ [251:435](#), [251:436](#)

The general rule is that when the administration of a trust is vested in cotrustees, they all form but one collective trustee,[\[FN1\]](#) and they must exercise jointly all those powers that call for their discretion and judgment,[\[FN2\]](#) unless the trust instrument provides otherwise.[\[FN3\]](#)

Where there are several trustees, each is under a duty to participate fully in the administration of the trust.[\[FN4\]](#) The Uniform Trust Code recognizes this rule, requiring trustees to exercise reasonable care to prevent breach by other cotrustees.[\[FN5\]](#) Cotrustees are obligated to maintain an attitude of vigilant concern for the proper administration of the trust.[\[FN6\]](#) Whenever a cotrustee determines that actions of the other trustee are dangerous to the interest of the trust beneficiary, the cotrustee must act to protect the beneficiary.[\[FN7\]](#)

Some statutes permit a majority of a group of three or more trustees to exercise the powers of the trust, in the absence of any limitation provided in the trust instrument, or by an order of the court.[\[FN8\]](#) The Uniform Trust Code provides that if the cotrustees cannot act unanimously, they may act upon a majority.[\[FN9\]](#) It also imposes upon cotrustees a duty to act unless excused by illness, absence, or disability.[\[FN10\]](#) It and the older Uniform Trust Act provide that the majority can act after providing written notice to, or obtaining written waiver of notice by, each other trustee and further absolves a dissenting trustee from liability for the acts of the majority.[\[FN11\]](#)

An exception to the requirement of unanimous or majority action arises in the instance of damage to the trust res. One trustee may invoke the aid of the courts for the protection of the trust estate, although the other cotrustees refuse to join in the action; if the cotrustee does not act, the cotrustee herself or himself may become liable for the failure to safeguard the trust property.[\[FN12\]](#)

Observation: A cotrustee is liable for any loss to the trust caused by another, dishonest cotrustee, where the cotrustee pays no attention to the administration of the trust by the dishonest cotrustee.[\[FN13\]](#)

[\[FN1\]](#) [Dunker v. Reichman](#), 841 F.2d 177 (7th Cir. 1988); [Scullin v. Clark](#), 242 S.W.2d 542, 29 A.L.R.2d 1024 (Mo. 1951).

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[\[FN2\]](#) [Howard Fire Ins. Co. v. Chase](#), 72 U.S. 509, 18 L. Ed. 524 (1866); [Dunker v. Reichman](#), 841 F.2d 177 (7th Cir. 1988) (applying Illinois law); [Richards v. Midkiff](#), 48 Haw. 32, 396 P.2d 49 (1964); [In re Greenberg's Estate](#), 15 Ill. App. 2d 414, 146 N.E.2d 404, 66 A.L.R.2d 1162 (1st Dist. 1957); [Columbia Union Nat. Bank and Trust Co. v. Bundschu](#), 641 S.W.2d 864 (Mo. Ct. App. W.D. 1982); [Merrill Lynch Pierce Fenner & Smith Inc. v. Nora-Johnson](#), 351 N.J. Super. 177, 797 A.2d 226 (App. Div. 2002).

- As to delegation of responsibility, see § 348.

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[\[FN3\]](#) [Hackbarth v. Hackbarth](#), 62 Conn. App. 490, 767 A.2d 1276 (2001) (majority of trustees); [Merrill Lynch Pierce Fenner & Smith Inc. v. Nora-Johnson](#), 351 N.J. Super. 177, 797 A.2d 226 (App. Div. 2002); [Matter of Larson](#), 341 N.W.2d 627 (N.D. 1983).

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[\[FN4\]](#) [Anton v. Anton](#), 815 So. 2d 768 (Fla. Dist. Ct. App. 4th Dist. 2002).

- As to delegation of duties, see § 321.

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[\[FN5\] Uniform Trust Code § 703\(g\) \(2000\).](#)

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[\[FN6\] Anton v. Anton, 763 So. 2d 404 \(Fla. Dist. Ct. App. 4th Dist. 2000\).](#)

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[\[FN7\] Merrill Lynch Pierce Fenner & Smith Inc. v. Nora-Johnson, 351 N.J. Super. 177, 797 A.2d 226 \(App. Div. 2002\).](#)

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[\[FN8\] Anton v. Anton, 763 So. 2d 404 \(Fla. Dist. Ct. App. 4th Dist. 2000\); Madden v. University Club of Evanston, 97 Ill. App. 3d 330, 52 Ill. Dec. 963, 422 N.E.2d 1172 \(1st Dist. 1981\).](#)

- Where there are multiple trustees, only a majority can exercise the powers conferred on them. [Hackbarth v. Hackbarth, 62 Conn. App. 490, 767 A.2d 1276 \(2001\).](#)

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[\[FN9\] Uniform Trust Code § 703\(a\) \(2000\).](#)

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[\[FN10\] Uniform Trust Code § 703\(c\), 703\(d\) \(2000\).](#)

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[\[FN11\] Uniform Trust Code § 703\(f\), 703\(h\) \(2000\); Uniform Trust Act § 11 \(1937\).](#)

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[\[FN12\] Merrill Lynch Pierce Fenner & Smith Inc. v. Nora-Johnson, 351 N.J. Super. 177, 797 A.2d 226 \(App. Div. 2002\).](#)

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[\[FN13\] Anton v. Anton, 815 So. 2d 768 \(Fla. Dist. Ct. App. 4th Dist. 2002\)](#) (cotrustee signed blank checks, and failed to review bank statements, cancelled checks, or the bills which the dishonest cotrustee was allegedly paying).

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§ 321. Delegation of powers

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [238](#) to [242](#)

Generally, one trustee who delegates to another the administration of a trust breaches the duties of a trustee.[\[FN1\]](#)

Multiple trustees may rightfully direct one of their members to perform acts which all have decided upon and which it is inconvenient for all of them to perform,[\[FN2\]](#) such as purchasing insurance in the name of one of them,[\[FN3\]](#) but the trustee thus acting is to be considered the agent of all the cotrustees and not as an individual trustee.[\[FN4\]](#) Where one cotrustee acts without the authority of the other cotrustees, they may ratify what has been done, where the act is of such character that they could have authorized the acting trustee to do it as their agent in the first instance.[\[FN5\]](#)

A surviving cotrustee or successor trustee may not employ a durable power of attorney to delegate the entire administration of the trust to another, even a cotrustee.[\[FN6\]](#)

The Uniform Trust Code provides that delegation of duties is impermissible generally, but also recognizes delegation of ministerial acts, and provides for revocation of designations.[\[FN7\]](#)

[\[FN1\]](#) [Anton v. Anton, 815 So. 2d 768 \(Fla. Dist. Ct. App. 4th Dist. 2002\).](#)

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[\[FN2\]](#) [Winslow v. Baltimore & O.R. Co., 188 U.S. 646, 23 S. Ct. 443, 47 L. Ed. 635 \(1903\).](#)

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[\[FN3\]](#) [§ 423.](#)

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[\[FN4\]](#) [Howard Fire Ins. Co. v. Chase, 72 U.S. 509, 18 L. Ed. 524 \(1866\).](#)

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[\[FN5\]](#) [Howard Fire Ins. Co. v. Chase, 72 U.S. 509, 18 L. Ed. 524 \(1866\); Gleason v. Elbthal Realty Trust, 122 N.H. 411, 445 A.2d 1104 \(1982\).](#)

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[\[FN6\]](#) [Geren v. Geren, 29 Kan. App. 2d 565, 29 P.3d 448 \(2001\).](#)

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[\[FN7\]](#) [Uniform Trust Code § 703\(e\) \(2000\).](#)

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§ 322. Employment of independent legal counsel

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 238 to 242

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[Right of coexecutor or cotrustee to retain independent legal counsel, 66 A.L.R.2d 1169](#)

In addressing whether one or a group of cotrustees can employ independent counsel and pay counsel's fees out of the trust assets, the fact that the whole of the fees allowed various attorneys employed separately by cotrustees does not exceed, or can be limited to, an amount which would be reasonable if only one attorney had represented the trust, is sometimes pointed to as sustaining the authority of a cotrustee to employ independent counsel.[FN1] Whether specific trust language tends to uphold or deny the propriety of hiring separate counsel depends upon a proper construction of the particular language used by the settlor.[FN2]

The fact that the services rendered by counsel separately employed by one cotrustee were for the benefit of the estate as a whole tends to justify charging the fees of such attorney against the estate,[FN3] although a fee may be denied where there was no reasonable necessity for one cotrustee to bring an action against another cotrustee[FN4] or where the action was not in the interest of and for the benefit of the trust estate.[FN5] A fee has also been denied in an action between cotrustees where each cotrustee's attack on the other could not be extricated from his or her attempted defense of his or her own position.[FN6]

Caution: One court has distinguished between testamentary trusts and inter vivos trusts, and held that a commercial trustee of an inter vivos trust was not entitled to an award of attorney's fees in an action brought against it by an individual cotrustee.[FN7]

[\[FN1\] In re Henriques' Estate, 36 Haw. 518, 1943 WL 6377 \(1943\).](#)

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[\[FN2\] In re Conan's Will, 231 Minn. 164, 42 N.W.2d 400 \(1950\).](#)

- As to construction of trust provisions, generally, see §§ [28](#) to [39](#).

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[\[FN3\] Wilkinson v. McCall, 247 Ala. 225, 23 So. 2d 577 \(1945\).](#)

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[\[FN4\] Forth v. Forth, 409 N.E.2d 1107 \(Ind. Ct. App. 1st Dist. 1980\).](#)

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[\[FN5\] Ex parte Adams, 514 So. 2d 845 \(Ala. 1987\).](#)

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[\[FN6\] Matter of Guardianship of Brown, 436 N.E.2d 877, 24 A.L.R.4th 601 \(Ind. Ct. App. 3d Dist. 1982\).](#)

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[\[FN7\] Wagstaff v. Manufacturers Nat. Bank of Detroit, 588 F. Supp. 1389 \(E.D. Mich. 1984\).](#)

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§ 323. Exercise by surviving cotrustees

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West's Key Number Digest, [Trusts](#) [242](#)

Forms

Powers of cotrustees. Am. Jur. Legal Forms 2d, Trusts §§ [251:435](#), [251:436](#)

The general rule is that surviving cotrustees can exercise trust powers without filling the vacancy created by the death, removal, or resignation of one cotrustee.[\[FN1\]](#) The Uniform Trust Code concurs in this position.[\[FN2\]](#) A common law exception exists as to powers which are purely personal and discretionary powers based on the trustor's personal confidence in the cotrustees.[\[FN3\]](#)

A surviving testamentary trustee or trustees have the power to receive from the executor assets belonging to the trust regardless of any duty to apply for the appointment of cotrustees necessary or advisable to carry out the intention of the testator.[\[FN4\]](#)

Generally, a trustor may place such limits as he or she sees fit upon the powers of surviving trustees, either expressly or by implication indicating the intention that a surviving trustee not have power to act until the vacancy caused by the death, resignation, or removal of his or her cotrustee has been filled, and such intention will be given effect.[\[FN5\]](#) But the mere fact that a trust instrument authorizes the appointment of successor trustees to fill vacancies caused by the death, refusal to act, resignation, or removal of those originally named, or prescribes the method of making such appointments, does not necessarily deprive the surviving trustee or trustees of the right to act in execution of the trust without such substitution.[\[FN6\]](#)

Reference to the trustees of a revocable inter vivos trust that use the plural "us" does not limit the power to only the joint trustees, but applies to the joint trustees or the sole surviving trustee, where the trust provides for a surviving joint trustee continuing as sole trustee "[u]pon the death of the survivor of us."[\[FN7\]](#)

[\[FN1\]](#) [Wilson v. Snow](#), 228 U.S. 217, 33 S. Ct. 487, 57 L. Ed. 807 (1913).

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[\[FN2\]](#) [Uniform Trust Code § 703\(b\)](#) (2000).

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[\[FN3\]](#) [Lorings v. Marsh](#), 73 U.S. 337, 18 L. Ed. 802 (1867).

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[\[FN4\]](#) [McInnes v. Goldthwaite](#), 94 N.H. 331, 52 A.2d 795, 171 A.L.R. 1414 (1947); [Perrenoud v. Harman](#), 2000 UT App 241, 8 P.3d 293 (Utah Ct. App. 2000).

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[\[FN5\]](#) [Home for Destitute Crippled Children v. Boomer](#), 308 Ill. App. 170, 31 N.E.2d 812 (1st Dist. 1941).

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[\[FN6\]](#) [Oliver v. Poulos](#), 312 Mass. 188, 44 N.E.2d 1, 142 A.L.R. 1094 (1942).

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[\[FN7\]](#) [Perrenoud v. Harman](#), 2000 UT App 241, 8 P.3d 293 (Utah Ct. App. 2000).

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[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

Forms

Powers and duties of successor trustees. [Am. Jur. Legal Forms 2d, Trusts § 251:391](#)

The powers of a substitute or successor trustee may be stated expressly in a trust instrument or declaration.^[FN1] Thus, where, by the terms of the trust, a power may be exercised by the original trustee or its successor, there is no question that the successor trustee can exercise the power.^[FN2] Whether, in the absence of such an express statement, the successor trustee has all the powers of the predecessor depends on the character of the powers held by the predecessor.^[FN3]

The general rule is that a new trustee succeeds to all the rights, duties, and responsibilities of his or her predecessors.^[FN4] Thus, a nonconfidential and impersonal power, pertaining to the office rather than to the person of the trustee, can be exercised by a substitute or successor trustee.^[FN5]

A purely personal and confidential power cannot be exercised by a substitute or successor trustee.^[FN6] Nevertheless, there is a strong tendency to narrow the scope of "personal trusts," and to permit trusts involving strong discretionary powers to continue under the supervision of a substituted fiduciary.^[FN7] Where the trust instrument does not expressly provide that powers of the trustee may be exercised by a successor trustee, it may

be determined that a successor trustee succeeds to the discretionary powers of the predecessor where the trustor's intention as expressed in the will as a whole, construed in light of surrounding circumstances, indicates a desire that a successor succeed to the powers of a predecessor trustee.[FN8]

Legal title to realty ordinarily descends to the heirs of a sole or last-surviving trustee, and legal title to personalty ordinarily passes to his or her personal representative, or the trust estate devolves in accordance with the will of the trustee.[FN9]

[FN1] [Price v. Marathon Oil Co., 11 Ohio App. 3d 106, 463 N.E.2d 410 \(3d Dist. Hancock County 1983\).](#)

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[FN2] [Price v. Marathon Oil Co., 11 Ohio App. 3d 106, 463 N.E.2d 410 \(3d Dist. Hancock County 1983\).](#)

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[FN3] [Kenaday v. Edwards, 134 U.S. 117, 10 S. Ct. 523, 33 L. Ed. 853 \(1890\).](#)

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[FN4] [Eddy v. Fields, 121 Cal. App. 4th 1543, 18 Cal. Rptr. 3d 487 \(2d Dist. 2004\)](#), as modified on denial of reh'g, (Sept. 21, 2004) and review filed, (Oct. 12, 2004).

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[FN5] [Booth v. Krug, 368 Ill. 487, 14 N.E.2d 645, 117 A.L.R. 1193 \(1938\).](#)

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[FN6] [Fontain v. Ravenel, 58 U.S. 369, 17 How. 369, 15 L. Ed. 80 \(1854\) \(applying Pa. law\); Pippin v. Barker, 233 N.C. 549, 64 S.E.2d 830 \(1951\); In re Houghton's Estate, 118 Vt. 228, 105 A.2d 257 \(1954\).](#)

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[FN7] [Munsey v. Laconia Home for Aged, 103 N.H. 42, 164 A.2d 557 \(1960\).](#)

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[FN8] [In re Emery's Will, 145 N.Y.S.2d 419 \(Sur. Ct. 1955\).](#)

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[FN9] [§ 257.](#)

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§ 325. Requirement of consent, generally

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[Propriety of sale of trust assets without consent despite trust provision requiring consent, 39 A.L.R.4th 158](#)

[Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 A.L.R.3d 1249](#)

[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

Forms

Advice of counsel. [Am. Jur. Legal Forms 2d, Trusts § 251:418](#)

Prohibition against sales—Without trustor's consent. [Am. Jur. Legal Forms 2d, Trusts § 251:469](#)

Approval of inter vivos trust by trustor's spouse. [Am. Jur. Legal Forms 2d, Trusts § 251:624](#)

In some instances, a trustee's exercise of powers is dependent on the advice or consent of others,[[FN1](#)] sometimes on that of disinterested persons,[[FN2](#)] sometimes on that of an executor of the will creating the trust estate,[[FN3](#)] and sometimes on that of beneficiaries[[FN4](#)] or of the trustor.[[FN5](#)] Where a trust instrument permits an investment in nonlegals only when the trustee obtains the consent of a designated person, the power to make such investments expires when the designated person dies.[[FN6](#)]

A trustor may appoint advisers to a trustee whose advice or consent to certain acts may be prerequisite to the valid execution of parts of the trust.[[FN7](#)] Such advisers may be said to be advisory trustees with strictly limited capacities and duties, that is, having no right or duty further than the capacity of advising as provided in the trust instrument.[[FN8](#)] Where an instrument requires a trustee to obtain the consent of a judge of a Circuit Court, if named advisers are incompetent or refuse to act, the requirement is not personal only to the advisers named, and where all the judges refuse to act, another will be appointed as adviser.[[FN9](#)]

[[FN1](#)] [In re Stillman's Estate, 81 Misc. 2d 747, 366 N.Y.S.2d 934 \(Sur. Ct. 1975\)](#) (although finding exception as to requirement of consent to nonlegal actions); [Young v. Hood, 209 N.C. 801, 184 S.E. 823 \(1936\)](#).

- As to the right of a trustee to petition the court for guidance in the administration of the trust, see [§ 309](#).

[\[FN2\] Title Guarantee Loan & Trust Co. v. Woodward, 238 Ala. 304, 191 So. 363, 129 A.L.R. 1301 \(1939\); In re Stillman's Estate, 81 Misc. 2d 747, 366 N.Y.S.2d 934 \(Sur. Ct. 1975\).](#)

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[\[FN3\] Rivers v. Stevenson, 169 S.C. 422, 169 S.E. 135, 89 A.L.R. 766 \(1933\).](#)

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[\[FN4\] §§ 326 to 330.](#)

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[\[FN5\] In re Rolston's Estate, 162 Misc. 194, 294 N.Y.S. 112 \(Sur. Ct. 1937\).](#)

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[\[FN6\] Petition of Bankers Trust Co., 109 N.Y.S.2d 158 \(Sup 1951\).](#)

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[\[FN7\] Chase Nat. Bank of City of New York v. Chicago Title & Trust Co., 246 A.D. 201, 284 N.Y.S. 472 \(1st Dep't 1935\), aff'd, 271 N.Y. 602, 3 N.E.2d 205 \(1936\).](#)

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[\[FN8\] Gathright's Trustee v. Gaut, 276 Ky. 562, 124 S.W.2d 782, 120 A.L.R. 1403 \(1939\).](#)

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[\[FN9\] Gathright's Trustee v. Gaut, 276 Ky. 562, 124 S.W.2d 782, 120 A.L.R. 1403 \(1939\).](#)

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West's Key Number Digest, [Trusts](#) [171](#), [172](#), [192](#), [206\(7\)](#), [218\(2\)](#)

Trust instruments sometimes require a trustee to obtain the advice and consent of beneficiaries before exercising a certain power, entering into a certain transaction, or taking a certain step in the administration of the trust,[\[FN1\]](#) or require that the trustee consider or act in a matter upon the request of beneficiaries.[\[FN2\]](#) Consent subsequent to the trustee's exercise of the power in question may be considered a sufficient compliance with such a requirement.[\[FN3\]](#)

Absent a requirement in the trust agreement, the consent of the beneficiaries of a trust is not required to any action taken by the trustee.[\[FN4\]](#) Nevertheless, a trustee may sua sponte seek the beneficiaries' agreement before disposing of trust property.[\[FN5\]](#) In this instance, the trustee may not delegate his or her investment authority to a beneficiary or others, and thus, even with acquiescence by some, a duty to the nonconsenting beneficiaries will remain.[\[FN6\]](#)

A trustee of a land trust is a mere vessel of title, and it exercises no control over the property and only acts according to the beneficiaries' directions.[\[FN7\]](#) In fact, the trustee of a land trust is not required to inquire into the propriety of any direction received from the authorized person.[\[FN8\]](#)

The trustees of a nominee trust act at the direction of the beneficiaries.[\[FN9\]](#)

Observation: A third party to an express trust who, as escrow holder, title insurer, and deed-of-trust trustee, helps the trustee sell trust properties owes no duty to the trust beneficiaries to investigate and determine whether the trustee has complied with the "beneficiary consent" provisions of the trust instrument, absent evidence that the third party actually knows the trustee is acting in violation of the trust provisions, does not act in good faith, or acts without consideration. [\[FN10\]](#)

[\[FN1\]](#) [Vournas v. Fidelity Nat. Title Ins. Co., 73 Cal. App. 4th 668, 86 Cal. Rptr. 2d 490 \(4th Dist. 1999\); Young v. Hood, 209 N.C. 801, 184 S.E. 823 \(1936\); Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN2\]](#) [Haggin v. Straus, 148 Ky. 140, 146 S.W. 391 \(1912\).](#)

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[\[FN3\]](#) [Lee v. Giles, 124 Ga. 494, 52 S.E. 806 \(1905\).](#)

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[\[FN4\]](#) [Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN5\]](#) [Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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[\[FN6\]](#) [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\).](#)

- As to investment by trustees, generally, see §§ [432](#) to [499](#).

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[\[FN7\]](#) [In re Marriage of Gross, 324 Ill. App. 3d 872, 258 Ill. Dec. 330, 756 N.E.2d 312 \(1st Dist. 2001\).](#)

- As to land trusts generally, see § [260](#).

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[\[FN8\]](#) [In re Marriage of Gross, 324 Ill. App. 3d 872, 258 Ill. Dec. 330, 756 N.E.2d 312 \(1st Dist. 2001\).](#)

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[\[FN9\]](#) [Lattuca v. Robsham, 442 Mass. 205, 812 N.E.2d 877 \(2004\).](#)

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[\[FN10\] Vournas v. Fidelity Nat. Title Ins. Co., 73 Cal. App. 4th 668, 86 Cal. Rptr. 2d 490 \(4th Dist. 1999\).](#)

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[Beneficiary's consent to, acquiescence in, or ratification of, trustee's improper allocation or distribution of assets, 29 A.L.R.2d 1034](#)

Where a beneficiary has requested or consented to what essentially amounts to mismanagement by a fiduciary, equitable rather than contractual principles govern the fiduciary's liability.[\[FN1\]](#)

The general rule is that a beneficiary of a trust who consents to or approves of an act, omission, or transaction by the trustee, if sui juris at the time,[\[FN2\]](#) may, upon the ground of waiver or estoppel, be precluded from subsequently objecting to the impropriety of such act, omission, or transaction, and thus be precluded from holding the trustee liable for any loss consequent thereupon, even though the conduct of the trustee may constitute a breach of duty in the administration of the trust.[\[FN3\]](#) The rule applies with special force as to a beneficiary who is the settlor or a cotrustee.[\[FN4\]](#)

On the other hand, the consent or approval of the beneficiary does not operate as a waiver or estoppel to object to the impropriety of acts, omissions, or transactions prohibited by statute or by the express terms of the trust.^[FN5] Moreover, the rule comes into operation only where there has been disclosure by the trustee and knowledge by the beneficiaries of material facts and circumstances,^[FN6] or where the trustee can establish absence of fraud, duress, undue influence, or abuse of confidence.^[FN7] In this regard, statute may create a presumption that a trust beneficiary's consent for a trustee to engage in self-dealing was given without sufficient consideration and under undue influence; in order for the presumption to be overcome, the trust must contain clear and unmistakable language authorizing such activities.^[FN8]

When there are several beneficiaries and only one of them approves of or consents to improper conduct on the part of the trustee, the nonassenting beneficiaries are not bound by such approval or consent.^[FN9] Furthermore, the approval or the consent to a particular transaction does not extend to other acts, omissions, or transactions by the trustee.^[FN10]

^[FN1] [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\).](#)

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^[FN2] As to the effect of incompetency, see [§ 329](#).

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^[FN3] [Hoyt v. Sprague, 103 U.S. 613, 26 L. Ed. 585 \(1880\); Heller v. First Nat. Bank of Denver, N.A., 657 P.2d 992 \(Colo. Ct. App. 1982\); Brent v. Smathers, 547 So. 2d 683 \(Fla. Dist. Ct. App. 3d Dist. 1989\); John R. Boyce Family Trust v. Snyder, 128 S.W.3d 630 \(Mo. Ct. App. E.D. 2004\); In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\).](#)

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^[FN4] [Scullin v. Clark, 242 S.W.2d 542, 29 A.L.R.2d 1024 \(Mo. 1951\).](#)

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^[FN5] [Jordan v. Jordan's Trust Estate, 111 Me. 124, 88 A. 390 \(1913\).](#)

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^[FN6] [§ 328](#).

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^[FN7] [Heller v. First Nat. Bank of Denver, N.A., 657 P.2d 992 \(Colo. Ct. App. 1982\).](#)

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^[FN8] [In re Estate of Stevenson, 2000 SD 24, 605 N.W.2d 818 \(S.D. 2000\).](#)

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^[FN9] [In re Allen's Estate, 35 Haw. 501, 1940 WL 7570 \(1940\).](#)

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^[FN10] [Duncan v. Jaudon, 82 U.S. 165, 21 L. Ed. 142 \(1872\).](#)

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VII. Administration of Trust, Generally
D. Approval, Consent, or Advice of Trustor, Beneficiary, and Others
2. Approval or Consent of Beneficiaries

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§ 328. Effect of disclosure by trustee or knowledge of mistake by beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [172](#), [192](#), [206\(7\)](#), [218\(2\)](#)

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[Beneficiary's consent to, acquiescence in, or ratification of, trustee's improper allocation or distribution of assets, 29 A.L.R.2d 1034](#)

The rule that beneficiaries cannot question the propriety of a trustee's act, omission, or transaction to which they have given their approval or consent is operative only where the trustee made a full disclosure^[FN1] and the beneficiaries had full knowledge of all the material facts and circumstances,^[FN2] or ought to have had such knowledge by reason of means and opportunities directly at their command.^[FN3] Moreover, the beneficiaries must have been aware of the impropriety or breach of trust involved in the act, omission, or transaction which they approved or to which they gave their consent.^[FN4]

In some cases, the rule is operative only where the beneficiary's knowledge is actual, and it is clear that the rule is not operative by reason of facts of public record which the beneficiaries are under no obligation to search.^[FN5] The beneficiaries must not only have been acquainted with the facts, but they must know of their rights and have been apprised of the law, and of how the facts would be dealt with by a court of equity.^[FN6]

^[FN1] [Pacelli Bros. Transp., Inc. v. Pacelli](#), 189 Conn. 401, 456 A.2d 325 (1983).

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^[FN2] [Heller v. First Nat. Bank of Denver, N.A.](#), 657 P.2d 992 (Colo. Ct. App. 1982); [Brent v. Smathers](#), 547 So. 2d 683 (Fla. Dist. Ct. App. 3d Dist. 1989); [Scullin v. Clark](#), 242 S.W.2d 542, 29 A.L.R.2d 1024 (Mo. 1951).

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^[FN3] [Hoyt v. Sprague](#), 103 U.S. 613, 26 L. Ed. 585 (1880); [Scullin v. Clark](#), 242 S.W.2d 542, 29 A.L.R.2d 1024 (Mo. 1951).

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[\[FN4\] Fulton Nat. Bank v. Tate, 363 F.2d 562 \(5th Cir. 1966\); In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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[\[FN5\] McAllister v. McAllister, 120 N.J. Eq. 407, 184 A. 723 \(Ch. 1936\), aff'd, 121 N.J. Eq. 264, 190 A. 52 \(Ct. Err. & App. 1937\) and aff'd, 121 N.J. Eq. 265, 190 A. 53 \(Ct. Err. & App. 1937\).](#)

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[\[FN6\] Brent v. Smathers, 547 So. 2d 683 \(Fla. Dist. Ct. App. 3d Dist. 1989\).](#)

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VII. Administration of Trust, Generally
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2. Approval or Consent of Beneficiaries

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 329. Effect of incompetency of beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [172](#), [192](#), [206\(7\)](#), [218\(2\)](#)

The rule that a trustee may be protected from liability where a beneficiary approves of or consents to a particular course of action is operative only where the beneficiaries are competent and sui juris at the time of their approval or consent.[\[FN1\]](#) Competency in this connection has been tested by the ability to understand the consequences of conduct, and therefore youths inexperienced in business may not possess the requisite competence to preclude the operation of the rule.[\[FN2\]](#)

[\[FN1\] Heller v. First Nat. Bank of Denver, N.A., 657 P.2d 992 \(Colo. Ct. App. 1982\).](#)

- As to the burden of proof of incompetence, see [§ 628](#).

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[\[FN2\] New York Life Ins. Co. v. Gilmore, 40 Ga. App. 431, 149 S.E. 799 \(1929\), rev'd, 171 Ga. 894, 157 S.E. 188 \(1931\).](#)

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VII. Administration of Trust, Generally
D. Approval, Consent, or Advice of Trustor, Beneficiary, and Others
2. Approval or Consent of Beneficiaries

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§ 330. Mode and sufficiency of approval or consent

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [172](#), [192](#), [206\(7\)](#), [218\(2\)](#)

The approval or consent by a beneficiary, within the rule of estoppel, waiver, or preclusion, may be oral or in writing,[\[FN1\]](#) and it may be express[\[FN2\]](#) or inferred from language or conduct.[\[FN3\]](#) However, conduct from which the inference is made must be established by full and satisfactory proof,[\[FN4\]](#) and ordinarily a trustee invoking the protection of the rule has the burden of proof of statements or conduct expressing or implying approval or consent of the beneficiaries.[\[FN5\]](#)

According to some courts, mere silence and failure to complain justifies an inference of waiver.[\[FN6\]](#)

Approval or consent of beneficiaries within the rule precluding them from thereafter attacking the propriety of an act, omission, or transaction in the administration of a trust may be inferred from their request or persuasion that the act, omission, or transaction be made.[\[FN7\]](#)

Approval or consent of beneficiaries as to improper acts, omissions, or transactions of a trustee may be by ratification of past acts of the trustee, either express or inferred from conduct.[\[FN8\]](#)

[\[FN1\] In re Miller's Estate, 333 Pa. 116, 3 A.2d 370, 128 A.L.R. 1 \(1939\).](#)

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[\[FN2\] Appeal of Matthews, 76 Conn. 654, 57 A. 694 \(1904\); Campbell v. Miller, 38 Ga. 304, 1868 WL 1507 \(1868\); Cary v. Cary, 159 Or. 578, 80 P.2d 886, 121 A.L.R. 1371 \(1938\).](#)

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[\[FN3\] White v. Sherman, 168 Ill. 589, 48 N.E. 128 \(1897\).](#)

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[\[FN4\] § 643.](#)

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[\[FN5\] § 628.](#)

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[\[FN6\] Hopkins v. Cleveland Trust Co., 163 Ohio St. 539, 56 Ohio Op. 442, 127 N.E.2d 385 \(1955\); Appeal of Burke, 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 \(1954\).](#)

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[\[FN7\] Smith v. Paquin, 325 Mass. 231, 90 N.E.2d 1 \(1950\); Appeal of Burke, 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 \(1954\).](#)

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[\[FN8\] Scullin v. Clark, 242 S.W.2d 542, 29 A.L.R.2d 1024 \(Mo. 1951\); In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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Trial Strategy

[Self-Dealing by Trustee, 38 Am. Jur. Proof of Facts 3d 279](#)

[Trustee's Representation That It Possessed Expert Knowledge Or Skill. 19 Am. Jur. Proof of Facts 2d 45](#)

19 Am. Jur. Proof of Facts 2d § 45

Forms

Am. Jur. Legal Forms 2d, Trusts §§ [251:409](#), [251:411](#), [251:412](#), [251:424](#)

[Am. Jur. Pleading and Practice Forms, Trusts §§ 143, 259](#)

Complaint, petition, or declaration—By beneficiary—For damages from trustee's breach of fiduciary duty. [Am. Jur. Pleading and Practice Forms, Trusts § 259](#)

Model Codes and Restatements

[Uniform Custodial Trust Act § 7\(b\)](#)

[Uniform Prudent Investor Act § 1](#)

[Uniform Trust Code §§ 802, 1001, 1009](#)

[Restatement Third, Trusts \(Prudent Investor Rule\) §§ 170, 171, 183, 184, 204, 205, 232](#)

[Restatement Third, Trusts \(Prudent Investor Rule\) § 181](#)

[Restatement Second, Trusts §§ 164, 173, 174, 217, 222 to 224, 226, 232](#)

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

a. Generally

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§ 331. Duties, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#) to [179](#)

The duties of a trustee are similar to those of a personal representative.^[FN1] A trustee occupies a position of peculiar responsibility,^[FN2] and is selected because of the settlor's confidence in his or her diligence, prudence, and absolute fidelity.^[FN3] Thus, the duties of a trustee are the highest known to the law.^[FN4]

A trustee's action is restricted by an overarching fiduciary duty,^[FN5] and courts have held that a trustee's first or primary duty is to —

— act wholly for the benefit of the trust,^[FN6] and to administer the trust solely in the interest,^[FN7] or for the benefit,^[FN8] of the beneficiaries.

— preserve the trust assets.^[FN9]

— carry out the settlor's intent.[\[FN10\]](#)

The sole duty of a trustee in a resulting trust or a constructive trust[\[FN11\]](#) is to convey the property to the beneficiary.[\[FN12\]](#) Generally speaking, the standard of a trustee's duty is the same whether the trust is by operation of law or express.[\[FN13\]](#)

[\[FN1\] Matter of Estate of Erlien, 190 Wis. 2d 400, 527 N.W.2d 389 \(Ct. App. 1994\).](#)

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[\[FN2\] Matter of Guardianship and Protective Placement of Verma L.B., 214 Wis. 2d 207, 571 N.W.2d 860 \(Ct. App. 1997\).](#)

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[\[FN3\] Matter of Guardianship and Protective Placement of Verma L.B., 214 Wis. 2d 207, 571 N.W.2d 860 \(Ct. App. 1997\).](#)

-

[\[FN4\] Eastern States Health & Welfare Fund v. Philip Morris, Inc., 188 Misc. 2d 638, 729 N.Y.S.2d 240 \(Sup 2000\).](#)

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[\[FN5\] Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 \(Iowa 2001\).](#)

- A trustee undertakes fiduciary obligations with respect to beneficiaries of the trust.

- [Recorded Picture Co. v. Nelson Entertainment, Inc., 53 Cal. App. 4th 350, 61 Cal. Rptr. 2d 742 \(2d Dist. 1997\)](#), as modified on denial of reh'g, (Apr. 3, 1997).

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[\[FN6\] In re Estate of Stevenson, 2000 SD 24, 605 N.W.2d 818 \(S.D. 2000\).](#)

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[\[FN7\] In re Baylis, 313 F.3d 9 \(1st Cir. 2002\).](#)

- Upon acceptance of the trust by the trustee, he or she is under a duty to the beneficiary to administer the trust. [Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963 \(Miss. 1999\).](#)

- As to the duty to administer the trust solely in the interest of the beneficiaries, generally, see [§ 350](#).

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[\[FN8\] Matter of Mangnall, 1997 ND 19, 559 N.W.2d 221 \(N.D. 1997\).](#)

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[\[FN9\] § 404.](#)

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[\[FN10\] § 344.](#)

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[\[FN11\]](#) As to a constructive trust, see §§ [168](#) to [204](#).

-

[\[FN12\] McCarthy v. Poulsen, 173 Cal. App. 3d 1212, 219 Cal. Rptr. 375 \(3d Dist. 1985\); Hogg v. Walker, 622 A.2d 648 \(Del. 1993\); Metropulos v. Chicago Art Glass, Inc., 156 Ill. App. 3d 727, 109 Ill. Dec. 229, 509 N.E.2d 1068 \(2d Dist. 1987\); Partrick & Wilkins Co. v. Reliance Ins. Co., 500 Pa. 399, 456 A.2d 1348 \(1983\).](#)

- The sole duty of the constructive trustee is to transfer title and possession of the wrongfully acquired property to the beneficiary. [Smithberg v. Illinois Mun. Retirement Fund, 192 Ill. 2d 291, 248 Ill. Dec. 909, 735 N.E.2d 560 \(2000\).](#)

- As to the surrender of possession and control of estate, generally, see [§ 405](#).

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[\[FN13\] § 131](#).

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

a. Generally

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§ 332. Duration

West's Key Number Digest

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A trustee's duties continue until the trust beneficiaries receive all the property due them under the trust.[\[FN1\]](#) Thus, a trustee has a fiduciary duty in winding up the trust,[\[FN2\]](#) which extends beyond termination until the trust assets are distributed.[\[FN3\]](#)

[\[FN1\]](#) [Wheeler v. Queen](#), 132 N.C. App. 91, 510 S.E.2d 195 (1999).

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[\[FN2\]](#) [In re Spengler](#), 228 Wis. 2d 250, 596 N.W.2d 818 (Ct. App. 1999).

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[FN3] [In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\)](#) (where the beneficiaries of a family trust agreed to loan the trust corpus to other family trusts).

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

b. Liability

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§ 333. Liability of trustee for breach of duty

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West's Key Number Digest, [Trusts](#) [339](#)

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[Liability of testamentary trustee for failure to assert claim against executor of testator's estate for mistake resulting in overpayment of taxes, 68 A.L.R.3d 1265.](#)

Forms

Complaint, petition, or declaration—By beneficiary—For damages from trustee's breach of fiduciary duty. [Am. Jur. Pleading and Practice Forms, Trusts § 259](#)

Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) § 204](#)

A trustee is liable for losses if there is a breach of trust^[FN1] or breach of duty.^[FN2] The beneficiaries of a trust may sue a trustee to recover profits or recoup losses resulting from the trustee's breach of any of its duties.^[FN3] A statute may require that any violation of the trustee's fiduciary duty to income beneficiaries and remaindermen will subject the trustee to a surcharge.^[FN4]

Observation: Under the Uniform Trust Code, a court may compel the trustee to redress a breach of trust by paying money, restoring property, or other means.^[FN5]

A breach of trust occurs when the trustee violates any duty that he or she owes to the beneficiary of the trust.^[FN6] Stated another way, a breach of duty by a trustee is a violation of a correlative right of beneficiary.^[FN7] However, a mere mistake is not an appropriate basis upon which to assess damages against trustees.^[FN8] Thus, a trustee is not liable for mere errors of judgment,^[FN9] when acting honestly with ordinary prudence within the limits of the trust.^[FN10] Similarly, a trustee is not liable for losses or depreciation in the value of trust property unless there has also been a breach of trust.^[FN11]

Liability may arise either when a trustee fails to do some mandatory act required by express terms of trust instrument^[FN12] or when a trustee performs a discretionary act negligently.^[FN13] In other words, the rule imposing liability on trustees is applicable to positive acts, as well as omissions or negligence.^[FN14] While it has been said that a trustee will not be held liable for a breach of duty where no loss or damage was suffered by the beneficiaries,^[FN15] it has also been said that a private beneficiary may be held liable for breach of duty even if the beneficiary was not financially damaged.^[FN16] Further, the Restatement recognizes that a trustee's liability extends to profits made or lost through the breach of trust.^[FN17]

CUMULATIVE SUPPLEMENT

Cases:

Civil contempt was not permissible sanction for trustee's violation of settlement agreement, which required her to hold \$60,000 in proceeds from sale of trust property in bank account in order to make funds available in event that trust beneficiary prevailed on her claims; trustee's violation of settlement agreement by disbursing funds to other parties was not omission to perform act which was yet in trustee's power to do, but instead, trustee had performed act that she had been commanded not to do, trustee no longer had power or ability to hold funds, and imprisonment could not undo nor remedy trustee's violation. West's I.C.A. § 7-611. [Johnson v. Howard, 246 P.3d 983 \(Idaho 2011\).](#)

[END OF SUPPLEMENT]

^[FN1] [In re Cannon, 277 F.3d 838, 2002 FED App. 0026P \(6th Cir. 2002\).](#) [Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\); Guerriero v. Commissioner of the Div. of Medical Assistance, 433 Mass. 628, 745 N.E.2d 324 \(2001\).](#)

- A trustee who commits a breach of trust is accountable for any profit accruing to the trust through the breach of trust, or chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered. [Estate of Wilde, 1998 ME 55, 708 A.2d 273 \(Me. 1998\).](#)

- As to liability for traffic in trust estate, see [§ 351](#).
- As to liability for lack of care, diligence, and skill, see §§ [360](#) to [365](#).
- As to liability for improper investments, see [§ 437](#).

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[FN2] [Hogg v. Walker, 622 A.2d 648 \(Del. 1993\)](#).

- When a trustee breaches his or her duties, he or she will be liable to trust in damages. [Estate of Wilde, 1998 ME 55, 708 A.2d 273 \(Me. 1998\)](#).

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[FN3] [City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329 \(1st Dist. 1998\)](#), as modified on denial of reh'g, (Jan. 6, 1999).

- A breach of duty gives rise to an action on the part of a beneficiary for any loss to the trust estate. [Hogg v. Walker, 622 A.2d 648 \(Del. 1993\)](#).

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[FN4] [In re Pace, 182 Misc. 2d 618, 699 N.Y.S.2d 257 \(Sup 1999\)](#) (with respect to receipts and expenditures).

- A surcharge is typically levied when trustees breach their fiduciary duties. [F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc., 244 F.3d 1128 \(9th Cir. 2001\)](#).

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[FN5] [Uniform Trust Code § 1001\(b\)\(3\)](#).

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[FN6] [Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\)](#); [City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329 \(1st Dist. 1998\)](#), as modified on denial of reh'g, (Jan. 6, 1999); [Adamson v. Norwest Bank Indiana, N.A., 633 N.E.2d 293 \(Ind. Ct. App. 3d Dist. 1994\)](#); [Branum v. Akins, 978 S.W.2d 554 \(Tenn. Ct. App. 1998\)](#); [Guerriero v. Commissioner of the Div. of Medical Assistance, 433 Mass. 628, 745 N.E.2d 324 \(2001\)](#).

- A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust. [Uniform Trust Code § 1001\(a\)](#).

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[FN7] [Hogg v. Walker, 622 A.2d 648 \(Del. 1993\)](#).

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[FN8] [McNeil v. Bennett, 792 A.2d 190 \(Del. Ch. 2001\)](#), aff'd in part, rev'd in part on other grounds, [798 A.2d 503 \(Del. 2002\)](#).

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[FN9] [Branum v. Akins, 978 S.W.2d 554 \(Tenn. Ct. App. 1998\)](#); [Columbia Land Development, LLC v. Secretary of State, 868 So. 2d 1006 \(Miss. 2004\)](#).

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[FN10] [Branum v. Akins, 978 S.W.2d 554 \(Tenn. Ct. App. 1998\)](#).

- As to the duty of care required of trustees, generally, see §§ [360](#) to [365](#).

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[FN11] [Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\)](#).

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[FN12] [Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 \(1986\)](#).

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[FN13] [Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 \(1986\)](#).

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[FN14] [Hogg v. Walker, 622 A.2d 648 \(Del. 1993\).](#)

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[FN15] [First Midwest Bank/Joliet v. Dempsey, 157 Ill. App. 3d 307, 109 Ill. Dec. 130, 509 N.E.2d 791 \(3d Dist. 1987\); Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 \(1999\).](#)

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[FN16] [Navajo Tribe of Indians v. U.S., 9 Cl. Ct. 336 \(1986\).](#)

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[FN17] [Restatement Third, Trusts \(Prudent Investor Rule\) § 205.](#)

- As to chargeability of trustee with interest, see [§ 381](#).

- Generally, as to liability for interest, see [Am. Jur. 2d, Interest and Usury § 68](#).

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A. In General

1. Generally

b. Liability

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§ 334. Liability of trustee for breach of duty—Nature of liability

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [245.1](#), [339](#)

A trustee is personally liable for a breach of trust[FN1] under general common-law principles.[FN2] Further, a statute may require that a trustee be held personally liable for any tort committed by him or her.[FN3] Thus, a trustee may be required, because of past loss of the trust corpus, to use his or her own resources to replenish the corpus.[FN4]

[\[FN1\] Matter of Wills of Jacobs, 91 N.C. App. 138, 370 S.E.2d 860 \(1988\); In re Cannon, 277 F.3d 838, 2002 FED App. 0026P \(6th Cir. 2002\).](#)

- A surcharge is an imposition of personal liability on a fiduciary for wilful or negligent misconduct in the administration of fiduciary duties. [F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc., 244 F.3d 1128 \(9th Cir. 2001\).](#)

[\[FN2\] Matter of Wills of Jacobs, 91 N.C. App. 138, 370 S.E.2d 860 \(1988\).](#)

[\[FN3\] Matter of Wills of Jacobs, 91 N.C. App. 138, 370 S.E.2d 860 \(1988\).](#)

- As to the trustee's personal liability for torts committed in the administration of the trust, see §§ [366](#), [367](#).

[\[FN4\] Papasan v. Allain, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209, 32 Ed. Law Rep. 1197 \(1986\).](#)

- Generally, as to following trust property, see §§ [272](#) to [277](#).

- As to following trust property into the hands of a personal representative, see [Am. Jur. 2d, Executors and Administrators § 1211](#).

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

b. Liability

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 335. Liability of trustee for breach of duty—For payment to wrong person

West's Key Number Digest

A.L.R. Library

[Trustee's liability for payments of trust funds to one whose interest has terminated, 48 A.L.R.2d 1252](#)

When a trustee makes a payment to a person other than the beneficiary entitled to receive the money, he or she is liable to the proper beneficiary to make restitution unless the payment was authorized by the proper court.[FN1] Thus, if a beneficiary transfers his or her interest and the trustee makes a payment or conveyance to the transferor-beneficiary when the trustee has notice of the transfer, the trustee is liable to the transferee.[FN2]

Comment: The trustee is liable although he or she reasonably believes that the person to whom he or she pays or conveys is the beneficiary or that the payment or conveyance is authorized or directed by the beneficiary or by the terms of the trust.[FN3]

[FN1] [National Academy of Sciences v. Cambridge Trust Co., 370 Mass. 303, 346 N.E.2d 879 \(1976\).](#)

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[FN2] [Guerriero v. Commissioner of the Div. of Medical Assistance, 433 Mass. 628, 745 N.E.2d 324 \(2001\).](#)

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[FN3] [Restatement Second, Trusts § 226](#), comment b.

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

b. Liability

§ 336. Limitation of liability by terms of trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 339

A.L.R. Library

[Coexecutor's, coadministrator's, or co-trustee's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019](#)

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

Forms

Limitation of trustee's liability—General form. [Am. Jur. Legal Forms 2d, Trusts § 251:409](#)

Model Codes and Restatements

[Restatement Second, Trusts § 222](#)

Exculpatory provisions in trust instruments are generally held effective.^[FN1] Thus, the terms of a trust may validly save or limit a trustee from liability to the trust estate or to the beneficiary^[FN2] with respect to the administration of the trust,^[FN3] or with respect to responsibility for the acts or defaults of a co-trustee.^[FN4]

A state legislature may expressly authorize the use of exculpatory clauses.^[FN5] However, clauses saving or limiting the trustee from liability are not favored by the law^[FN6] and are construed strictly against the trustee,^[FN7] particularly in the case of trust companies and professional trustees who hold themselves out as fully conversant with the duties of trustees and fully competent to perform them.^[FN8]

^[FN1] [Mahle v. First Nat. Bank of Peoria, 241 Ill. App. 3d 672, 182 Ill. Dec. 691, 610 N.E.2d 115 \(3d Dist. 1993\).](#)

- A trustee, by provisions in the terms of the trust, can be relieved of liability for breach of trust. [Restatement Second, Trusts § 222\(1\).](#)

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^[FN2] [Corpus Christi Nat. Bank v. Gerdes, 551 S.W.2d 521 \(Tex. Civ. App. Corpus Christi 1977\), writ refused n.r.e., \(Nov. 30, 1977\).](#)

- A trust agreement may validly provide that the trustee shall not be liable by reason of any loss, injury, or destruction to the property in any of the trust by or through the action of the trustee, except for losses caused by the trustee's willful fault or gross negligence. [Matter of Donald E. Bradford Trust, 538 So. 2d 263 \(La. 1989\).](#)

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[\[FN3\] *Perling v. Citizens and Southern Nat. Bank*, 250 Ga. 674, 300 S.E.2d 649 \(1983\); *Hanson v. Minette*, 461 N.W.2d 592 \(Iowa 1990\); *New England Trust Co. v. Paine*, 317 Mass. 542, 59 N.E.2d 263, 158 A.L.R. 262 \(1945\); *In re Clark's Will*, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 \(1931\).](#)

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[\[FN4\] *Caldwell v. Graham*, 115 Md. 122, 80 A. 839 \(1911\).](#)

- Generally, as to liability of trustee for acts or defaults of a co-trustee, see [§ 340](#).

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[\[FN5\] *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 \(Tex. 2002\), reh'g of cause overruled, \(Feb. 27, 2003\).](#)

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[\[FN6\] *New England Trust Co. v. Paine*, 317 Mass. 542, 59 N.E.2d 263, 158 A.L.R. 262 \(1945\).](#)

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[\[FN7\] *Renz v. Beeman*, 589 F.2d 735 \(2d Cir. 1978\); *Dunkley v. Peoples Bank & Trust Co.*, 728 F. Supp. 547 \(W.D. Ark. 1989\); *Bartlett v. Dumaine*, 128 N.H. 497, 523 A.2d 1 \(1986\); *Jewett v. Capital Nat. Bank of Austin*, 618 S.W.2d 109 \(Tex. Civ. App. Waco 1981\), writ refused n.r.e., \(Nov. 4, 1981\).](#)

- Although express terms of a trust may relax, constrict, or otherwise modify the standard of care to which a particular trustee is held, a trust provision fixing the standard of care or skill lower than that which would otherwise be required of a trustee is strictly construed. [New York State Medical Care Facilities Finance Agency v. Bank of Tokyo Trust Co.](#), 163 Misc. 2d 551, 621 N.Y.S.2d 466 (Sup 1994), aff'd, 216 A.D.2d 126, 629 N.Y.S.2d 3 (1st Dep't 1995).

- Trust language was intended to protect the trustee against liability for actions taken in the operation of the business which the decedent owned when he executed the trust agreement, not to exculpate the trustee from liability for a failure to collect the assets of the trust. [Semler v. CoreStates Bank](#), 301 N.J. Super. 164, 693 A.2d 1198 (App. Div. 1997).

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[\[FN8\] *New England Trust Co. v. Paine*, 317 Mass. 542, 59 N.E.2d 263, 158 A.L.R. 262 \(1945\).](#)

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VIII. Duties and Liabilities of Trustee

- A. In General
 - 1. Generally
 - b. Liability

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 337. Limitation of liability by terms of trust—Extent of effectiveness

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [339](#)

Model Codes and Restatements

[Restatement Second, Trusts § 222](#), comment a

Under the Restatement, a provision in the trust instrument is not effective to relieve the trustee of liability for a breach of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary, or of liability for any profit which the trustee has derived from a breach of trust.[\[FN1\]](#) Similarly, courts have held that a saving or exemption provision in a trust instrument will not save or limit the trustee from liability for —

— bad faith.[\[FN2\]](#)

— an excess of authority.[\[FN3\]](#)

— an abuse by the trustee of a fiduciary or confidential relationship to the settlor.[\[FN4\]](#)

— breaches committed intentionally or with reckless disregard to the beneficiary's interests.[\[FN5\]](#)

Public policy prohibits exculpatory clauses that authorize self-dealing in violation of a state statute.[\[FN6\]](#) Likewise, an exculpatory provision is ineffective to allow the trustee to escape fiduciary obligations imposed under statutory provisions.[\[FN7\]](#)

Observation: An exculpatory clause contained in a trust instrument which provided that "each trustee shall be liable only for his own willful misconduct or omissions in bad faith" was ineffective to protect the trustee where: (1) the trustee had written the trust instrument as the settlor's attorney; (2) the settlor received no independent advice; (3) the settlor was 70 years old and in questionable health when she created trust; and (4) the trustee did not bring the exculpatory clause to the settlor's attention and did not explain the clause's implications.[\[FN8\]](#)

However, exculpatory provisions go far toward absolving an honest trustee from responsibility for unconscious mistakes.[\[FN9\]](#) For example, a saving clause may save the trustee from liability for —

— mistake or a mere error of judgment.[\[FN10\]](#)

— losses not intentionally or voluntarily incurred.[\[FN11\]](#)

— negligence.[\[FN12\]](#)

— a failure of diversification of trust investments[\[FN13\]](#) in a jurisdiction where the duty of diversification is recognized.[\[FN14\]](#)

[FN1] [Restatement Second, Trusts § 222\(2\)](#).

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[FN2] [Fidelity Bank v. Com. Marine and General Assur. Co., Ltd., 592 F. Supp. 513 \(E.D. Pa. 1984\)](#); [Perling v. Citizens and Southern Nat. Bank, 250 Ga. 674, 300 S.E.2d 649 \(1983\)](#); [Mahle v. First Nat. Bank of Peoria, 241 Ill. App. 3d 672, 182 Ill. Dec. 691, 610 N.E.2d 115 \(3d Dist. 1993\)](#); [North Adams Nat. Bank v. Curtiss, 278 Mass. 471, 180 N.E. 217, 83 A.L.R. 607 \(1932\)](#); [Corpus Christi Nat. Bank v. Gerdes, 551 S.W.2d 521 \(Tex. Civ. App. Corpus Christi 1977\)](#), writ refused n.r.e., (Nov. 30, 1977).

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[FN3] [Conover v. Guarantee Trust Co., 88 N.J. Eq. 450, 102 A. 844 \(Ch. 1918\)](#), aff'd, [89 N.J. Eq. 584, 106 A. 890 \(Ct. Err. & App. 1918\)](#).

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[FN4] [Hanson v. Minette, 461 N.W.2d 592 \(Iowa 1990\)](#).

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[FN5] [Mahle v. First Nat. Bank of Peoria, 241 Ill. App. 3d 672, 182 Ill. Dec. 691, 610 N.E.2d 115 \(3d Dist. 1993\)](#).

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[FN6] [Corpus Christi Nat. Bank v. Gerdes, 551 S.W.2d 521 \(Tex. Civ. App. Corpus Christi 1977\)](#), writ refused n.r.e., (Nov. 30, 1977).

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[FN7] [Gaudina v. Haberman, 644 P.2d 159 \(Wyo. 1982\)](#).

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[FN8] [Rutanen v. Ballard, 424 Mass. 723, 678 N.E.2d 133 \(1997\)](#).

- As to independent advice promoting fairness in dealings between the trustee and beneficiary, generally, see [§ 357](#).

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[FN9] [Anderson v. Bean, 272 Mass. 432, 172 N.E. 647, 72 A.L.R. 959 \(1930\)](#).

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[FN10] [In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 \(1931\)](#); [Corpus Christi Nat. Bank v. Gerdes, 551 S.W.2d 521 \(Tex. Civ. App. Corpus Christi 1977\)](#), writ refused n.r.e., (Nov. 30, 1977).

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[FN11] [New England Trust Co. v. Paine, 317 Mass. 542, 59 N.E.2d 263, 158 A.L.R. 262 \(1945\)](#).

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[FN12] [Corpus Christi Nat. Bank v. Gerdes, 551 S.W.2d 521 \(Tex. Civ. App. Corpus Christi 1977\)](#), writ refused n.r.e., (Nov. 30, 1977).

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[FN13] [North Adams Nat. Bank v. Curtiss, 278 Mass. 471, 180 N.E. 217, 83 A.L.R. 607 \(1932\)](#).

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[FN14] [§ 490](#).

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

b. Liability

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§ 338. Release of trustee by beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#), [237](#), [339](#)

A.L.R. Library

[Coexecutor's, coadministrator's, or co-trustee's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019](#)

Model Codes and Restatements

[Restatement Second, Trusts § 217\(1\), \(2\)](#)

Under the Uniform Trust Code, a trustee is generally not liable to a beneficiary for breach of trust if the beneficiary:[\[FN1\]](#)

- (1) consented to the conduct constituting the breach;
- (2) released the trustee from liability for the breach; or
- (3) ratified the transaction constituting the breach.

Thus, a trust beneficiary who consents to or approves of an act, omission, or transaction by a trustee may, upon the ground of waiver or estoppel, be precluded from subsequently objecting to the impropriety of the act, omission, or transaction.^[FN2] In such cases, approval may arise from acquiescence, request, participation, or notification.^[FN3] However, a trustee may remain liable if: (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee;^[FN4] or (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.^[FN5]

The rule that a trustee owes the fullest possible fairness and disclosure to a beneficiary in any dealing between them^[FN6] applies to a release of a trustee from liability for a breach of duty in the administration of the trust.^[FN7] To constitute a valid consent under the Uniform Trust Code, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach.^[FN8] While the burden of proof with respect to the fairness of the transaction that led to the release is on the trustee,^[FN9] the beneficiary, or the party opposing its use, has the burden of challenging the validity of the release, by asserting fraud in the execution, fraud in the inducement, mutual mistake, or mental incompetence.^[FN10]

A release executed by an infant or other incompetent is voidable to the same extent as are the contracts of an infant or other incompetent, generally.^[FN11] Under the Uniform Trust Code, however, an incapacitated beneficiary may be bound to the extent an approval is given by a person authorized to represent the beneficiary.^[FN12] A release of a trustee by a beneficiary will be set aside when executed under coercion or duress,^[FN13] or upon the ground of mistake where the circumstances justify a rescission in equity.^[FN14] It is legal duress for a trustee to refuse to turn over property to a beneficiary rightfully entitled to the property, except upon condition of signing a release.^[FN15]

^[FN1] [Uniform Trust Code § 1009.](#)

^[FN2] [Mahle v. First Nat. Bank of Peoria, 241 Ill. App. 3d 672, 182 Ill. Dec. 691, 610 N.E.2d 115 \(3d Dist. 1993\).](#)

- As to consent, approval, request, or acquiescence of a beneficiary operating as an estoppel, waiver, or preclusion in respect of any assertion by the beneficiary of a breach of trust, see §§ [325](#) to [330](#).

^[FN3] [Mahle v. First Nat. Bank of Peoria, 241 Ill. App. 3d 672, 182 Ill. Dec. 691, 610 N.E.2d 115 \(3d Dist. 1993\).](#)

^[FN4] [Uniform Trust Code § 1009\(1\).](#)

^[FN5] [Uniform Trust Code § 1009\(2\).](#)

^[FN6] §§ [355](#), [356](#).

^[FN7] [Ingram v. Lewis, 37 F.2d 259, 70 A.L.R. 702 \(C.C.A. 10th Cir. 1930\)](#); [Ditmars v. Camden Trust Co., 10 N.J. Super. 306, 76 A.2d 280 \(Ch. Div. 1950\)](#), judgment modified, [10 N.J. 471, 92 A.2d 12, 35 A.L.R.2d 822 \(1952\)](#).

^[FN8] [Uniform Trust Code § 1009](#), comment.

^[FN9] [Ingram v. Lewis, 37 F.2d 259, 70 A.L.R. 702 \(C.C.A. 10th Cir. 1930\).](#)

[\[FN10\] McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\).](#)

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[\[FN11\] Anderson v. Simms, 29 S.C. 247, 7 S.E. 289 \(1888\).](#)

- Generally, as to releases executed persons under mental disability, see [Am. Jur. 2d, Release § 19](#).

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[\[FN12\] Uniform Trust Code § 1009](#) comment.

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[\[FN13\] Ingram v. Lewis, 37 F.2d 259, 70 A.L.R. 702 \(C.C.A. 10th Cir. 1930\).](#)

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[\[FN14\] Reggio v. Warren, 207 Mass. 525, 93 N.E. 805 \(1911\).](#)

- As to effect of fraud, duress, or mistake on releases, generally, see [66 Am. Jur. 2d, Release §§ 16 to 27](#).

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[\[FN15\] Ingram v. Lewis, 37 F.2d 259, 70 A.L.R. 702 \(C.C.A. 10th Cir. 1930\).](#)

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

b. Liability

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§ 339. Liabilities of third person participating in trustee's breach of duty

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [179](#), [232](#) to [235](#)

Where third parties, with actual or constructive knowledge of a trustee's breach of duty, participate in the breach, they are liable to the trust estate or to the beneficiaries^[FN1] for any loss caused to the trust estate by the trustee's breach of duty.^[FN2] The third-party strangers to the trust are liable as principals with the trustee.^[FN3]

The liability of third persons applies —
— to purchasers of trust property who take with actual or constructive notice that the sale is unauthorized and constitutes a breach of trust.^[FN4]

— where a third party makes a payment to a trustee, knowing that the trustee intends to misappropriate the money or otherwise be false to his or her trust.^[FN5]

— where a creditor accepts property from a trustee-debtor that the creditor knows or should know is trust property.^[FN6]

— where a third party knowingly aids or participates in a diversion of trust funds.^[FN7]

Practice Guide: It has been held that there is no element of intent to be proved in connection with a claim of knowing participation in a fiduciary duty.^[FN8] A person who deals with another whom he or she knows to be a trustee is put upon inquiry as to the extent of the trustee's powers and charged with knowledge of the facts which a reasonable investigation would disclose.^[FN9]

^[FN1] Donovan v. Schmoutey, 592 F. Supp. 1361 (D. Nev. 1984) (rejected on other grounds by, Carpenters Dist. Council of Kansas City Pension Fund v. Bowlus School Supply, Inc., 716 F. Supp. 1232 (W.D. Mo. 1989)); Gilbert v. El Paso Co., 490 A.2d 1050 (Del. Ch. 1984), judgment aff'd, 575 A.2d 1131 (Del. 1990).
- As to the duty of inquiry of a purchaser from the trustee, see §§ 295 to 297.

^[FN2] Seminole Nation v. U.S., 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480, 86 L. Ed. 1777 (1942); Donovan v. Schmoutey, 592 F. Supp. 1361 (D. Nev. 1984) (rejected on other grounds by, Carpenters Dist. Council of Kansas City Pension Fund v. Bowlus School Supply, Inc., 716 F. Supp. 1232 (W.D. Mo. 1989)); Olin Cemetery Ass'n of Olin v. Citizens Sav. Bank of Olin, 222 Iowa 1053, 270 N.W. 455, 112 A.L.R. 1205 (1936); Marcus v. Marcus, 92 A.D.2d 887, 459 N.Y.S.2d 873 (2d Dep't 1983).

^[FN3] Martin v. First Nat. Bank, 51 F.2d 840 (D. Minn. 1931); Olin Cemetery Ass'n of Olin v. Citizens Sav. Bank of Olin, 222 Iowa 1053, 270 N.W. 455, 112 A.L.R. 1205 (1936).
- As to transferees of trust funds as joint and several tortfeasors, see § 277.

^[FN4] § 272.

^[FN5] Seminole Nation v. U.S., 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480, 86 L. Ed. 1777 (1942).

^[FN6] Centrust Sav. Bank v. Barnett Banks Trust Co., N.A., 483 So. 2d 867 (Fla. Dist. Ct. App. 5th Dist. 1986).

^[FN7] Duckett v. National Mechanics' Bank, 86 Md. 400, 38 A. 983 (1897); Knox Glass Bottle Co. v. Underwood, 228 Miss. 699, 91 So. 2d 843 (1957).

[\[FN8\] Donovan v. Schmoutey, 592 F. Supp. 1361 \(D. Nev. 1984\)](#) (rejected on other grounds by, [Carpenters Dist. Council of Kansas City Pension Fund v. Bowlus School Supply, Inc., 716 F. Supp. 1232 \(W.D. Mo. 1989\)](#)).

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[\[FN9\] FNB Southeast v. Lane, 160 N.C. App. 535, 586 S.E.2d 530 \(2003\)](#), review denied, [358 N.C. 153, 592 S.E.2d 558 \(2004\)](#).

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

c. Co-trustees; Successor Trustees

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§ 340. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [339](#), [238.1](#), [240](#)

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[Coexecutor's, coadministrator's, or co-trustee's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019](#)

Model Codes and Restatements

[Restatement Second, Trusts § 224](#)

As a general rule a trustee is responsible only for his or her own acts or defaults,[[FN1](#)] or acts or omissions,[[FN2](#)] and is not liable to the beneficiary for a breach of trust committed by a co-trustee.[[FN3](#)] Therefore, a trustee is not responsible for acts or misconduct of a co-trustee:[[FN4](#)]

- in which the first trustee has not joined

- to which the first trustee does not consent

- which the first trustee has not aided or made possible by his or her own neglect

On the other hand, a trustee is liable to the beneficiary if he or she:[[FN5](#)]

- (1) participates in a breach of trust committed by a cotrustee;
- (2) improperly delegates the administration of the trust to a cotrustee;
- (3) approves or acquiesces in or conceals a breach of trust committed by a co-trustee;
- (4) fails to exercise reasonable care in the administration of the trust which has enabled a co-trustee to commit a breach of trust; or
- (5) neglects to take proper steps to compel a co-trustee to redress a breach of trust.

In other words, a trustee is responsible for the wrongful acts of a co-trustee to which he or she consented or which, by his or her negligence, enabled the co-trustee to commit,[[FN6](#)] but for no others.[[FN7](#)]

While the terms of the trust may provide for an apportionment of powers among co-trustees,[[FN8](#)] or save or limit a trustee from liability for the acts or faults of a co-trustee,[[FN9](#)] these provisions generally are strictly construed against the trustee.[[FN10](#)]

Caution: Laches may defeat any right, if it ever existed, to hold one co-trustee liable for the acts of another co-trustee.[[FN11](#)]

[\[FN1\] Caldwell v. Graham, 115 Md. 122, 80 A. 839 \(1911\).](#)

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[\[FN2\] Shriners Hospitals for Crippled Children v. Robbins, 450 So. 2d 798 \(Ala. 1984\).](#)

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[\[FN3\] Dardovitch v. Haltzman, 190 F.3d 125 \(3d Cir. 1999\) \(applying Pennsylvania law\).](#)

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[\[FN4\] Rutanen v. Ballard, 424 Mass. 723, 678 N.E.2d 133 \(1997\).](#)

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[\[FN5\] Dardovitch v. Haltzman, 190 F.3d 125 \(3d Cir. 1999\)\(applying Pennsylvania law\).](#)

- As to liability for failure to participate, see [§ 341](#).

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[\[FN6\] Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\).](#)

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[\[FN7\] Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\).](#)

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[\[FN8\] Caldwell v. Graham, 115 Md. 122, 80 A. 839 \(1911\); Felsenheld v. Bloch Bros. Tobacco Co., 119 W. Va. 167, 192 S.E. 545, 123 A.L.R. 334 \(1937\).](#)

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[\[FN9\] § 336.](#)

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[\[FN10\] Felsenheld v. Bloch Bros. Tobacco Co., 119 W. Va. 167, 192 S.E. 545, 123 A.L.R. 334 \(1937\).](#)

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[\[FN11\] Colburn v. Grant, 181 U.S. 601, 21 S. Ct. 737, 45 L. Ed. 1021 \(1901\).](#)

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VIII. Duties and Liabilities of Trustee

A. In General

1. Generally

c. Co-trustees; Successor Trustees

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§ 341. Failure to participate

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [339](#), [238.1](#), [239](#), [241](#)

A trustee is under a duty to participate in the administration of the trust[\[FN1\]](#) and to use reasonable care to prevent a co-trustee from committing a breach of trust.[\[FN2\]](#) Thus, a co-trustee does not escape liability for a breach of fiduciary duty by failing to participate in the administration of the trust.[\[FN3\]](#) Simple, passive negligence of a trustee can give rise to liability for the breaches of a co-trustee.[\[FN4\]](#)

[\[FN1\] § 348.](#)

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[\[FN2\] § 364.](#)

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[\[FN3\] Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A., 914 S.W.2d 384 \(Mo. Ct. App. W.D. 1996\).](#)

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[\[FN4\] Dardovitch v. Haltzman, 190 F.3d 125 \(3d Cir. 1999\) \(applying Pennsylvania law\).](#)

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§ 342. Joint and several liability

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [240](#)

The general rule of legal liability of co-trustees when both chargeable with a breach of trust is that they are equally [\[FN1\]](#) and jointly and severally liable for losses occasioned by the breach of trust. [\[FN2\]](#) Joint and several liability is imposed when —
— both trustees are negligent. [\[FN3\]](#)

— one assents to the other's breach of trust.[\[FN4\]](#)

— the trustees mutually agreed between them that one would have the exclusive management of one part of the trust property and a loss results that would have been avoided if both trustees had attended to all assets.[\[FN5\]](#)

[\[FN1\] May v. Henderson, 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870 \(1925\); Colburn v. Grant, 181 U.S. 601, 21 S. Ct. 737, 45 L. Ed. 1021 \(1901\); Fox v. Tay, 89 Cal. 339, 24 P. 855 \(1890\), aff'd, 89 Cal. 339, 26 P. 897 \(1891\); Caldwell v. Graham, 115 Md. 122, 80 A. 839 \(1911\); Bruen v. Gillet, 115 N.Y. 10, 21 N.E. 676 \(1889\).](#)

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[\[FN2\] Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 \(3d Cir. 1984\)](#) (disapproved of on other grounds by, [Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 \(1989\)](#)); [Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\)](#); [Azarian v. Ettinger, 87 A.D.2d 980, 450 N.Y.S.2d 115 \(4th Dep't 1982\).](#)

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[\[FN3\] First & Merchants Nat. Bank of Richmond v. Bank of Waverly, 170 Va. 496, 197 S.E. 462, 116 A.L.R. 1156 \(1938\).](#)

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[\[FN4\] May v. Henderson, 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870 \(1925\); Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\).](#)

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[\[FN5\] Shriners Hospitals for Crippled Children v. Robbins, 450 So. 2d 798 \(Ala. 1984\).](#)

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§ 343. Successor or substitute trustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 243, 244

Model Codes and Restatements

[Restatement Second, Trusts § 223](#)

The liability of a successor trustee for defalcations of his or her predecessor must be based on some fault of his or her own.^[FN1] However, although a successor trustee is not automatically liable for a breach of trust committed by a predecessor trustee,^[FN2] liability will be imposed where the successor knows or should know of the breach and nevertheless permits its continuation.^[FN3]

^[FN1] [In re Campbell's Estate](#), 46 Haw. 475, 382 P.2d 920 (1963), [In re Kline's Estate](#), 280 Pa. 41, 124 A. 280, 32 A.L.R. 926 (1924).

- As to successor trustees succeeding to the powers of the trust, see § § [319](#), [324](#).

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^[FN2] [Hamilton v. Mercantile Bank of Cedar Rapids](#), 621 N.W.2d 401 (Iowa 2001).

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^[FN3] [Hamilton v. Mercantile Bank of Cedar Rapids](#), 621 N.W.2d 401 (Iowa 2001).

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§ 344. Generally

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West's Key Number Digest, [Trusts](#) [171](#) to [178](#)

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[Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196](#)

A trust is to be managed to carry out the testator's intent.^[FN1] Under some authority, a trustee's primary duty is to carry out the settlor's intent,^[FN2] tempered only by the fiduciary obligation of loyalty to the beneficiaries.^[FN3] Other authority holds that while the trustee's duties may derive from the trust instrument,^[FN4] they initially stem from the special nature of the relation between trustee and beneficiary,^[FN5] so that the trustee's undertakings or promises in a trust instrument are not normally contractual.^[FN6]

A trustee, by operation of law is, in general, under a duty to carry out the trust.^[FN7] In the event the trust is impossible to perform, the trustee may apply to the court for a decree or order to terminate it^[FN8] or to permit a deviation from its terms.^[FN9]

^[FN1] [In re Estate of Berthot, 2002 MT 277, 312 Mont. 366, 59 P.3d 1080 \(2002\).](#)

- A trustee must ensure that the estate is distributed in accordance with the testator's wishes. [Matter of Duke, 305 N.J. Super. 408, 702 A.2d 1008 \(Ch. Div. 1995\), aff'd, 305 N.J. Super. 407, 702 A.2d 1007 \(App. Div. 1997\).](#)

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^[FN2] [Austin v. U.S. Bank of Washington, 73 Wash. App. 293, 869 P.2d 404 \(Div. 2 1994\).](#)

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^[FN3] [In re IJB Schroder Bank & Trust Co., 271 A.D.2d 322, 706 N.Y.S.2d 114 \(1st Dep't 2000\).](#)

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^[FN4] [In re Naarden Trust, 195 Ariz. 526, 990 P.2d 1085 \(Ct. App. Div. 1 1999\),](#) as amended, (June 16, 1999).

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^[FN5] [In re Naarden Trust, 195 Ariz. 526, 990 P.2d 1085 \(Ct. App. Div. 1 1999\),](#) as amended, (June 16, 1999).

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^[FN6] [In re Naarden Trust, 195 Ariz. 526, 990 P.2d 1085 \(Ct. App. Div. 1 1999\),](#) as amended, (June 16, 1999).

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^[FN7] Generally, as to the duty of a trustee by operation of law to execute a trust, see [§ 131](#).

- Concerning the duty of a trustee to execute a constructive trust binding the transferee of the trust property, see [§ § 276, 290](#).

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[\[FN8\] § 88.](#)

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[\[FN9\] § 312.](#)

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§ 345. Compliance with terms of trust

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West's Key Number Digest, [Trusts](#) [171](#) to [172](#)

Model Codes and Restatements

[Restatement Second, Trusts § 164\(a\)](#)

The powers and duties of a trustee are controlled or defined by the terms of the trust instrument,[\[FN1\]](#) as well as the common law and statutes.[\[FN2\]](#) However, a settlor is free to alter or even eliminate some of the specific statutory duties imposed upon the fiduciary in the terms of the trust.[\[FN3\]](#)

Unless a trust provision is void as against public policy,[\[FN4\]](#) a trustee must act in conformance with the trust instrument,[\[FN5\]](#) or in accordance with the true intent of the trust agreement.[\[FN6\]](#) Thus, in ascertaining the powers of a trustee to carry out the purposes of a trust, it is important to analyze the terms of the trust.[\[FN7\]](#) Nonetheless, a trustee cannot deviate from the terms of the trust merely because the beneficiary would derive greater benefit from a failure to abide by the directive of the trust instrument.[\[FN8\]](#)

Under some circumstances, the trustee may be deemed to have authority to deviate from the terms of the trust upon court order.[\[FN10\]](#) However, as a general rule, a failure to administer the trust in accordance with its terms renders a trustee liable for any injury sustained thereby by the trust estate or any person beneficially interested in the trust,[\[FN11\]](#) irrespective of good faith on the part of the trustee.[\[FN12\]](#) A trustee, in accepting the trust, is presumed to know the limitations on his or her powers stated in the trust,[\[FN13\]](#) and the consequences of transgression.[\[FN14\]](#) Misapplication of the trust estate renders the trustee immediately liable for the proceeds or the value of the property misapplied, at the option of the beneficiary.[\[FN15\]](#)

[\[FN1\]](#) [Cobell v. Norton](#), 240 F.3d 1081 (D.C. Cir. 2001); [Dunkley v. Peoples Bank & Trust Co.](#), 728 F. Supp. 547 (W.D. Ark. 1989) (applying Arkansas law); [Lichtenstein v. Consolidated Services Group, Inc.](#), 173 F.3d 17, 43 Fed. R. Serv. 3d 1161 (1st Cir. 1999) (applying Maine law); [Wahrman v. Wahrman](#), 243 Neb. 673, 502 N.W.2d 95 (1993); [In re Trust of Brooke](#), 82 Ohio St. 3d 553, 1998-Ohio-185, 697 N.E.2d 191 (1998); [In re IBJ Schroder Bank & Trust Co.](#), 271 A.D.2d 322, 706 N.Y.S.2d 114 (1st Dep't 2000); [In re Estate of Ehlers](#), 80 Wash. App. 751, 911 P.2d 1017 (Div. 3 1996); [Hatleberg v. Norwest Bank Wisconsin](#), 271 Wis. 2d 225, 2004 WI App 48, 678 N.W.2d 302 (Ct. App. 2004), review granted, 2004 WI 123, 687 N.W.2d 522 (Wis. 2004).
- Where the trust estate is created by will, the trustees must look to the will for its powers in the execution of the trust and the management of the trust estate. [First Nat. Bank of Kansas City v. Hyde](#), 363 S.W.2d 647 (Mo. 1962).

[\[FN2\]](#) [In re Estate of Ehlers](#), 80 Wash. App. 751, 911 P.2d 1017 (Div. 3 1996); [Wahrman v. Wahrman](#), 243 Neb. 673, 502 N.W.2d 95 (1993).

[\[FN3\]](#) [In re Testamentary Trust of Hamm](#), 124 Ohio App. 3d 683, 707 N.E.2d 524 (11th Dist. Geauga County 1997); [Cohen v. Gainer Bank, N.A.](#), 628 N.E.2d 1246 (Ind. Ct. App. 5th Dist. 1994).

[\[FN4\]](#) [Helman v. Mendelson](#), 138 Md. App. 29, 769 A.2d 1025 (2001).

[\[FN5\]](#) [Helman v. Mendelson](#), 138 Md. App. 29, 769 A.2d 1025 (2001).

- The fundamental duty of a trustee is to carry out the terms of the trust. [American Nat. Bank of Cheyenne, Wyo. v. Miller](#), 899 P.2d 1337 (Wyo. 1995).

[\[FN6\]](#) [Merrill Lynch Pierce Fenner & Smith Inc. v. Nora-Johnson](#), 351 N.J. Super. 177, 797 A.2d 226 (App. Div. 2002).

- In determining the scope of a trustee's powers, courts seek to effectuate the intent of the grantor as expressed in the terms of the trust. [Ward v. NationsBank of Virginia, N.A.](#), 256 Va. 427, 507 S.E.2d 616 (1998).

[\[FN7\]](#) [New Jersey Thoroughbred Horseman's Ass'n v. State](#), 348 N.J. Super. 125, 791 A.2d 320 (Ch. Div. 2001).

[\[FN8\]](#) [Sunrise Healthcare Corp. v. Azarigian](#), 76 Conn. App. 800, 821 A.2d 835 (2003).

[\[FN10\]](#) §§ [312](#) to [314](#).

[\[FN11\]](#) [In re Trusteeship of Stone](#), 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 (1941); [Kutz v. Nolan](#), 224 Pa. 262, 73 A. 555 (1909); [Rodgers v. Herron](#), 226 S.C. 317, 85 S.E.2d 104, 48 A.L.R.2d

[1241 \(1954\)](#).

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[FN12] [Rodgers v. Herron, 226 S.C. 317, 85 S.E.2d 104, 48 A.L.R.2d 1241 \(1954\)](#).

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[FN13] [In re Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204, 172 A.L.R. 977 \(1947\)](#); [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\)](#).

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[FN14] [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\)](#).

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[FN15] § § [275](#), [276](#).

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§ 346. Compliance with orders of court

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [178](#)

A trustee must comply with orders of the court with jurisdiction and control over the trust estate.[FN1] Fiduciaries may not be surcharged when they properly rely upon an adjudication of a court directing payment of funds in their trust.[FN2] The rule that a trustee must obey court orders applies to trustees by operation of law as well as to those by express trust.[FN3] Violations of orders of the court generally are punishable as contempt.[FN4]

While it has been held that courts should not serve as legal advisers to trustees,[FN5] the trustee may seek instruction from the court when there is valid doubt as to the testator's intent.[FN6] Indeed, it is the duty of the trustee—not the court or the beneficiaries—to take the steps needed to obtain instruction from the court when the trustee is unclear on a course of action.[FN7] In such cases, the court's role is limited to fulfilling the donor's intent as gathered from the whole instrument and all reasonable inferences that may be drawn from it.[FN8] However, a court may direct or permit a trustee to deviate from any trust term to avoid defeating or substantially impairing the accomplishment of the purposes of the trust.[FN9]

[FN1] [In re Hill's Estate, 272 Wis. 197, 75 N.W.2d 582 \(1956\).](#)

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[FN2] [Estate of Pew, 440 Pa. Super. 195, 655 A.2d 521 \(1994\).](#)

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[FN3] [§ 131.](#)

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[FN4] [§ 670.](#)

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[FN5] [State ex rel. Nixon v. Turpin, 994 S.W.2d 53 \(Mo. Ct. App. W.D. 1999\).](#)

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[FN6] [Matter of Duke, 305 N.J. Super. 408, 702 A.2d 1008 \(Ch. Div. 1995\), aff'd, 305 N.J. Super. 407, 702 A.2d 1007 \(App. Div. 1997\).](#)

- A court of equity as a part of its general supervisory power over trusts has the authority to instruct and advise trustees as to their powers and duties. [Brock v. Blackwood, 143 S.W.3d 47 \(Mo. Ct. App. W.D. 2004\)](#), reh'g and/or transfer denied, (July 27, 2004) and transfer denied, (Sept. 28, 2004).

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[FN7] [In re Marriage of Petrie, 105 Wash. App. 268, 19 P.3d 443 \(Div. 1 2001\)](#), as amended, (Apr. 10, 2001).

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[FN8] [In re Trusteeship of Williams, 591 N.W.2d 743 \(Minn. Ct. App. 1999\).](#)

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[FN9] [Appeal of Gannon, 428 Pa. Super. 349, 631 A.2d 176 \(1993\)](#) (referring to orphans court).

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§ 347. Delegation of powers

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West's Key Number Digest, [Trusts](#) [176](#)

Law Reviews and Other Periodicals

Iris J. Goodwin and Pierce McDowell, Delegating responsibility: Trustees explore the once taboo. 138 Tr & Est 4:8 (1999)

As a general rule, a trustee may not delegate discretionary powers^[FN1] or duties,^[FN2] that he or she can reasonably be expected personally to perform,^[FN3] nor may a fiduciary delegate the responsibility for the entire administration of the trust,^[FN4] as the duty of a fiduciary is personal and cannot be divested by delegation.^[FN5] The trustee is liable to the trust estate for any loss arising from an unauthorized delegation of powers.^[FN6] Thus, a fiduciary who delegates the responsibility for the entire administration of the estate or trust is liable for a breach of trust and potentially subject to surcharge.^[FN7]

The trustee may, however, delegate powers which are purely ministerial,^[FN8] and of course, a delegation of powers may be made where authorized by the trust instrument or declaration.^[FN9] Further, employing agents or contracting for services, where full responsibility by the trustee is retained, does not constitute a delegation of the trustee's powers,^[FN10] and a trustee may delegate those duties which a person of ordinary prudence might in like circumstances entrust others to perform in the management of his or her own affairs.^[FN11]

Observation: The Restatement Third, Trusts states that the trustee may not delegate powers except as a prudent person might delegate powers to others.^[FN12] However, decisions of trustees concerning delegation are matters of fiduciary judgment and discretion.^[FN13] Significant terms of a delegation include those involving the compensation of the agent, the duration and conditions of the delegation, and arrangements for monitoring or supervising the activities of agents.^[FN14]

^[FN1] [Mann v. Cooke](#), 624 So. 2d 785 (Fla. Dist. Ct. App. 1st Dist. 1993); [Corpus Christi Bank & Trust v. Roberts](#), 587 S.W.2d 173 (Tex. Civ. App. Corpus Christi 1979), judgment aff'd, [597 S.W.2d 752 \(Tex. 1980\)](#).
- As to the powers of trustees, generally, see §§ [316](#) to [324](#).
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^[FN2] [Jacob v. Davis](#), 128 Md. App. 433, 738 A.2d 904 (1999).
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[\[FN3\] Shriners Hospitals for Crippled Children v. Gardiner, 152 Ariz. 527, 733 P.2d 1110 \(1987\).](#)

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[\[FN4\] In re Will of Jones, 1 Misc. 3d 688, 765 N.Y.S.2d 756 \(Sur. Ct. 2003\).](#)

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[\[FN5\] In re Will of Jones, 1 Misc. 3d 688, 765 N.Y.S.2d 756 \(Sur. Ct. 2003\).](#)

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[\[FN6\] Matter of Marine Midland Bank, N.A., 127 A.D.2d 973, 513 N.Y.S.2d 311 \(4th Dep't 1987\); Meck v. Behrens, 141 Wash. 676, 252 P. 91, 50 A.L.R. 207 \(1927\); Abrams v. U. S. Fidelity & Guaranty Co., 127 Wis. 579, 106 N.W. 1091 \(1906\).](#)

- Excessive delegation of functions may subject an appointed trustee to liability therefor. [In re Phillips' Trust](#), 252 Minn. 301, 90 N.W.2d 522 (1958).

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[\[FN7\] In re Will of Jones, 1 Misc. 3d 688, 765 N.Y.S.2d 756 \(Sur. Ct. 2003\).](#)

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[\[FN8\] McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\); Meck v. Behrens, 141 Wash. 676, 252 P. 91, 50 A.L.R. 207 \(1927\); Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514 \(1952\), opinion adhered to on reh'g, 261 Wis. 492, 55 N.W.2d 40 \(1952\).](#)

- Trustees may delegate authority to agents to perform certain acts. [Illinois Conference of Teamsters and Employers Welfare Fund v. Mrowicki](#), 44 F.3d 451 (7th Cir. 1994).

- Generally, as to whether powers are discretionary or ministerial, see [§ 319](#).

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[\[FN9\] McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\); Meck v. Behrens, 141 Wash. 676, 252 P. 91, 50 A.L.R. 207 \(1927\).](#)

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[\[FN10\] § 420.](#)

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[\[FN11\] City of New Orleans v. Cheramie, 509 So. 2d 58 \(La. Ct. App. 1st Cir. 1987\), writ denied, 512 So. 2d 463 \(La. 1987\).](#)

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[\[FN12\] Restatement Third, Trusts \(Prudent Investor Rule\) § 171.](#)

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[\[FN13\] Restatement Third, Trusts \(Prudent Investor Rule\) § 171, comment a.](#)

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[\[FN14\] Restatement Third, Trusts \(Prudent Investor Rule\) § 171, comment a.](#)

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[Coexecutor's, coadministrator's, or co-trustee's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019.](#)

Model Codes and Restatements

[Restatement Second, Trusts § 224\(2\)\(b\)](#)

If there are several trustees, each trustee is under a duty to the beneficiary to participate in the administration of the trust.^[FN1] Thus, a co-trustee cannot delegate the administration of a trust to a single trustee.^[FN2] Nor may a trustee delegate the exercise of discretion to a joint or co-trustee.^[FN3]

Observation: If one trustee were obligated to merely do as instructed by a co-trustee, the role of the trustee would be diminished to conduct less than that expected of a fiduciary.^[FN4] Further, a corporate trustee cannot take a passive role in the administration of a trust for which it accepted fiduciary responsibility as trustee.^[FN5]

A trustee who delegates to another trustee the administration of a trust breaches the duties of a trustee.^[FN6] However, the duty of a trustee not to abandon the exercise of powers to co-trustees is owed to the beneficiaries of the trust,^[FN7] and not to persons dealing with the co-trustee.^[FN8]

^[FN1] [In re Baylis](#), 313 F.3d 9 (1st Cir. 2002) (applying Massachusetts law); [Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A.](#), 914 S.W.2d 384 (Mo. Ct. App. W.D. 1996); [Anton v. Anton](#), 815 So. 2d 768 (Fla. Dist. Ct. App. 4th Dist. 2002); [Stegemeier v. Magness](#), 728 A.2d 557 (Del. 1999).

- As to the requirement that a co-trustee must act jointly in the exercise of powers, see [§ 320](#).

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[\[FN2\] Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A., 914 S.W.2d 384 \(Mo. Ct. App. W.D. 1996\).](#)

- A trustee or successor trustee may not use a durable power of attorney to delegate the entire administration of the trust to a co-trustee. [Geren v. Geren, 29 Kan. App. 2d 565, 29 P.3d 448 \(2001\).](#)

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[\[FN3\] Colburn v. Grant, 181 U.S. 601, 21 S. Ct. 737, 45 L. Ed. 1021 \(1901\); Bumbaugh v. Burns, 635 S.W.2d 518 \(Tenn. Ct. App. 1982\).](#)

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[\[FN4\] Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A., 914 S.W.2d 384 \(Mo. Ct. App. W.D. 1996\).](#)

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[\[FN5\] Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A., 914 S.W.2d 384 \(Mo. Ct. App. W.D. 1996\).](#)

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[\[FN6\] Anton v. Anton, 815 So. 2d 768 \(Fla. Dist. Ct. App. 4th Dist. 2002\).](#)

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[\[FN7\] Coxe v. Kriebel, 323 Pa. 157, 185 A. 770, 106 A.L.R. 102 \(1936\).](#)

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[\[FN8\] Coxe v. Kriebel, 323 Pa. 157, 185 A. 770, 106 A.L.R. 102 \(1936\).](#)

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Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

VIII. Duties and Liabilities of Trustee

A. In General
3. Good Faith
a. Generally

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§ 349. Generally

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Forms

Discretion in exercise of powers—Exercise in a fiduciary capacity. [Am. Jur. Legal Forms 2d, Trusts § 251:424](#)

Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) § 170](#)

A trustee is a fiduciary of the highest order[[FN1](#)] and is required to exercise a high standard of conduct and loyalty in the administration of the trust.[[FN2](#)] The requirement of loyalty and fair dealing in good faith are at the core of every trust instrument,[[FN3](#)] whether specifically stated or not.[[FN4](#)] Trustees must act with good faith,[[FN5](#)] loyalty,[[FN6](#)] fairness,[[FN7](#)] candor and honesty[[FN8](#)] toward the trust beneficiaries.[[FN9](#)] Indeed, under some authority, trustees must act with the utmost good faith,[[FN10](#)] scrupulous good faith,[[FN11](#)] the highest degree of fidelity[[FN12](#)] and good faith,[[FN13](#)] absolute fidelity,[[FN14](#)] or undivided or complete loyalty.[[FN15](#)]

Observation: A trustee is held to something stricter than the morals of the market place.[[FN16](#)] The standard of behavior is not honesty alone, but the punctilio of an honor the most sensitive.[[FN17](#)] The rules of undivided loyalty have developed as defensive responses of the common-law nervous system to impulses of self-interest.[[FN18](#)]

The trustee's duty to act in utmost good faith is not diminished by provisions in the trust instrument purporting to limit the trustee's liability.[[FN19](#)] However, the exercise of good faith by a trustee, where he or she has not violated his or her duty in any other respect, constitutes a defense to any liability on the trustee's part for any loss to the trust estate in administering the trust.[[FN20](#)] There is a presumption that a trustee is faithful in the administration of the trust,[[FN21](#)] with the burden of proof being on the one challenging the good faith of the trustee.[[FN22](#)]

CUMULATIVE SUPPLEMENT

Cases:

A trustee owes a fiduciary duty to a trust's beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith. [Bank of America, N.A. v. Carpenter, 340 Ill. Dec. 919, 929 N.E.2d 570 \(App. Ct. 1st Dist. 2010\).](#)

To the cestui que trust a trustee always owes uberrima fides, that is, utmost good faith. [State ex rel. Oklahoma Bar Ass'n v. Clausing, 2009 OK 74, 224 P.3d 1268 \(Okla. 2009\).](#)

[END OF SUPPLEMENT]

[FN1] [State ex rel. Oklahoma Bar Ass'n v. Busch](#), 1998 OK 103, 976 P.2d 38 (Okla. 1998), as corrected, (May 18, 1999); [John R. Boyce Family Trust v. Snyder](#), 128 S.W.3d 630 (Mo. Ct. App. E.D. 2004); [Marshall v. First Nat. Bank Alaska](#), 97 P.3d 830 (Alaska 2004).

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[FN2] [John R. Boyce Family Trust v. Snyder](#), 128 S.W.3d 630 (Mo. Ct. App. E.D. 2004).

- Like the attorney-client relationship, a trustee's fiduciary relationship is based on the utmost trust. [In re Niles](#), 176 N.J. 282, 823 A.2d 1 (2003).

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[FN3] [Mucci v. Stobbs](#), 281 Ill. App. 3d 22, 216 Ill. Dec. 882, 666 N.E.2d 50 (5th Dist. 1996).

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[FN4] [Mucci v. Stobbs](#), 281 Ill. App. 3d 22, 216 Ill. Dec. 882, 666 N.E.2d 50 (5th Dist. 1996).

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[FN5] [Branum v. Akins](#), 978 S.W.2d 554 (Tenn. Ct. App. 1998); [In re Marriage of Petrie](#), 105 Wash. App. 268, 19 P.3d 443 (Div. 1 2001), as amended, (Apr. 10, 2001); [Smith v. Baptist Foundation of Oklahoma](#), 2002 OK 57, 50 P.3d 1132 (Okla. 2002); [Conway v. Pacific University](#), 324 Or. 231, 924 P.2d 818, 113 Ed. Law Rep. 942 (1996); [Herschbach v. City of Corpus Christi](#), 883 S.W.2d 720 (Tex. App. Corpus Christi 1994), writ denied, (May 25, 1995); [NationsBank of Virginia, N.A. v. Estate of Grandy](#), 248 Va. 557, 450 S.E.2d 140 (1994); [Columbia Land Development, LLC v. Secretary of State](#), 868 So. 2d 1006 (Miss. 2004).

- A trustee must use his or her best informed judgment in good faith. [Fine v. Cohen](#), 35 Mass. App. Ct. 610, 623 N.E.2d 1134 (1993).

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[FN6] [In re Marriage of Petrie](#), 105 Wash. App. 268, 19 P.3d 443 (Div. 1 2001), as amended, (Apr. 10, 2001); [John R. Boyce Family Trust v. Snyder](#), 128 S.W.3d 630 (Mo. Ct. App. E.D. 2004); [Herschbach v. City of Corpus Christi](#), 883 S.W.2d 720 (Tex. App. Corpus Christi 1994), writ denied, (May 25, 1995); [Reardon v. Riggs Nat. Bank](#), 677 A.2d 1032 (D.C. 1996); [Willers v. Wettestad](#), 510 N.W.2d 676 (S.D. 1994) [City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.](#), 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329 (1st Dist. 1998), as modified on denial of reh'g, (Jan. 6, 1999).

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[FN7] [Herschbach v. City of Corpus Christi](#), 883 S.W.2d 720 (Tex. App. Corpus Christi 1994), writ denied, (May 25, 1995); [Marshall v. First Nat. Bank Alaska](#), 97 P.3d 830 (Alaska 2004).

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[FN8] [Smith v. Baptist Foundation of Oklahoma](#), 2002 OK 57, 50 P.3d 1132 (Okla. 2002); [Marshall v. First Nat. Bank Alaska](#), 97 P.3d 830 (Alaska 2004).

- It is the trustee's duty to disclose to the beneficiary fully, frankly, and without reservation all facts pertaining to the trust. [Norwest Bank Minnesota North, N.A. v. Beckler](#), 663 N.W.2d 571 (Minn. Ct. App. 2003), subsequent determination, [2003 WL 23854013 \(Minn. Dist. Ct. 2003\)](#), aff'd, [2004 WL 2093550 \(Minn. Ct. App. 2004\)](#).

- A trustee owes to its beneficiaries the duty of duty of full disclosure. [In re Estate of Hunter](#), 194 Misc. 2d 364, 753 N.Y.S.2d 675 (Sur. Ct. 2002), order aff'd as modified, [6 A.D.3d 117, 775 N.Y.S.2d 42 \(App. Div. 2d Dep't 2004\)](#).

- As to the obligation of full disclosure in dealings between the trustee and fiduciary, see [§ 356](#).

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[FN9] [Smith v. Baptist Foundation of Oklahoma](#), 2002 OK 57, 50 P.3d 1132 (Okla. 2002).

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[FN10] [NC Illinois Trust Co. v. First Illini Bancorp, Inc.](#), 323 Ill. App. 3d 254, 256 Ill. Dec. 925, 752 N.E.2d 1167 (3d Dist. 2001); [Marshall v. First Nat. Bank Alaska](#), 97 P.3d 830 (Alaska 2004); [Matter of Nathan Trust](#),

[618 N.E.2d 1343 \(Ind. Ct. App. 1st Dist. 1993\)](#), opinion vacated, [638 N.E.2d 789 \(Ind. 1994\)](#).

- Generally, a trustee owes the duty of uberrima fides, or utmost fidelity, to the beneficiaries of a trust. [Wiggins v. PNC Bank, Kentucky, Inc., 988 S.W.2d 498 \(Ky. Ct. App. 1998\)](#).

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[FN11] [Office of Com'r of Ins. v. Hartford Fire Ins. Co., 623 So. 2d 37 \(La. Ct. App. 1st Cir. 1993\)](#), writ denied, [635 So. 2d 1131 \(La. 1994\)](#) (referring to the good faith required from a fiduciary analogous to a trustee).

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[FN12] [Giagnorio v. Emmett C. Torkelson Trust, 292 Ill. App. 3d 318, 226 Ill. Dec. 693, 686 N.E.2d 42 \(2d Dist. 1997\)](#).

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[FN13] [In re Estate of Stevens, 94 Wash. App. 20, 971 P.2d 58 \(Div. 2 1999\)](#), as amended, (Apr. 9, 1999); [Burlington Northern and Sante Fe Ry. Co. v. Burlington Resources Oil & Gas Co., 1999 ND 39, 590 N.W.2d 433 \(N.D. 1999\)](#).

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[FN14] [In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\)](#).

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[FN15] [Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 \(1993\)](#); [In re Morgan, 8 A.D.3d 789, 777 N.Y.S.2d 813 \(App. Div. 3d Dep't 2004\)](#); [Mucci v. Stobbs, 281 Ill. App. 3d 22, 216 Ill. Dec. 882, 666 N.E.2d 50 \(5th Dist. 1996\)](#); [In re Estate of Stevens, 94 Wash. App. 20, 971 P.2d 58 \(Div. 2 1999\)](#), as amended, (Apr. 9, 1999); [In re Charnock, 158 N.C. App. 35, 579 S.E.2d 887 \(2003\)](#), cert. denied, [357 N.C. 506, 588 S.E.2d 473 \(2003\)](#) and decision aff'd, [358 N.C. 523, 597 S.E.2d 706 \(2004\)](#); [Tyler v. Citizens Home Bank of Greenfield, 670 S.W.2d 954 \(Mo. Ct. App. S.D. 1984\)](#).

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[FN16] [In re Estate of Klarner, 98 P.3d 892 \(Colo. Ct. App. 2003\)](#), cert. granted, [2004 WL 2211536 \(Colo. 2004\)](#) and cert. granted, (Oct. 4, 2004).

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[FN17] [In re Estate of Klarner, 98 P.3d 892 \(Colo. Ct. App. 2003\)](#), cert. granted, [2004 WL 2211536 \(Colo. 2004\)](#) and cert. granted, (Oct. 4, 2004); [Britton v. Winger, 110 Ill. App. 3d 230, 65 Ill. Dec. 953, 442 N.E.2d 264 \(4th Dist. 1982\)](#); [Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 \(1928\)](#).

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[FN18] [Fulton Nat. Bank v. Tate, 363 F.2d 562 \(5th Cir. 1966\)](#).

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[FN19] [Fidelity Bank v. Com. Marine and General Assur. Co., Ltd., 592 F. Supp. 513 \(E.D. Pa. 1984\)](#); [Perling v. Citizens and Southern Nat. Bank, 250 Ga. 674, 300 S.E.2d 649 \(1983\)](#); [North Adams Nat. Bank v. Curtiss, 278 Mass. 471, 180 N.E. 217, 83 A.L.R. 607 \(1932\)](#); [Corpus Christi Nat. Bank v. Gerdes, 551 S.W.2d 521 \(Tex. Civ. App. Corpus Christi 1977\)](#), writ refused n.r.e., (Nov. 30, 1977).

- As to trust provisions limiting the liability of trustees, see [§ 336](#).

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[FN20] [Champion v. Commonwealth, 228 Ky. 794, 15 S.W.2d 1003 \(1929\)](#); [Young v. Hood, 209 N.C. 801, 184 S.E. 823 \(1936\)](#).

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[FN21] [§ 632](#).

[\[FN22\] First Midwest Bank/Joliet v. Dempsey, 157 Ill. App. 3d 307, 109 Ill. Dec. 130, 509 N.E.2d 791 \(3d Dist. 1987\); Parker v. Pine, 617 S.W.2d 536 \(Mo. Ct. App. W.D. 1981\).](#)

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AMJUR TRUSTS § 349

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Trusts

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VIII. Duties and Liabilities of Trustee

A. In General
3. Good Faith
a. Generally

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§ 350. Acting in interest of trust exclusively

West's Key Number Digest

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Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) § 170\(1\)](#)

Consistent with the provisions of the Uniform Trust Code,[\[FN1\]](#) courts hold that a trustee must administer the trust solely in the interest of the beneficiaries.[\[FN2\]](#) Administering the trust solely in the interest of the beneficiaries has been described as the most fundamental duty owed by a trustee.[\[FN3\]](#) A trustee should not act in his or her own interest,[\[FN4\]](#) or in the interest of a third person.[\[FN5\]](#) In other words, a trustee has the duty to avoid a conflict of interest.[\[FN6\]](#)

A fiduciary cannot contend that, although he or she had conflicting interests, he or she served both masters equally well or that his or her primary loyalty was not weakened by the pull of a secondary one.[\[FN7\]](#) The rule of undivided loyalty is enforced with uncompromising rigidity.[\[FN8\]](#) Courts will not permit an investigation

into the fairness or unfairness of such a transaction,[\[FN9\]](#) or allow the trustee to show that the dealing was for the best interest of the beneficiaries.[\[FN10\]](#)

[\[FN1\] Uniform Trust Code § 802.](#)

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[\[FN2\] N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc., 453 U.S. 322, 101 S. Ct. 2789, 69 L. Ed. 2d 672 \(1981\); Renz v. Beeman, 589 F.2d 735 \(2d Cir. 1978\); Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 130 Ed. Law Rep. 1105 \(10th Cir. 1998\); Marshall v. First Nat. Bank Alaska, 97 P.3d 830 \(Alaska 2004\); In re Baylis, 313 F.3d 9 \(1st Cir. 2002\); Hardy v. Hardy, 217 Ark. 296, 230 S.W.2d 6 \(1950\); Brotman v. East Lake Creek Ranch, L.L.P., 31 P.3d 886, 157 Ed. Law Rep. 336 \(Colo. 2001\); In re Hardimon, 751 So. 2d 989 \(La. Ct. App. 4th Cir. 2000\); John R. Boyce Family Trust v. Snyder, 128 S.W.3d 630 \(Mo. Ct. App. E.D. 2004\); Matter of Wills of Jacobs, 91 N.C. App. 138, 370 S.E.2d 860 \(1988\); Estate of McCredy, 323 Pa. Super. 268, 470 A.2d 585 \(1983\).](#)

- A trustee is expected to exercise the obligations of the office for the exclusive benefit of those holding beneficial interests. [Smith v. Baptist Foundation of Oklahoma, 2002 OK 57, 50 P.3d 1132 \(Okla. 2002\).](#)

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[\[FN3\] In re Baylis, 313 F.3d 9 \(1st Cir. 2002\).](#)

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[\[FN4\] Bruch v. Firestone Tire and Rubber Co., 828 F.2d 134 \(3d Cir. 1987\), decision aff'd in part, rev'd in part on other grounds, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 \(1989\); Colton v. Stanford, 82 Cal. 351, 23 P. 16 \(1890\); Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 \(1986\); In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\).](#)

- A trustee owes a fiduciary duty to serve the interest of the beneficiaries with total loyalty, excluding all self-interest. [Giagnorio v. Emmett C. Torkelson Trust, 292 Ill. App. 3d 318, 226 Ill. Dec. 693, 686 N.E.2d 42 \(2d Dist. 1997\).](#)

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[\[FN5\] Windscheffel v. Wright, 187 Kan. 678, 360 P.2d 178, 89 A.L.R.2d 636 \(1961\) \(spouse or other relative of fiduciary\); In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\).](#)

- A trustee's duty of loyalty bars the trustee from acting in the interest of third parties at the expense of beneficiaries. [Attorney Grievance Com'n of Maryland v. Sachse, 345 Md. 578, 693 A.2d 806 \(1997\)](#) (noting the duty of loyalty extends beyond the prohibition against self-dealing and conflict of interest).

- A trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. [Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 \(1993\).](#)

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[\[FN6\] City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329 \(1st Dist. 1998\), as modified on denial of reh'g, \(Jan. 6, 1999\).](#)

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[\[FN7\] N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc., 453 U.S. 322, 101 S. Ct. 2789, 69 L. Ed. 2d 672 \(1981\).](#)

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[\[FN8\] Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 \(1993\); Britton v. Winger, 110 Ill. App. 3d 230, 65 Ill. Dec. 953, 442 N.E.2d 264 \(4th Dist. 1982\); Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 \(1928\).](#)

- It is an unyielding rule that it is against public policy to permit persons occupying fiduciary relations to be

placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust. [Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\)](#).

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[FN9] [Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\)](#).

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[FN10] [Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\)](#).

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VIII. Duties and Liabilities of Trustee

A. In General

3. Good Faith

b. Refraining from Personal Traffic or Self-Dealing in Trust Property

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§ 351. Generally

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Trial Strategy

[Self-Dealing by Trustee, 38 Am. Jur. Proof of Facts 3d 279](#)

Forms

Petition or application—For removal of trustee—Breach of duty. [Am. Jur. Pleading and Practice Forms, Trusts § 143](#)

Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) § 170](#)

The trustee's duty to serve the interests of the beneficiary with complete loyalty excluding all self-interest,[\[FN1\]](#) prohibits the trustee from —

— self-dealing.[\[FN2\]](#)

— dealing with himself or herself in any transaction in his or her individual capacity.[\[FN3\]](#)

— dealing with trust property for his or her individual benefit.[\[FN4\]](#)

— profiting at the expense of the beneficiary from any transaction where fiduciary duty and personal interest may come into conflict.[\[FN5\]](#)

In other words, a trustee must refrain from personal traffic in, or private use, application, or appropriation of trust property or funds,[\[FN6\]](#) at least without the express consent of the beneficiaries.[\[FN7\]](#) In order to violate the self-dealing prohibitions, it must be shown that a trustee either:[\[FN8\]](#)

(1) loaned funds from the trust to himself, herself, or an affiliate;

(2) purchased or participated in the purchase of trust property for his or her own account or an affiliate's account;

(3) sold or participated in a sale of his or her or an affiliate's property to the trust; or

(4) transferred the property of one trust to another.

Observation: Nothing in the law is better settled than that a trustee may not advantage himself or herself in dealings with the trust estate.[\[FN9\]](#)

Under most circumstances, self-dealing is a breach of the fiduciary duty,[\[FN10\]](#) as the law is jealous to see that a trustee shall not engage in double dealing to his or her own advantage and profit.[\[FN11\]](#) Any transaction involving trust property for the personal benefit of the trustee is illegal.[\[FN12\]](#) While the presumption is that a trustee does not traffic in the trust estate in violation of the trust, every intendment of the law is against the trustee when he or she does so traffic.[\[FN13\]](#) Thus, a trustee may be held liable for losses sustained by the trust when the trustee loaned money from the trust to himself or herself,[\[FN14\]](#) and a trustee of land is deemed to have committed a breach of loyalty by leasing trust land to himself or herself.[\[FN15\]](#)

While a trustee may not purchase trust property at his or her own sale, the trustee may purchase for himself or herself trust property where he or she does not have any control over the sale.[\[FN16\]](#) However, under those circumstances it is his or her duty to communicate fully all the facts to the beneficiary in connection with the transaction.[\[FN17\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Generally, should a breach of trust occur, it should be remedied with two objectives in mind: (1) to render whole both the beneficiary and the estate; and, (2) to prevent the trustee from profiting from his wrongful conduct. [Lingo v. Lingo, 3 A.3d 241 \(Del. 2010\)](#), as corrected, (June 24, 2010).

[END OF SUPPLEMENT]

[FN1] [Grundy County Nat. Bank v. Olsen, 178 Ill. App. 3d 1003, 128 Ill. Dec. 176, 534 N.E.2d 196 \(2d Dist. 1989\)](#).

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[FN2] [Albright v. Jefferson County Nat. Bank, 292 N.Y. 31, 53 N.E.2d 753, 151 A.L.R. 897 \(1944\)](#); [John R. Boyce Family Trust v. Snyder, 128 S.W.3d 630 \(Mo. Ct. App. E.D. 2004\)](#); [Attorney Grievance Com'n of Maryland v. Sachse, 345 Md. 578, 693 A.2d 806 \(1997\)](#) (recognizing rule).

- The almost universal rule that a trustee may not purchase trust property from himself or herself at his or her own sale. [Britton v. Winger, 110 Ill. App. 3d 230, 65 Ill. Dec. 953, 442 N.E.2d 264 \(4th Dist. 1982\)](#).

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[FN3] [Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\)](#).

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[FN4] [Giagnorio v. Emmett C. Torkelson Trust, 292 Ill. App. 3d 318, 226 Ill. Dec. 693, 686 N.E.2d 42 \(2d Dist. 1997\)](#).

- A trustee may not use or deal with the trust property for his or her own profit. [Cagnolatti v. Guinn, 140 Cal. App. 3d 42, 189 Cal. Rptr. 151 \(4th Dist. 1983\)](#).

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[FN5] [In re Calton Crescent, 173 F.2d 944, 13 A.L.R.2d 1160 \(2d Cir. 1949\)](#), judgment aff'd, [338 U.S. 304, 70 S. Ct. 127, 94 L. Ed. 107 \(1949\)](#).

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[FN6] [Hardy v. Hardy, 217 Ark. 296, 230 S.W.2d 6 \(1950\)](#).

- A trustee will not be permitted to traffic in trust property in the trustee's own interest or benefit. [Gibson v. Security Trust Co., 107 F. Supp. 766 \(N.D. W. Va. 1952\)](#), judgment aff'd, [201 F.2d 573 \(4th Cir. 1953\)](#).

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[FN7] [Hardy v. Hardy, 217 Ark. 296, 230 S.W.2d 6 \(1950\)](#).

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[FN8] [Matter of Trust of Loeb, 492 N.E.2d 40 \(Ind. Ct. App. 1st Dist. 1986\)](#).

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[FN9] [Gibson v. Security Trust Co., 107 F. Supp. 766 \(N.D. W. Va. 1952\)](#), judgment aff'd, [201 F.2d 573 \(4th Cir. 1953\)](#); [Morrison v. Asher, 361 S.W.2d 844 \(Mo. Ct. App. 1962\)](#).

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[FN10] [John R. Boyce Family Trust v. Snyder, 128 S.W.3d 630 \(Mo. Ct. App. E.D. 2004\)](#).

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[FN11] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\)](#).

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[FN12] [Gibson v. Security Trust Co., 107 F. Supp. 766 \(N.D. W. Va. 1952\)](#), judgment aff'd, [201 F.2d 573 \(4th Cir. 1953\)](#).

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[\[FN13\] § 632.](#)

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[\[FN14\] Brown v. Schwegmann 861 So.2d 862](#) La.App. 4 Cir.,2003.

- As to accountability for interest, see [§ 381](#).

- As to tracing trust property or funds where commingled with other property or funds, see §§ [278](#) to [286](#).

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[\[FN15\] Wilkins v. Lasater, 46 Wash. App. 766, 733 P.2d 221 \(Div. 3 1987\).](#)

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[\[FN16\] Britton v. Winger, 110 Ill. App. 3d 230, 65 Ill. Dec. 953, 442 N.E.2d 264 \(4th Dist. 1982\).](#)

- As to a trustee's purchase of trust property at a sale by another, see [§ 583](#).

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[\[FN17\] Britton v. Winger, 110 Ill. App. 3d 230, 65 Ill. Dec. 953, 442 N.E.2d 264 \(4th Dist. 1982\).](#)

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VIII. Duties and Liabilities of Trustee

A. In General

3. Good Faith

b. Refraining from Personal Traffic or Self-Dealing in Trust Property

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§ 352. Uniform Trust Code

West's Key Number Digest

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The Uniform Trust Code provides that, generally, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or

which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction, unless:[FN1]

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the prescribed time;

(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with the applicable code provision; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

[\[FN1\] Uniform Trust Code § 802\(b\)](#).

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VIII. Duties and Liabilities of Trustee

A. In General

3. Good Faith

b. Refraining from Personal Traffic or Self-Dealing in Trust Property

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§ 353. For benefit of family member

West's Key Number Digest

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A trustee will not be permitted to traffic in trust property to the benefit of his or her spouse or other relative.[\[FN1\]](#) Any transaction involving trust property for the personal benefit of the trustee's relatives is illegal.[\[FN2\]](#)

Subject to certain exceptions,[\[FN3\]](#) the Uniform Trust Code provides that a sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:(1) the trustee's spouse; or (2) the trustee's descendants, siblings, parents, or their spouses.[\[FN4\]](#)

[\[FN1\] Gibson v. Security Trust Co., 107 F. Supp. 766 \(N.D. W. Va. 1952\), judgment aff'd, 201 F.2d 573 \(4th Cir. 1953\).](#)

- The rule against a trustee's profiting at the expense of the beneficiaries of the trust applies to cases where the spouse of a trustee is the recipient of such profit. [Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

- [\[FN2\] Gibson v. Security Trust Co., 107 F. Supp. 766 \(N.D. W. Va. 1952\), judgment aff'd, 201 F.2d 573 \(4th Cir. 1953\).](#)

- [\[FN3\] Uniform Trust Code § 802\(h\).](#)

- [\[FN4\] Uniform Trust Code § 802\(c\).](#)

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3. Good Faith

b. Refraining from Personal Traffic or Self-Dealing in Trust Property

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§ 354. Dealings by corporate trustee

[Restatement Third, Trusts \(Prudent Investor Rule\) § 170](#), comments (d), (i)

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Trial Strategy

[Self-Dealing by Trustee, 38 Am. Jur. Proof of Facts 3d 279](#)

The rule against objectionable self-dealing applies with full force to trust companies and banks doing a trust business.^[FN1] It may also apply to transactions between a commercial or other department of a banking corporation and its trust department.^[FN2] Thus, it has been held that a bank acting as trustee violates its duty to the beneficiary or trust estate, as well as the rule forbidding self-dealing where it purchases mortgages for the trust which it formerly held in its commercial department.^[FN3] However, there is contrary authority that a bank, acting as executor through its trust department, is regarded as a separate entity from the bank in doing its general banking business with respect to a loan to a trust estate.^[FN4]

The rule against self-dealing embraces situations in which a corporate trustee or administrator, executor, or guardian buys property for the estate from a subsidiary corporation,^[FN5] or sells trust property to an affiliated corporation.^[FN6] However, the trustee's interest in the affiliate must be substantial, so that there is some temptation for the trustee to consider his or her own advantage.^[FN7]

Under the Uniform Trust Code, a sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.^[FN8] However, an investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule.^[FN9] Further, the Uniform Trust Code does not preclude the a deposit of trust money in a regulated financial service institution operated by the trustee.^[FN10]

^[FN1] [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\).](#)

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^[FN2] [In re Downing's Estate, 162 Pa. Super. 354, 57 A.2d 710 \(1948\)](#), opinion adopted, [359 Pa. 534, 59 A.2d 903 \(1948\)](#).

- As to the ability of a trustee to make deposits in its own bank [§ 430](#).

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^[FN3] [In re Downing's Estate, 162 Pa. Super. 354, 57 A.2d 710 \(1948\)](#), opinion adopted, [359 Pa. 534, 59 A.2d 903 \(1948\)](#).

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^[FN4] [Breedlove v. Freudenstein, 89 F.2d 324, 112 A.L.R. 777 \(C.C.A. 5th Cir. 1937\).](#)

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[\[FN5\] Albright v. Jefferson County Nat. Bank, 292 N.Y. 31, 53 N.E.2d 753, 151 A.L.R. 897 \(1944\).](#)

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[\[FN6\] Shanley's Estate v. Fidelity Union Trust Co., 108 N.J. Eq. 564, 5 N.J. Misc. 783, 138 A. 388 \(Ch. 1927\).](#)

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[\[FN7\] Krupnick v. Peoples State Bank of South Carolina, 29 F. Supp. 290 \(E.D. S.C. 1939\).](#)

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[\[FN8\] Uniform Trust Code § 802\(c\)\(4\).](#)

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[\[FN9\] Uniform Trust Code § 802\(f\).](#)

- The prudent investor rule is codified at [Uniform Prudent Investor Act § 1](#).

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[\[FN10\] Uniform Trust Code § 802\(h\)\(4\).](#)

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§ 355. Generally

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Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) § 170\(2\)](#)

In all matters connected with the trust, a trustee may not, in dealing with the cestui que trust, gain any advantage by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.^[FN1] Where a transaction involves a breach of trust, it is voidable by the beneficiary,^[FN2] though a transaction between the trustee and the beneficiary may be upheld upon a showing of good faith, valuable consideration, and that the transaction was not inequitable.^[FN3] Equity does not condemn in itself the transfer to a trustee of trust property from a beneficiary sui juris,^[FN4] but sanctions a transaction open, fair, and on informed consent—that is, by persons on a parity of knowledge of material facts and right, and otherwise free from undue influence.^[FN5]

Observation: Even where a trustee is absolutely prohibited from entering into a transaction with a beneficiary, the prohibitions do not make the contract void,^[FN6] but voidable only at the option of the beneficiary, who may either affirm or repudiate it.^[FN7]

^[FN1] [Adams v. Cowen](#), 177 U.S. 471, 20 S. Ct. 668, 44 L. Ed. 851 (1900); [Herpolsheimer v. Michigan Trust Co.](#), 261 Mich. 209, 246 N.W. 81 (1933), aff'd, 248 N.W. 610 (Mich. 1933); [In re Leonard's Will](#), 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 (1930).

^[FN2] [Peyton v. William C. Peyton Corp.](#), 23 Del. Ch. 321, 7 A.2d 737, 123 A.L.R. 1482 (1939).

- As to a presumption against fairness of any such dealing, and the burden of proving fairness, see § § [628](#), [632](#).

^[FN3] [Clay v. Thomas](#), 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 (1917); [In re Filardo](#), 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 (1936).

^[FN4] [Gross v. Gross](#), 625 S.W.2d 655 (Mo. Ct. App. W.D. 1981).

^[FN5] [Gross v. Gross](#), 625 S.W.2d 655 (Mo. Ct. App. W.D. 1981).

- The trustees must show more than a mere absence of undue influence when they asked a court to uphold the validity of a self-interested transaction in trust property with the beneficiary of the trust. [Ramage v. Ramage](#), 283 S.C. 239, 322 S.E.2d 22 (Ct. App. 1984).

^[FN6] [BGJ Associates, LLC v. Wilson](#), 113 Cal. App. 4th 1217, 7 Cal. Rptr. 3d 140 (2d Dist. 2003), review denied, (Feb. 18, 2004).

^[FN7] [BGJ Associates, LLC v. Wilson](#), 113 Cal. App. 4th 1217, 7 Cal. Rptr. 3d 140 (2d Dist. 2003), review denied, (Feb. 18, 2004).

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§ 356. Disclosure

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Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) § 170\(2\)](#)

[Restatement Second, Trusts §§ 173, 174](#)

Law Reviews and Other Periodicals

Charles Mitchell, Disclosure of trust information to discretionary beneficiaries. 115 Law Q Rev 206-208 (1999)

A trustee's duty to the beneficiaries includes the responsibility to inform the beneficiaries fully of all facts that would aid them in protecting their interests[[FN1](#)] in dealing with third persons.[[FN2](#)] Similarly, in any transaction with a trust beneficiary, a trustee or fiduciary has the duty to make full disclosure to the beneficiary of all material facts[[FN3](#)] which might affect the beneficiary's own decision,[[FN4](#)] so as to enable the beneficiary to deal on even terms.[[FN5](#)]

Observation: The duties of trustees to furnish information to beneficiaries and to act impartially are not subspecies of the duty of care, but separate duties.[[FN6](#)]

[[FN1](#)] [In re Marriage of Petrie](#), 105 Wash. App. 268, 19 P.3d 443 (Div. 1 2001), as amended, (Apr. 10, 2001); [Krohn v. Huron Memorial Hosp.](#), 173 F.3d 542, 1999 FED App. 0122P (6th Cir. 1999).

- Trustees owe beneficiaries a duty of full disclosure of all material facts known to them that might affect rights

of beneficiaries. [Trostle v. Trostle, 77 S.W.3d 908 \(Tex. App. Amarillo 2002\)](#).

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[FN2] [Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292 \(3d Cir. 1993\)](#); [Krohn v. Huron Memorial Hosp., 173 F.3d 542, 1999 FED App. 0122P \(6th Cir. 1999\)](#).

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[FN3] [First Union Nat. Bank v. Turney, 824 So. 2d 172 \(Fla. Dist. Ct. App. 1st Dist. 2001\)](#), review denied, [828 So. 2d 385 \(Fla. 2002\)](#); [Burlington Northern and Sante Fe Ry. Co. v. Burlington Resources Oil & Gas Co., 1999 ND 39, 590 N.W.2d 433 \(N.D. 1999\)](#).

- A beneficiary is always entitled to such information as is reasonably necessary to enforce his or her rights under the trust or to prevent or redress a breach of trust. [Vartanian v. Monsanto Co., 131 F.3d 264 \(1st Cir. 1997\)](#).

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[FN4] [Burlington Northern and Sante Fe Ry. Co. v. Burlington Resources Oil & Gas Co., 1999 ND 39, 590 N.W.2d 433 \(N.D. 1999\)](#).

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[FN5] [Gross v. Gross, 625 S.W.2d 655 \(Mo. Ct. App. W.D. 1981\)](#) (gift to trust).

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[FN6] [McNeil v. McNeil, 798 A.2d 503 \(Del. 2002\)](#).

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§ 357. Necessity and effect of independent advice to beneficiaries

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West's Key Number Digest, [Trusts](#) [179](#)

Generally, there is no hard-and-fast rule requiring that to support a transaction between a trustee and a beneficiary the beneficiary must have had independent advice.[FN1] In some instances, however, independent advice from one who is competent, honest, independent, impartial, and sufficiently informed may be required to rebut the presumption of undue influence or unfairness in a transaction between a trustee and a beneficiary.[FN2] The purpose of requiring independent advice in some instances is not so much to protect the beneficiary against the consequences of undue influence by the trustee as it is to safeguard the beneficiary against the results of his or her own voluntary acts induced by the confidential relation between the beneficiary and the trustee.[FN3]

[FN1] [Zimmerman v. Freshour, 108 Md. 115, 69 A. 796 \(1908\)](#); [Phipps v. Willis, 53 Or. 190, 96 P. 866 \(1908\)](#), [aff'd, 53 Or. 190, 99 P. 935 \(1909\)](#); [Egan v. Burnight, 34 S.D. 473, 149 N.W. 176 \(1914\)](#).

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[FN2] [Peyton v. William C. Peyton Corp., 23 Del. Ch. 321, 7 A.2d 737, 123 A.L.R. 1482 \(1939\)](#).

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[FN3] [Peyton v. William C. Peyton Corp., 23 Del. Ch. 321, 7 A.2d 737, 123 A.L.R. 1482 \(1939\)](#).

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§ 358. Corporate merger

West's Key Number Digest

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A corporate trustee's failure to provide a beneficiary with advance notice of its proposed corporate merger and to offer her the option of moving her trust to another trustee bank does not amount to gross negligence, bad faith, or fraud, giving rise to liability under the trust instrument, where the trust instrument contained no provision requiring such disclosures and options.[\[FN1\]](#)

[\[FN1\] Texas Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240 \(Tex. 2002\)](#), reh'g of cause overruled, (Feb. 27, 2003).

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3. Good Faith

d. Loyalty to plural beneficiaries and plural trusts

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§ 359. Generally

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Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) §§ 183, 232](#)

Trustees owe a duty to all trust beneficiaries,[\[FN1\]](#) and must treat all equally.[\[FN2\]](#) Unless the trust instrument itself provides otherwise, the trustee's duty to each beneficiary precludes it from favoring one party over another.[\[FN3\]](#) Thus, a trustee must act impartially with respect to all beneficiaries,[\[FN4\]](#) doing his or her best for the entire trust as a whole.[\[FN5\]](#) A trustee who violates his or her duties to deal impartially with all beneficiaries risks exposure to liability for breach of trust.[\[FN6\]](#)

Observation The duty of impartiality is owed by the trustee as between successive[\[FN7\]](#) and contingent[\[FN8\]](#) beneficiaries.

Likewise, a trustee acting for more than a single trust owes to each the same extreme loyalty that a trustee acting for a single trust owes to it.[\[FN9\]](#) In the case of a corporate trustee administering many and large trusts, the temptation to favoritism is bound to be strong, and consequently the trustee must make extreme effort to administer such trusts with fairness and impartiality.[\[FN10\]](#) Further, when one person is trustee of two distinct trusts, he or she must keep funds and application of each separate even though the corpus of each fund is finally to be paid to the same party.[\[FN11\]](#)

[\[FN1\]](#) [In re McGuire Marital Trust, 260 Wis. 2d 815, 2003 WI App 44, 660 N.W.2d 308 \(Ct. App. 2003\), review denied, 265 Wis. 2d 417, 2003 WI 126, 668 N.W.2d 557 \(2003\).](#)

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[\[FN2\]](#) [In re Miller's Trust, 48 Haw. 238, 397 P.2d 443 \(1964\).](#)

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[\[FN3\]](#) [Matter of Duke, 305 N.J. Super. 408, 702 A.2d 1008 \(Ch. Div. 1995\), aff'd, 305 N.J. Super. 407, 702 A.2d 1007 \(App. Div. 1997\).](#)

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[\[FN4\]](#) [In re Calton Crescent, 173 F.2d 944, 13 A.L.R.2d 1160 \(2d Cir. 1949\), judgment aff'd, 338 U.S. 304, 70 S. Ct. 127, 94 L. Ed. 107 \(1949\); Rhode Island Hospital Trust Co. v. Tucker, 52 R.I. 277, 160 A. 465 \(1932\); In re Pace, 182 Misc. 2d 618, 699 N.Y.S.2d 257 \(Sup 1999\); White Mountain Apache Tribe v. U.S., 249 F.3d 1364 \(Fed. Cir. 2001\), cert. granted, 535 U.S. 1016, 122 S. Ct. 1604, 152 L. Ed. 2d 619 \(2002\) and aff'd and remanded, 537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40 \(2003\); First Nat. Bank of Chicago v. A.M. Castle & Co. Employee Trust, 180 F.3d 814 \(7th Cir. 1999\); Friedman v. Friedman, 844 So. 2d 789 \(Fla. Dist. Ct. App. 4th Dist. 2003\); Matter of Duke, 305 N.J. Super. 408, 702 A.2d 1008 \(Ch. Div. 1995\), aff'd, 305 N.J. Super. 407, 702 A.2d 1007 \(App. Div. 1997\); Matter of Estate of Butterfield, 418 Mich. 241, 341 N.W.2d 453 \(1983\); Matter of Boright, 377 N.W.2d 9 \(Minn. 1985\).](#)

- Impartiality toward beneficiaries governs the exercise of a trustees' powers. [In re Estate of King, 668 N.W.2d 6 \(Minn. Ct. App. 2003\).](#)

- A trustee must act impartially with respect to the differing positions of those entitled to the remainder of the trust. [Merer by Merer v. Romoff, 172 Misc. 2d 807, 660 N.Y.S.2d 241 \(Sup 1997\).](#)

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[\[FN5\]](#) [Morse v. Stanley, 732 F.2d 1139 \(2d Cir. 1984\); Friedman v. Friedman, 844 So. 2d 789 \(Fla. Dist. Ct. App. 4th Dist. 2003\).](#)

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[FN6] [Valentine v. Read, 50 Cal. App. 4th 787, 57 Cal. Rptr. 2d 836 \(1st Dist. 1996\)](#) (where the trustee made distributions that might increase his wife's share at the expense of other beneficiaries).

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[FN7] [Matter of Ralph E. Breeding Trust, 21 Kan. App. 2d 351, 899 P.2d 511 \(1995\)](#); [White Mountain Apache Tribe v. U.S., 249 F.3d 1364 \(Fed. Cir. 2001\)](#), cert. granted, [535 U.S. 1016, 122 S. Ct. 1604, 152 L. Ed. 2d 619 \(2002\)](#) and aff'd and remanded, [537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40 \(2003\)](#).

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[FN8] [In re McGuire Marital Trust, 260 Wis. 2d 815, 2003 WI App 44, 660 N.W.2d 308 \(Ct. App. 2003\)](#), review denied, [265 Wis. 2d 417, 2003 WI 126, 668 N.W.2d 557 \(2003\)](#).

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[FN9] [Mechanicks Nat. Bank of Concord v. D'Amours, 100 N.H. 461, 129 A.2d 859, 64 A.L.R.2d 260 \(1957\)](#).

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[FN10] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\)](#).

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[FN11] [MMI Investments, L.L.C. v. Eastern Co., 45 Conn. Supp. 101, 701 A.2d 50 \(Super. Ct. 1996\)](#).

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4. Care, Diligence, and Skill

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§ 360. Standard or measure of care or diligence; prudent person rule

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Forms

Gross negligence or willful default. [Am. Jur. Legal Forms 2d, Trusts § 251:411](#)

Model Codes and Restatements

Restatement Third (Prudent Investor Rule), Trusts § 181

[Restatement Second, Trusts § 174](#)

The extent and character of care that a trustee owes beneficiaries in managing a trust depends on the circumstances of the particular trust.^[FN1] Generally, however, in managing trust property, trustees must act with skill,^[FN2] care,^[FN3] diligence,^[FN4] caution,^[FN5] and prudence.^[FN6] Courts also require the trustee to act as would an ordinary prudent person engaged in —

— similar business affairs and with objectives similar to those of the trust in question.^[FN7]

— managing his or her own affairs, property, or estate.^[FN8]

— dealing with the property of another.^[FN9]

A trustee properly administers a trust only by complying with the applicable standards of fiduciary care.^[FN10] A trustee that fails to meet the applicable standard of care is subject to a penalty including a surcharge.^[FN11] When, however, a trustee meets the required measure or standard of care, diligence, and skill, no liability can attach from the administration of the trust.^[FN12] A trustee meeting the applicable standard of care is not an insurer of the trust estate,^[FN13] against losses arising from the trustee's errors or mistakes of judgment,^[FN14] or from other causes, such as financial depressions^[FN15] or world calamities beyond his or her powers to foresee.^[FN16]

^[FN1] [Matter of Estate of Maxedon, 24 Kan. App. 2d 427, 946 P.2d 104 \(1997\).](#)

^[FN2] [Dardovitch v. Haltzman, 190 F.3d 125 \(3d Cir. 1999\) \(applying Pennsylvania law\); Law v. Law, 753 A.2d 443 \(Del. 2000\); Attorney Grievance Com'n of Maryland v. Sachse, 345 Md. 578, 693 A.2d 806 \(1997\); Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963 \(Miss. 1999\); Guerriero v. Commissioner of the Div. of Medical Assistance, 433 Mass. 628, 745 N.E.2d 324 \(2001\); In re Hardimon, 751 So. 2d 989 \(La. Ct. App. 4th Cir. 2000\); Herschbach v. City of Corpus Christi, 883 S.W.2d 720 \(Tex. App. Corpus Christi 1994\), writ denied, \(May 25, 1995\).](#)

^[FN3] [Law v. Law, 753 A.2d 443 \(Del. 2000\); Attorney Grievance Com'n of Maryland v. Sachse, 345 Md. 578, 693 A.2d 806 \(1997\); Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963 \(Miss. 1999\); Guerriero v. Commissioner of the Div. of Medical Assistance, 433 Mass. 628, 745 N.E.2d 324 \(2001\) \(reasonable care\); In re Hardimon, 751 So. 2d 989 \(La. Ct. App. 4th Cir. 2000\).](#)

^[FN4] [Law v. Law, 753 A.2d 443 \(Del. 2000\); Friedman v. Friedman, 844 So. 2d 789 \(Fla. Dist. Ct. App. 4th Dist. 2003\); Attorney Grievance Com'n of Maryland v. Sachse, 345 Md. 578, 693 A.2d 806 \(1997\); In re](#)

[Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\)](#); [Columbia Land Development, LLC v. Secretary of State, 868 So. 2d 1006 \(Miss. 2004\)](#); [In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\)](#).

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[FN5] [Dardovitch v. Haltzman, 190 F.3d 125 \(3d Cir. 1999\) \(applying Pennsylvania law\)](#).

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[FN6] [Law v. Law, 753 A.2d 443 \(Del. 2000\)](#); [Attorney Grievance Com'n of Maryland v. Sachse, 345 Md. 578, 693 A.2d 806 \(1997\)](#); [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\)](#); [Dardovitch v. Haltzman, 190 F.3d 125 \(3d Cir. 1999\) \(applying Pennsylvania law\)](#); [In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\)](#).

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[FN7] [Attorney Grievance Com'n of Maryland v. Sachse, 345 Md. 578, 693 A.2d 806 \(1997\)](#); [Liska v. First Nat. Bank in Sioux City, 322 N.W.2d 892 \(Iowa Ct. App. 1982\)](#); [Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 \(1986\)](#).

- As to the application of the prudent person rule to the making, retention, disposal, or change of trust investments, see §§ [476](#) to [484](#).

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[FN8] [Dardovitch v. Haltzman, 190 F.3d 125 \(3d Cir. 1999\) \(applying Pennsylvania law\)](#); [Durdle v. Durdle, 141 Ill. App. 3d 12, 95 Ill. Dec. 414, 489 N.E.2d 1142 \(4th Dist. 1986\)](#); [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\)](#); [Law v. Law, 753 A.2d 443 \(Del. 2000\)](#); [Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\)](#); [Branum v. Akins, 978 S.W.2d 554 \(Tenn. Ct. App. 1998\)](#); [Columbia Land Development, LLC v. Secretary of State, 868 So. 2d 1006 \(Miss. 2004\)](#); [In re Hardimon, 751 So. 2d 989 \(La. Ct. App. 4th Cir. 2000\)](#); [Herschbach v. City of Corpus Christi, 883 S.W.2d 720 \(Tex. App. Corpus Christi 1994\), writ denied, \(May 25, 1995\)](#).

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[FN9] [Shriners Hospitals for Crippled Children v. Gardiner, 152 Ariz. 527, 733 P.2d 1110 \(1987\)](#); [Matter of Estate of Butterfield, 418 Mich. 241, 341 N.W.2d 453 \(1983\)](#); [Matter of Trust of Rosati, 177 Mich. App. 1, 441 N.W.2d 30 \(1989\)](#); [Marshall v. First Nat. Bank Alaska, 97 P.3d 830 \(Alaska 2004\)](#).

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[FN10] [Estate of Wilde, 1998 ME 55, 708 A.2d 273 \(Me. 1998\)](#).

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[FN11] [Matter of Estate of Campbell, 692 A.2d 1098 \(Pa. Super. Ct. 1997\)](#).

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[FN12] [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\)](#); [Champion v. Commonwealth, 228 Ky. 794, 15 S.W.2d 1003 \(1929\)](#); [Gibson County v. Fourth & First Nat. Bank, 20 Tenn. App. 168, 96 S.W.2d 184 \(1936\)](#).

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[FN13] [Eaker v. Husbands, 263 Ky. 283, 92 S.W.2d 43 \(1935\)](#); [Young v. Phillips, 170 Tenn. 169, 93 S.W.2d 634, 104 A.L.R. 975 \(1936\)](#); [Dallas Dome Wyoming Oil Fields Co. v. Brooder, 55 Wyo. 109, 97 P.2d 311 \(1939\)](#); [Marshall v. First Nat. Bank Alaska, 97 P.3d 830 \(Alaska 2004\)](#).

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[FN14] [Hardy v. Hardy, 217 Ark. 296, 230 S.W.2d 6 \(1950\)](#); [Eaker v. Husbands, 263 Ky. 283, 92 S.W.2d 43 \(1935\)](#); [In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 \(1931\)](#).

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[FN15] [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\)](#).

[\[FN16\] In re Saeger's Estate, 340 Pa. 73, 16 A.2d 19, 131 A.L.R. 1152 \(1940\).](#)

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A. In General

4. Care, Diligence, and Skill

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§ 361. Standard or measure of care or diligence; prudent person rule—Concurrent circumstances, not subsequent events, as governing

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West's Key Number Digest, [Trusts](#) [179](#)

Whether a trustee meets the standard or measure of care required depends on circumstances as they exist at the time that the trustee acts, and not upon subsequent developments.[\[FN1\]](#) Thus, when reviewing actions of a trustee, a court may not use the advantages of hindsight,[\[FN2\]](#) but rather should place itself in the position of the trustee at the time an action was taken,[\[FN3\]](#) and not charge the trustee with knowledge of what has happened since the action.[\[FN4\]](#)

[\[FN1\] Navajo Tribe of Indians v. U.S., 9 Cl. Ct. 336 \(1986\); Law v. Law, 753 A.2d 443 \(Del. 2000\); Young v. Phillips, 170 Tenn. 169, 93 S.W.2d 634, 104 A.L.R. 975 \(1936\); Collins v. Hartford Accident & Indemnity Co., 178 Va. 501, 17 S.E.2d 413, 137 A.L.R. 1046 \(1941\).](#)

- Wisdom developed after an event, and having the event and its consequences as its source, is a standard by which no person should be judged. [Fortune v. First Trust Co. of St. Paul, 200 Minn. 367, 274 N.W. 524, 112 A.L.R. 346 \(1937\).](#)

[\[FN2\] Boston Safe Deposit and Trust Co. v. Boone, 21 Mass. App. Ct. 637, 489 N.E.2d 209 \(1986\); Estate of McCredy, 323 Pa. Super. 268, 470 A.2d 585 \(1983\).](#)

- The conduct of a trustee in administering the trust is generally not a violation of a fiduciary duty if it was based on hindsight knowledge of subsequently developed facts and circumstances. [Law v. Law, 753 A.2d 443 \(Del. 2000\).](#)

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[\[FN3\] Heller v. First Nat. Bank of Denver, N.A., 657 P.2d 992 \(Colo. Ct. App. 1982\).](#)

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[\[FN4\] Heller v. First Nat. Bank of Denver, N.A., 657 P.2d 992 \(Colo. Ct. App. 1982\).](#)

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§ 362. Standard or measure of care or diligence; prudent person rule—Where trustee possesses special or professional knowledge

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[Standard of care required of trustee representing itself to have expert knowledge or skill, 91 A.L.R.3d 904](#)

Trial Strategy

[Trustee's Representation That It Possessed Expert Knowledge Or Skill. 19 Am. Jur. Proof of Facts 2d 45 § 5](#)

Model Codes and Restatements

[Restatement Second, Trusts § 174](#)

A trustee holding itself out as having greater skills than the average individual may be held to that degree of care.^[FN1] Where a trustee has special or professional knowledge or skill, he or she ordinarily is under duty to exercise that knowledge and skill in the administration of the trust,^[FN2] even if the trustee did not represent that he or she had extraordinary skills.^[FN3] Thus, it has been held that the standard of care owed by a bank trustee is higher than that owed by an ordinary individual nonprofessional trustee.^[FN4]

Observation: The measure of duty for a professional trustee is that degree of care and diligence in management which is used by professional trustees generally in the same or a similar community.^[FN5]

^[FN1] [Dunkley v. Peoples Bank & Trust Co., 728 F. Supp. 547 \(W.D. Ark. 1989\)](#); [Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\)](#); [Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963 \(Miss. 1999\)](#); [Estate of Knipp, 489 Pa. 509, 414 A.2d 1007 \(1980\)](#).

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^[FN2] [Citizens and Southern Nat. Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 \(1985\)](#); [Matter of Green Charitable Trust, 172 Mich. App. 298, 431 N.W.2d 492 \(1988\)](#); [In re Trusteeship of Williams, 591 N.W.2d 743 \(Minn. Ct. App. 1999\)](#); [Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\)](#); [In re Mendenhall, 484 Pa. 77, 398 A.2d 951 \(1979\)](#).

- If a fiduciary has greater skill than that of a person of ordinary prudence, then the fiduciary's standard of care must be judged according to standard of one having this special skill. [In re Estate of Scharlach, 2002 PA Super 279 \(PASUPER,2002\)](#).

- Under the [Uniform Custodial Trust Act § 7\(b\)](#), if a custodial trustee has a special skill or expertise or is named custodial trustee on the basis of representation of a special skill or expertise, the custodial trustee shall use that skill or expertise.

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^[FN3] [In re Mendenhall, 484 Pa. 77, 398 A.2d 951 \(1979\)](#).

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^[FN4] [Matter of Estate of Maxedon, 24 Kan. App. 2d 427, 946 P.2d 104 \(1997\)](#).

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^[FN5] [Matter of Estate of Maxedon, 24 Kan. App. 2d 427, 946 P.2d 104 \(1997\)](#).

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§ 363. In exercise of discretionary power

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Forms

Exercise of discretion. [Am. Jur. Legal Forms 2d, Trusts § 251:412](#)

A deferential standard of judicial review is appropriate when a trustee exercises discretionary powers.^[FN1] So long as the trustee acts in good faith, with proper motives, and within the bounds of reasonable judgment, courts will not interfere with his or her decision.^[FN2] However, the grant of broad discretionary powers to a trustee does not relieve him or her of the duty to use ordinary skill and prudence in the administration of the trust.^[FN3] In other words, a trustee is under the duty to exercise a reasonable discretion,^[FN4] subject to the control of a proper court in the case of an unreasonable exercise.^[FN5]

^[FN1] [In re A.H. Robins Co., Inc.](#), 42 F.3d 870 (4th Cir. 1994).

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^[FN2] [§ 315](#).

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^[FN3] [New York State Medical Care Facilities Finance Agency v. Bank of Tokyo Trust Co.](#), 163 Misc. 2d 551, 621 N.Y.S.2d 466 (Sup 1994), *aff'd*, 216 A.D.2d 126, 629 N.Y.S.2d 3 (1st Dep't 1995).

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^[FN4] [Dunkley v. Peoples Bank & Trust Co.](#), 728 F. Supp. 547 (W.D. Ark. 1989); [Lineback by Hutchens v. Stout](#), 79 N.C. App. 292, 339 S.E.2d 103 (1986); [City Bank Farmers' Trust Co. v. Smith](#), 263 N.Y. 292, 189

[N.E. 222, 93 A.L.R. 598 \(1934\)](#), aff'd, [264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\)](#).

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[\[FN5\] § 315](#).

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§ 364. With respect to co-trustees

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[Coexecutor's, coadministrator's, or co-trustee's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019](#)

Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) § 184](#)

[Restatement Second, Trusts § 224\(2\)\(d\)](#)

Co-trustees must participate in the administration of a trust,[\[FN1\]](#) and maintain an attitude of vigilant concern for the proper administration of the trust.[\[FN2\]](#) If there are several trustees, each trustee is under a duty to the beneficiary to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel the co-trustee to redress the breach of trust.[\[FN3\]](#)

[\[FN1\]](#) § 348.

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[\[FN2\]](#) *Anton v. Anton*, 763 So. 2d 404 (Fla. Dist. Ct. App. 4th Dist. 2000).

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[\[FN3\]](#) *In re Baylis*, 313 F.3d 9 (1st Cir. 2002) (applying Massachusetts law); *Stegemeier v. Magness*, 728 A.2d 557 (Del. 1999); *Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A.*, 914 S.W.2d 384 (Mo. Ct. App. W.D. 1996); *Rutanen v. Ballard*, 424 Mass. 723, 678 N.E.2d 133 (1997); *Gbur v. Cohen*, 93 Cal. App. 3d 296, 155 Cal. Rptr. 507 (2d Dist. 1979).

- A trustee is liable for a breach of trust on the part of a co-trustee which he or she could have prevented through the exercise of reasonable care. *Shriners Hospitals for Crippled Children v. Robbins*, 450 So. 2d 798 (Ala. 1984).

- As to the liability of a trustee for a breach of trust by a co-trustee, generally, see [§ 340](#).

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§ 365. With respect to employment of agents

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A trustee who employs an agent or attorney must use, in such employment,[\[FN1\]](#) that standard of care required generally in the administration of the trust.[\[FN2\]](#)

[\[FN1\]](#) [In re Kline's Estate, 280 Pa. 41, 124 A. 280, 32 A.L.R. 926 \(1924\)](#) (holding standard of care to be common skill, common prudence, and common caution).

- As to the authority to employ an agent, see § § [420](#), [421](#).

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[\[FN2\]](#) §§ [360](#) to [365](#).

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[Uniform Custodial Trust Act § 12](#)

[Uniform Trust Code § 1010](#)

[Restatement Second, Trusts § 264, 266 to 270, 271A](#)

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§ 366. Personal liability of trustee; liability of trust estate

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[Liability of estate for tort of executor, administrator, or trustee, 82 A.L.R.3d 892](#)

The usual rule, absent a statute, is that a trust is not liable for the torts of its trustees,[FN1] even torts committed in the course of the trust's administration.[FN2] The mere fact that a trustee used trust funds to the detriment of third persons does not create a tort liability in the trust.[FN3]

On the other hand, a trustee may be held personally liable for damages or injuries resulting from a tort committed in the administration of the trust,[FN4] at least where the person seeking to impose personal liability on the trustee demonstrates that the trustee intentionally or negligently acted or failed to act in a manner that establishes personal fault.[FN5] Because the trustee is the operator and controller of the funds, a court does not presume that the beneficiaries or owners of the trust corpus knew of any wrongdoing through the use of trust funds.[FN6] Thus, substantial authority holds that a trustee is liable for a tort committed in the administration of the trust only in his or her individual, and not in a representative, capacity.[FN7]

However, some courts charge the trust estate with responsibility for torts committed by the trustee against third persons in the administration of a trust.[FN8] Moreover, even courts that follow the view that the trustee is liable in only his or her individual capacity may recognize exceptions where the tort is one committed in carrying on a business as a part of the trust's administration[FN9] or resulted in the estate's enrichment.[FN10] Further, the terms of the trust may provide that the trust estate is liable for torts committed by the trustee or the trustee's agents or employees in the administration of the trust.[FN11]

[FN1] [Richardson v. Klaesson, 210 F.3d 811 \(8th Cir. 2000\)](#).

- Generally, trust funds may not be depleted by subjection to liability for negligence of or other tort by the trustee, [Miller v. Tranakos, 209 Ga. App. 688, 434 S.E.2d 84 \(1993\)](#).

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[FN2] [Richardson v. Klaesson, 210 F.3d 811 \(8th Cir. 2000\)](#).

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[FN3] [Miller v. Tranakos, 209 Ga. App. 688, 434 S.E.2d 84 \(1993\)](#).

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[FN4] [Wood v. Comins, 303 Mass. 367, 21 N.E.2d 977, 123 A.L.R. 454 \(1939\)](#).

- A trustee may be personally liable to third parties based upon tort. [Maine Shipyard & Marine Ry. v. Lilley, 2000 ME 9, 743 A.2d 1264 \(Me. 2000\)](#).

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[FN5] [§ 367](#).

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[FN6] [Miller v. Tranakos, 209 Ga. App. 688, 434 S.E.2d 84 \(1993\)](#).

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[FN7] [Yonce v. Miners Memorial Hospital Ass'n, 161 F. Supp. 178 \(W.D. Va. 1958\)](#); [Smith v. Coleman, 100 Fla. 1707, 132 So. 198 \(1931\)](#); [Matter of Shugart's Estate, 81 Ill. App. 3d 538, 36 Ill. Dec. 770, 401 N.E.2d 611 \(3d Dist. 1980\)](#); [Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 \(1928\)](#); [Kirchner v. Muller, 280 N.Y. 23, 19 N.E.2d 665, 127 A.L.R. 681 \(1939\)](#); [Wright v. Caney River Ry. Co., 151 N.C. 529, 66 S.E. 588 \(1909\)](#) (admitting rule only as general one, and limiting it); [Parmenter v. Barstow, 22 R.I. 245, 47 A. 365 \(1900\)](#); [Abston v. Waldon Academy, 118 Tenn. 24, 102 S.W. 351 \(1907\)](#); [Massey v. Payne, 109 W. Va. 529, 155 S.E. 658 \(1930\)](#).

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[FN8] [Mees v. Winthrop Bank & Trust Co., 31 Conn. Supp. 407, 332 A.2d 791 \(Super. Ct. 1974\)](#); [Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 \(1926\)](#).

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[FN9] [§ 369](#).

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[\[FN10\] § 370.](#)

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[\[FN11\] Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 \(1928\).](#)

- As to the liability for the torts of a trustee's agents, generally, see [§ 367.](#)

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§ 367. Torts committed by agent or without personal fault of trustee

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[Liability of estate for tort of executor, administrator, or trustee, 82 A.L.R.3d 892](#)

Under some holdings, even when a trustee is without personal fault or negligence and the tort is the act of servants or agents, the trustee is personally, not officially, liable for the tort,[\[FN1\]](#) although the trustee has a right to reimbursement out of the trust estate for such damages as are recovered from and paid by him or her.[\[FN2\]](#)

Under other authority, a trustee cannot be held personally liable for any torts committed in the course of his or her administration of the trust, unless the party seeking to impose personal liability demonstrates that the trustee intentionally or negligently acted or failed to act in a manner that establishes personal fault.[\[FN3\]](#) The Uniform Trust Code follows a similar rule.[\[FN4\]](#) However, non-liability for the acts of subordinates when the

trustee is not personally at fault under the Uniform Trust Code is contrary to [Restatement Second, Trusts § 264](#) which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior.[\[FN5\]](#)

[\[FN1\]](#) [Yonce v. Miners Memorial Hospital Ass'n, 161 F. Supp. 178 \(W.D. Va. 1958\)](#); [St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon, 77 Colo. 463, 238 P. 22, 42 A.L.R. 964 \(1925\)](#); [Franks v. Del-Mar-Va Council, Inc., 352 A.2d 768 \(Del. Super. Ct. 1976\)](#); [Wood v. Comins, 303 Mass. 367, 21 N.E.2d 977, 123 A.L.R. 454 \(1939\)](#); [Kirchner v. Muller, 280 N.Y. 23, 19 N.E.2d 665, 127 A.L.R. 681 \(1939\)](#); [Fisher v. McNeely, 110 Wash. 283, 188 P. 478, 14 A.L.R. 369 \(1920\)](#) (executrix).

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[\[FN2\]](#) § § [181](#), [567](#).

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[\[FN3\]](#) [Haskett v. Villas at Desert Falls, 90 Cal. App. 4th 864, 108 Cal. Rptr. 2d 888 \(4th Dist. 2001\)](#).

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[\[FN4\]](#) As to the requirement of personal fault under the Uniform Trust Code, see [§ 367](#).

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[\[FN5\]](#) [Uniform Trust Code § 1010](#), comment.

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§ 368. Under the Restatement and the Uniform Trust Code

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[Liability of estate for tort of executor, administrator, or trustee, 82 A.L.R.3d 892](#)

Under the Restatement Second, Trusts, a trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he or she would be liable if he or she held the property free of trust.[\[FN1\]](#) A person to whom the trustee has become liable cannot reach trust property in an action at law against the trustee,[\[FN2\]](#) even though the liability was properly incurred by the trustee in the course of the administration of the trust.[\[FN3\]](#) However, a person to whom the trustee has incurred a liability in the course of the administration of the trust can by a proceeding in equity reach trust property and apply it to the satisfaction of his or her claim under certain circumstances,[\[FN4\]](#) including where —

— the trustee is entitled to exoneration.[\[FN5\]](#)

— the trust estate is benefited.[\[FN6\]](#)

— the terms of the trust provide for the liability of the trust estate.[\[FN7\]](#)

— other situations where it is equitable to permit satisfaction out of the trust estate.[\[FN8\]](#)

Under the Uniform Trust Code, a trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property only if the trustee is personally at fault.[\[FN9\]](#) A claim based on a tort committed in the course of administering a trust may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity,[\[FN10\]](#) whether the trustee is personally liable for the claim.[\[FN11\]](#) The Uniform Custodial Trust Act contains similar provisions.[\[FN12\]](#)

[\[FN1\]](#) [Restatement Second, Trusts § 264.](#)

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[\[FN2\]](#) [Restatement Second, Trusts § 266.](#)

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[\[FN3\]](#) [Restatement Second, Trusts § 266.](#)

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[\[FN4\]](#) [Restatement Second, Trusts § 267.](#)

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[\[FN5\]](#) [Restatement Second, Trusts § 268.](#)

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[\[FN6\]](#) [Restatement Second, Trusts § 269.](#)

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[\[FN7\]](#) [Restatement Second, Trusts § 270.](#)

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[\[FN8\]](#) [Restatement Second, Trusts § 271A.](#)

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[\[FN9\]](#) [Uniform Trust Code § 1010\(b\).](#)

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[\[FN10\] Uniform Trust Code § 1010\(c\)](#).

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[\[FN11\] Uniform Trust Code § 1010\(c\)](#).

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[\[FN12\] Uniform Custodial Trust Act § 12\(a\) and \(b\)\(2\)](#).

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§ 369. Effect of trust being active or in business

West's Key Number Digest

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Some of the cases holding trustees personally liable for torts have arisen where the trustee was actively engaged in carrying on a business of the trust estate or managing property of the estate.[\[FN1\]](#) However, where a trustee is actually carrying on a going business in the administration of the trust,[\[FN2\]](#) some courts hold the trust estate, or the trustee officially, liable for torts occurring in the conduct of the business,[\[FN3\]](#) even though the trustee may have been personally negligent or personally at fault.[\[FN4\]](#)

[\[FN1\] *Kirchner v. Muller*, 280 N.Y. 23, 19 N.E.2d 665, 127 A.L.R. 681 \(1939\); *Parmenter v. Barstow*, 22 R.I. 245, 47 A. 365 \(1900\).](#)

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[\[FN2\]](#) § 408.

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[\[FN3\]](#) Pirtle's Adm'x v. Hargis Bank & Trust Co., 241 Ky. 455, 44 S.W.2d 541 (1931); Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 (1928); Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 (1926) (construction of an office building); [Marion v. Chandler, 139 W. Va. 596, 81 S.E.2d 89 \(1954\)](#).

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[\[FN4\]](#) Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 (1926).

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§ 370. Liability of trust estate on theory of unjust enrichment

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [235](#)

A recovery may be had against a trustee officially, or against a trust estate, for unjust enrichment of the estate resulting from a tort committed in the administration of the trust.[\[FN1\]](#) The proof of the trust's benefit from or complicity in the wrongful acts must be more than mere suspicion arising from circumstances including commingling of funds or other coincidence,[\[FN2\]](#) but must point to specific culpability or, at least, a specifically proved unjust enrichment.[\[FN3\]](#)

[\[FN1\]](#) Whiting v. Hudson Trust Co., 234 N.Y. 394, 138 N.E. 33, 25 A.L.R. 1470 (1923) (liability for money stolen by trustee to make good his defalcation to trust estate).

- As to the relief of one trust against diversion by the common trustee of its property or funds into another trust, see [§ 288](#).

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[\[FN2\] Miller v. Tranakos, 209 Ga. App. 688, 434 S.E.2d 84 \(1993\).](#)

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[\[FN3\] Miller v. Tranakos, 209 Ga. App. 688, 434 S.E.2d 84 \(1993\).](#)

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§ 371. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 289 to 295

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Accounting and reports. [Am. Jur. Legal Forms 2d, Trusts § 251:481](#)

Inspection of records. [Am. Jur. Legal Forms 2d, Trusts § 251:484](#)

Complaint, petition, or declaration—By settlor-beneficiary to compel final accounting by trustee—After termination of revocable trust. [Am. Jur. Pleading and Practice Forms, Trusts § 267](#)

Complaint, petition, or declaration—Allegation—Failure of trustee to render account. [Am. Jur. Pleading and Practice Forms, Trusts § 269](#)

A trustee is under the duty to keep and render a full, complete and accurate record and account to the beneficiary,[[FN1](#)] and the duty is strictly enforced by the courts.[[FN2](#)] The duty to account is commonly governed by statutory provisions,[[FN3](#)] though at common law trustees have the duty to give beneficiaries upon request complete and accurate information on the nature and amount of trust property.[[FN4](#)]

Making reports to beneficiaries is a duty of the trustee inherent in the trust relationship,[[FN5](#)] which exists independent of wrongdoing.[[FN6](#)] A trustee is required to preserve those documents necessary for an accounting.[[FN7](#)] However, keeping proper accounts does not require the trustee to justify the reasonableness of each transaction.[[FN8](#)] Rather, it merely requires a trustee to maintain proper records of the transactions.[[FN9](#)]

The trustee's duty is not affected by the mental incompetency of the beneficiary.[[FN10](#)] However, when a trust is a family affair, a trustee may be justified in the belief that he or she will not be required to maintain records as complete as if he or she were acting for strangers.[[FN11](#)] A trustee by operation of law—constructive or resulting—must account for and is chargeable with the property subject to the trust,[[FN12](#)] subject to proper credits.[[FN13](#)]

If a trustee dies before he or she has rendered an account, the successor trustee or the personal representative of the deceased trustee must render the account.[[FN14](#)]

[[FN1](#)] [May v. Henderson](#), 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870 (1925); [Shriners Hospitals for Crippled Children v. Robbins](#), 450 So. 2d 798 (Ala. 1984); [Bravo v. Sauter](#), 727 So. 2d 1103 (Fla. Dist. Ct. App. 4th Dist.

1999); [Schildberg v. Schildberg](#), 461 N.W.2d 186 (Iowa 1990); [Ingram v. Lewis](#), 37 F.2d 259, 70 A.L.R. 702 (C.C.A. 10th Cir. 1930); [Markus v. Markus](#), 331 Mass. 394, 119 N.E.2d 415 (1954); [In re Goldman Estate](#), 236 Mich. App. 517, 601 N.W.2d 126 (1999); [Morrison v. Asher](#), 361 S.W.2d 844 (Mo. Ct. App. 1962); [Betterson v. Stewart](#), 238 S.C. 574, 121 S.E.2d 102 (1961); [Faulkner v. Bost](#), 137 S.W.3d 254 (Tex. App. Tyler 2004); [Pueblo of San Ildefonso v. U.S.](#), 35 Fed. Cl. 777 (1996); [Reardon v. Riggs Nat. Bank](#), 677 A.2d 1032 (D.C. 1996).

- The trustee owes the trust beneficiary a duty to account. [Nozik v. McDonald](#), 99 Ohio App. 3d 353, 650 N.E.2d 923 (11th Dist. Lake County 1994).

- A trustee has a clear duty to make an accurate accounting and keep proper accounts of his or her stewardship, [In re Spengler](#), 228 Wis. 2d 250, 596 N.W.2d 818 (Ct. App. 1999).

- As to a trust provision as relieving the trustee from the duty to account, see [§ 373](#).

- As to accounting where a representative acts in the double capacity of executor or administrator and trustee, see [Am. Jur. 2d, Executors and Administrators § 876](#).

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[FN2] [In re Spilka's Will](#), 250 Iowa 1021, 97 N.W.2d 625 (1959); [In re Goldman Estate](#), 236 Mich. App. 517, 601 N.W.2d 126 (1999); [Haas v. McGinn](#), 64 R.I. 133, 11 A.2d 284 (1940); [Bravo v. Sauter](#), 727 So. 2d 1103 (Fla. Dist. Ct. App. 4th Dist. 1999) (referring to the "strict duty to account").

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[FN3] [Goodpasteur v. Fried](#), 183 Ill. App. 3d 491, 131 Ill. Dec. 854, 539 N.E.2d 207 (1st Dist. 1989); [In re Cosgrove's Will](#), 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 (1941).

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[FN4] [Faircloth v. Lundy Packing Co.](#), 91 F.3d 648 (4th Cir. 1996).

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[FN5] [Day v. Walker](#), 445 S.W.2d 422 (Ky. 1969).

- As a fiduciary of trust funds, a trustee must keep beneficiaries reasonably informed of the trust and of its administration. [People v. Robnett](#), 859 P.2d 872 (Colo. 1993).

- Trust beneficiaries are always entitled to reasonably necessary information to enable them to enforce their rights under the trust or to prevent or redress a breach of trust. [Faircloth v. Lundy Packing Co.](#), 91 F.3d 648 (4th Cir. 1996).

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[FN6] [Day v. Walker](#), 445 S.W.2d 422 (Ky. 1969).

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[FN7] [Cobell v. Norton](#), 240 F.3d 1081 (D.C. Cir. 2001).

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[FN8] [Day v. Walker](#), 445 S.W.2d 422 (Ky. 1969).

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[FN9] [John E. Shaffer Enterprises v. City of Yuma](#), 183 Ariz. 428, 904 P.2d 1252 (Ct. App. Div. 1 1995).

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[FN10] [Windishar v. Windishar](#), 83 Or. App. 162, 731 P.2d 445 (1986), opinion adhered to on reconsideration, 84 Or. App. 580, 735 P.2d 10 (1987).

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[FN11] [Matter of Trust of Grover](#), 109 Idaho 687, 710 P.2d 597 (1985).

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[FN12] [U.S. v. Rivieccio](#), 661 F. Supp. 281 (E.D. N.Y. 1987), opinion clarified on denial of reconsideration, 1987 WL 15271 (E.D. N.Y. 1987); [Marcus v. Marcus](#), 92 A.D.2d 887, 459 N.Y.S.2d 873 (2d Dep't 1983).

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[\[FN13\]](#) As to offsets and credits [§ 383](#).

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[\[FN14\]](#) [Markus v. Markus, 331 Mass. 394, 119 N.E.2d 415 \(1954\)](#); [Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173 \(Tex. Civ. App. Corpus Christi 1979\)](#), judgment aff'd, [597 S.W.2d 752 \(Tex. 1980\)](#).

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§ 372. Under the Uniform Trust Code and Restatement

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [289](#) to [295](#)

Under the Uniform Trust Code, a trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.[\[FN1\]](#) Indeed, keeping the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee.[\[FN2\]](#) Under the Code, unless unreasonable under the circumstances, a trustee must promptly respond to a beneficiary's request for information related to the administration of the trust.[\[FN3\]](#) The Restatement Second, Trusts sets out the common law rule regarding accounting.[\[FN4\]](#) Under the Restatement, the trustee is under a duty to the beneficiary to give the beneficiary upon request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit the beneficiary or a person duly authorized by him or her to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.[\[FN5\]](#)

[\[FN1\] Uniform Trust Code § 813\(a\)](#).

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[\[FN2\] Uniform Trust Code § 813](#), comment.

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[\[FN3\] Uniform Trust Code § 813\(a\)](#).

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[\[FN4\] Uniform Trust Code § 813](#), comment.

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[\[FN5\] Restatement Second, Trusts § 173](#).

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§ 373. Trust provision as relieving trustee from duty to account

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [289](#), [296](#)

An instrument creating a trust may in some cases relieve the trustee of the duty of making a formal accounting or may provide that the accounting may be made to a particular person whose approval shall be conclusive.[\[FN1\]](#) However, a provision purporting to relieve a trustee of all duty to account whatsoever is generally considered to be ineffective as against allegations and evidence of fraud, bad faith, or other deliberate wrongdoing.[\[FN2\]](#) Thus, a trust instrument may relieve a trustee from the necessity of keeping formal accounts,

but cannot legally relieve him or her from the duty to account in a court of equity[FN3] or remove the trustee from the supervision of the courts.[FN4]

With respect to testamentary trusts, a provision excluding the fiduciary from accounting may violate public policy and therefore be invalid.[FN5] An inter vivos trust may limit the rights of beneficiaries to compel an accounting,[FN6] but an attempt to completely excuse the obligation of a trustee to account is void as against public policy.[FN7] Thus, while a beneficiary cannot expect to receive reports concerning the trust estate under a trust instrument that relieves the trustee from keeping formal accounts,[FN8] the trustee may be required in a suit for an accounting to show that he or she faithfully performed his or her duties,[FN9] and subject to appropriate remedies if he or she is unfaithful to the trust.[FN10]

There is a tendency on the part of the courts to construe narrowly clauses in trust instruments relieving the trustee from the duty to account,[FN11] and at most to permit such clauses to operate only in the protection of honest trustees.[FN12]

[FN1] [State v. Taylor, 58 Wash. 2d 252, 362 P.2d 247, 86 A.L.R.2d 1365 \(1961\).](#)

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[FN2] [Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

- The fact that a testator relieves the trustee from making a formal accounting is not a license to manage the assets negligently, self-deal, or waste the estate. [Killeen v. Chico, 174 W. Va. 577, 328 S.E.2d 184 \(1985\).](#)

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[FN3] [Raak v. Raak, 170 Mich. App. 786, 428 N.W.2d 778 \(1988\); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

- No trust instrument can relieve a trustee from a duty to account to interested persons. [In re Guardianship and Conservatorship of Sim, 225 Neb. 181, 403 N.W.2d 721 \(1987\).](#)

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[FN4] [Matter of Estate of Thomson, 139 Ill. App. 3d 930, 94 Ill. Dec. 316, 487 N.E.2d 1193 \(4th Dist. 1986\).](#)

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[FN5] [Application of Kassover, 124 Misc. 2d 630, 476 N.Y.S.2d 763 \(Sur. Ct. 1984\)](#) (noting that unless the beneficiaries have a right to an accounting there is no one able to enforce the trust).

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[FN6] [In re Malasky, 290 A.D.2d 631, 736 N.Y.S.2d 151 \(3d Dep't 2002\).](#)

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[FN7] [In re Malasky, 290 A.D.2d 631, 736 N.Y.S.2d 151 \(3d Dep't 2002\).](#)

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[FN8] [Raak v. Raak, 170 Mich. App. 786, 428 N.W.2d 778 \(1988\); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

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[FN9] [Raak v. Raak, 170 Mich. App. 786, 428 N.W.2d 778 \(1988\); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

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[FN10] [Raak v. Raak, 170 Mich. App. 786, 428 N.W.2d 778 \(1988\); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

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[FN11] [Raak v. Raak, 170 Mich. App. 786, 428 N.W.2d 778 \(1988\); Pherson v. Mitchell, 12 Ohio App. 336, 1920 WL 705 \(4th Dist. Pickaway County 1920\).](#)

- A no-accounting clause may be construed as merely relieving the trustee from the duty of accounting in

particular courts. [Hastings v. Jackson, 201 Ark. 1005, 148 S.W.2d 305 \(1941\).](#)

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[\[FN12\] Helvering v. McCormack, 135 F.2d 294 \(C.C.A. 2d Cir. 1943\).](#)

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The records and accounting of a trustee should constitute a complete,[\[FN1\]](#) clear, accurate, and distinct report and disclosure[\[FN2\]](#) in detail of the administration of the trust or operation of a business held in trust.[\[FN3\]](#)

If the accounting of a trustee is uniform and in accordance with sound practice and reasonable judgment, it commonly ought not to be upset.[\[FN4\]](#) However, the accounting should not be a system readily lending itself to a device to conceal breaches of trust.[\[FN5\]](#) Generally, it is the duty of a trustee, sometimes imposed by statute, to keep the trust accounts separate from the trustee's own general books of account.[\[FN6\]](#)

[FN1] [Brent v. Smathers](#), 547 So. 2d 683 (Fla. Dist. Ct. App. 3d Dist. 1989); [Rothschild v. Village of Calumet Park](#), 262 Ill. App. 96, 1931 WL 3041 (1st Dist. 1931), judgment modified, 350 Ill. 330, 183 N.E. 337 (1932); [Markus v. Markus](#), 331 Mass. 394, 119 N.E.2d 415 (1954); [Betterson v. Stewart](#), 238 S.C. 574, 121 S.E.2d 102 (1961); [Reardon v. Riggs Nat. Bank](#), 677 A.2d 1032 (D.C. 1996).

[FN2] [Shriners Hospitals for Crippled Children v. Robbins](#), 450 So. 2d 798 (Ala. 1984); [Heller v. First Nat. Bank of Denver, N.A.](#), 657 P.2d 992 (Colo. Ct. App. 1982); [Benbow v. Benbow](#), 117 Fla. 37, 157 So. 512 (1934); [Cox v. Cox](#), 357 N.W.2d 304 (Iowa 1984); [Markus v. Markus](#), 331 Mass. 394, 119 N.E.2d 415 (1954); [Bartlett v. Dumaine](#), 128 N.H. 497, 523 A.2d 1 (1986); [Ross v. McCabe](#), 166 Tenn. 314, 61 S.W.2d 479 (1933); [In re Spengler](#), 228 Wis. 2d 250, 596 N.W.2d 818 (Ct. App. 1999).

- An adequate "disclosure" by the accounting fiduciary to the interested parties is warranted in connection with judicial accounting of a trust. [In re Estate of Hunter](#), 194 Misc. 2d 364, 753 N.Y.S.2d 675 (Sur. Ct. 2002), order aff'd as modified, 6 A.D.3d 117, 775 N.Y.S.2d 42 (App. Div. 2d Dep't 2004).

[FN3] [Horwitz v. Ritholz](#), 125 Ill. App. 3d 193, 80 Ill. Dec. 530, 465 N.E.2d 642 (1st Dist. 1984); [Reardon v. Riggs Nat. Bank](#), 677 A.2d 1032 (D.C. 1996).

- As to specific items to be included in an accounting, see [§ 378](#).

[FN4] [Old Colony Trust Co. v. Comstock](#), 290 Mass. 377, 195 N.E. 389, 101 A.L.R. 1 (1935).

[FN5] [First Nat. Bank v. Basham](#), 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 (1939).

[FN6] [In re Cosgrove's Will](#), 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 (1941).

- The records, documents, and account books kept by a trustee in the performance of his or her official duties do not belong to the trustee personally but constitute part of the trust estate. [Wood v. Honeyman](#), 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 (1946).

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§ 375. Purpose

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [289](#)

The purpose or end result of the accounting is to distribute to the beneficiaries the trust property or funds or their value,[\[FN1\]](#) with income thereon,[\[FN2\]](#) and without profit to the trustee,[\[FN3\]](#) although allowing the trustee compensation[\[FN4\]](#) and reimbursement.[\[FN5\]](#) The beneficiary of a trust is entitled to learn from his or her trustee what property came into the trustee's hands, what has passed out, and what remains therein.[\[FN6\]](#) The accounting should detail all receipts and disbursements and cash, and the sources from which they came, to whom paid, and for what purpose paid.[\[FN7\]](#) The final account of a trustee should show in detail the items expended and show when, to whom, and for what purposes the payments were made[\[FN8\]](#) to the beneficiaries can make a reasonable test of the accuracy of the accounts.[\[FN9\]](#)

[\[FN1\] Silver King Coalition Mines Co. of Nevada v. Silver King Consol. Mining Co. of Utah, 204 F. 166 \(C.C.A. 8th Cir. 1913\).](#)

- Generally, as to distribution and payment to beneficiaries, see §§ [549](#) to [555](#).

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[\[FN2\] §§ 380 to 382.](#)

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[\[FN3\] Silver King Coalition Mines Co. of Nevada v. Silver King Consol. Mining Co. of Utah, 204 F. 166 \(C.C.A. 8th Cir. 1913\).](#)

- Generally, as to rule against profit to trustee, see [§ 351](#).

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[\[FN4\] §§ 574 to 579.](#)

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[\[FN5\] §§ 564 to 566.](#)

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[\[FN6\] McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\).](#)

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[\[FN7\] McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\).](#)

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[\[FN8\] In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\).](#)

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[\[FN9\] In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\).](#)

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§ 376. Effect of failure or inadequacy of accounting

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [289](#), [324](#)

If clear, distinct, and accurate accounts are not provided, all intendments and presumptions are against the trustee,[FN1] and all obscurities and doubts are to be taken adversely to him or her.[FN2] Inadequacy of a trustee's accounts may result in liability to the beneficiary,[FN3] or in the trustee's being made to pay the costs of an accounting and the expenses of an accountant.[FN4] If a trustee, after due notice by the court, neglects to render an account and settle the estate, the court may order the removal of the trustee following hearing.[FN5]

In order to justify the surcharging of a trustee's account, proof either of fraud or of intentional wrongdoing is not necessary;[FN6] it is enough that the trustee has not followed the course prescribed by law.[FN7] However, a trustee does not breach his or her duties to a beneficiary by submitting an untimely accounting when the accounting, though untimely, follows statutory requirements and its untimeliness does not cause any loss to the beneficiary.[FN8]

[FN1] [Rainbolt v. Johnson](#), 669 F.2d 767 (D.C. Cir. 1981); [Savage v. Adams](#), 299 S.W.2d 597 (Ky. 1956); [Miller v. Pender](#), 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 (1943); [Finley v. Exchange Trust Co.](#), 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 (1938); [In re Spengler](#), 228 Wis. 2d 250, 596 N.W.2d 818 (Ct. App. 1999).

[\[FN2\] Bravo v. Sauter, 727 So. 2d 1103 \(Fla. Dist. Ct. App. 4th Dist. 1999\); In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\).](#)

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[\[FN3\] Heller v. First Nat. Bank of Denver, N.A., 657 P.2d 992 \(Colo. Ct. App. 1982\).](#)

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[\[FN4\] § 396.](#)

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[\[FN5\] Comerica Bank v. City of Adrian, 179 Mich. App. 712, 446 N.W.2d 553 \(1989\).](#)

- As to judicial removal or termination of trustee, generally, see §§ [224](#) to [226](#).

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[\[FN6\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN7\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

- Generally, as to the duty of compliance with the terms of a trust in its administration, see §§ [344](#) to [348](#).

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[\[FN8\] In re Estate of Ehlers, 80 Wash. App. 751, 911 P.2d 1017 \(Div. 3 1996\).](#)

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West's Key Number Digest, [Trusts](#) [332](#)

Forms

Accounting and reports—Approval as discharge of trustee. [Am. Jur. Legal Forms 2d, Trusts § 251:482](#)

The accounting of a trustee may be settled or excused out of court by beneficiaries.^[FN1] The burden of proof of the fairness of the private settlement, where it is challenged in such respect, is on the trustee.^[FN2]

The rule that the private settlement is not binding where it is of such unfair character is not altered by the fact that it is in the form of a consent judgment entered without judicial inquiry.^[FN3] However, where the application to withdraw a waiver and consent follows the execution of a trust accounting decree, the applicant must show that: (1) the waiver itself was obtained through fraud, misrepresentation, misunderstanding, undue influence, collusion, accident or some other similar ground; (2) the parties can be placed in a position of status quo ante; and (3) the proposed objections raised are meritorious.^[FN4]

^[FN1] [Ingram v. Lewis, 37 F.2d 259, 70 A.L.R. 702 \(C.C.A. 10th Cir. 1930\).](#)

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^[FN2] [Ingram v. Lewis, 37 F.2d 259, 70 A.L.R. 702 \(C.C.A. 10th Cir. 1930\).](#)

- Generally, as to the duty of full and fair disclosure by a trustee as requisite to release by the beneficiary of the duties and liabilities of the trustee, see [§ 338](#).

- Generally, as to the duty of full and fair disclosure by a trustee in dealing with the beneficiary, see [§ 355](#).

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^[FN3] [§ 667](#).

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^[FN4] [In re Estate of Hunter, 190 Misc. 2d 593, 739 N.Y.S.2d 916 \(Sur. Ct. 2002\).](#)

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§ 378. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [307](#) to [321](#)

Forms

Trustee's account—With explanation of attached schedules. [Am. Jur. Pleading and Practice Forms, Trusts § 276](#)

Model Codes and Restatements

[Restatement Second, Trusts § 172](#)

The scope of an accounting depends upon the circumstances of the individual case, and, as a general rule, should include all items of information in which the beneficiary has a legitimate interest.[\[FN1\]](#) As a general proposition, a trustee must, subject to proper credits,[\[FN2\]](#) account for, and is chargeable with, the following items —

— property or funds originally received by him or her.[\[FN3\]](#)

— all profits and gains arising from the trust estate,[\[FN4\]](#) including profits from a business which has been operated by the trustee in the administration of the trust.[\[FN5\]](#)

— the proceeds of a sale of trust property.[\[FN6\]](#)

— the worth of trust property that the trustee is under duty to, but cannot, surrender or deliver.[\[FN7\]](#)

— waste.[\[FN8\]](#)

— all receipts,[\[FN9\]](#) expenditures,[\[FN10\]](#) and disbursements.[\[FN11\]](#)

— the expense of an audit made necessary by the trustee's fault.[\[FN12\]](#)

— liabilities of the trustee to the estate growing out of impropriety or breach of trust in respect to trust investments.[\[FN13\]](#)

— profits from speculation, although the risk is his or her own,[\[FN14\]](#)

— what losses have occurred,[\[FN15\]](#) including losses of trust funds resulting from a failure to make a safe and proper deposit of the funds,[\[FN16\]](#) from prolonged deposits,[\[FN17\]](#) and from a transaction involving a breach of good faith[\[FN18\]](#) or self-dealing.[\[FN19\]](#)

—allocations of receipts or expenses to principal or income.[FN20]

Thus, a court should not approve a trustee's accounting that does not include a complete list of receipts, disbursements, and other transactions regarding the trust property[FN21] or that fails to show which property was being administered.[FN22]

[FN1] [Zuch v. Connecticut Bank & Trust Co., Inc., 5 Conn. App. 457, 500 A.2d 565 \(1985\).](#)

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[FN2] [§ 383.](#)

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[FN3] [McComb v. Frink, 149 U.S. 629, 13 S. Ct. 993, 37 L. Ed. 876 \(1893\); McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\); Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173 \(Tex. Civ. App. Corpus Christi 1979\), judgment aff'd, 597 S.W.2d 752 \(Tex. 1980\).](#)

- Under trust law, an accounting necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception. [Cobell v. Norton, 240 F.3d 1081 \(D.C. Cir. 2001\).](#)

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[FN4] [Zuch v. Connecticut Bank & Trust Co., Inc., 5 Conn. App. 457, 500 A.2d 565 \(1985\); Jose v. Lyman, 316 Mass. 271, 55 N.E.2d 433, 154 A.L.R. 190 \(1944\); Commissioners of Land Office of Oklahoma v. Brunson, 1935 OK 737, 175 Okla. 101, 51 P.2d 500 \(1935\); Pueblo of San Ildefonso v. U.S., 35 Fed. Cl. 777 \(1996\).](#)

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[FN5] [Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co., 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219 \(1920\)](#) (trusteeship operating railroad terminal property).

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[FN6] [Harrison v. State, 231 Ind. 147, 106 N.E.2d 912, 32 A.L.R.2d 875 \(1952\).](#)

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[FN7] [May v. Henderson, 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870 \(1925\).](#)

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[FN8] [In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\).](#)

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[FN9] [Pueblo of San Ildefonso v. U.S., 35 Fed. Cl. 777 \(1996\).](#)

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[FN10] [Pueblo of San Ildefonso v. U.S., 35 Fed. Cl. 777 \(1996\).](#)

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[FN11] [Zuch v. Connecticut Bank & Trust Co., Inc., 5 Conn. App. 457, 500 A.2d 565 \(1985\); McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\).](#)

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[FN12] [In re Kline's Estate, 280 Pa. 41, 124 A. 280, 32 A.L.R. 926 \(1924\).](#)

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[FN13] [§§ 432 to 440.](#)

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[FN14] [§ 483.](#)

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[\[FN15\] Pueblo of San Ildefonso v. U.S., 35 Fed. Cl. 777 \(1996\).](#)

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[\[FN16\] § 424.](#)

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[\[FN17\] §§ 425, 426.](#)

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[\[FN18\] §§ 349 to 357.](#)

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[\[FN19\] § § 351, 468, 519 to 526.](#)

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[\[FN20\] Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 \(1999\)](#) (holding that an accounting that failed to make the allocation was insufficient to meet the trustee's obligation to account upon request by the remaindermen).
- An account filed by a testamentary trustee should allocate payments made, as between income and principal.
[In re Clyde's Estate, 329 Pa. 552, 198 A. 640, 115 A.L.R. 1412 \(1938\).](#)

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[\[FN21\] In re Estate of Dillard, 98 S.W.3d 386 \(Tex. App. Amarillo 2003\)](#), review denied, (June 26, 2003).

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[\[FN22\] In re Estate of Dillard, 98 S.W.3d 386 \(Tex. App. Amarillo 2003\)](#), review denied, (June 26, 2003).

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§ 379. Under the Uniform Trust Code

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 307 to 321

Under the Uniform Trust Code, a trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, a report of:[\[FN1\]](#)

- (1) the trust property;
- (2) liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation; and
- (3) a listing of the trust assets and, if feasible, their respective market values.

The report shall be made at least annually and at the termination of the trust.[\[FN2\]](#)

[\[FN1\] Uniform Trust Code § 813\(c\).](#)

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[\[FN2\] Uniform Trust Code § 813\(c\).](#)

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§ 380. Income

West's Key Number Digest

Forms

Complaint in federal court—Diversity of citizenship—By beneficiary—To compel accounting by testamentary trustee—Misrepresentation by defendant as to income received from stock. [Am. Jur. Pleading and Practice Forms, Trusts § 270](#)

A trustee is bound to account for income to the trust estate,[\[FN1\]](#) but is not chargeable with income never paid through no fault on the trustee's part.[\[FN2\]](#) Where payment of income to beneficiaries is discretionary or rests in the judgment of the trustee, the trustee is not chargeable in the accounting with payment made to the beneficiaries in accordance with the terms of the trust,[\[FN3\]](#) but is accountable for income that has not been paid to them.[\[FN4\]](#)

[\[FN1\]](#) [Zuch v. Connecticut Bank & Trust Co., Inc., 5 Conn. App. 457, 500 A.2d 565 \(1985\); Cleveland Clinic Foundation v. Humphrys, 97 F.2d 849, 121 A.L.R. 163 \(C.C.A. 6th Cir. 1938\).](#)

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[\[FN2\]](#) [§ 549.](#)

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[\[FN3\]](#) [Cleveland Clinic Foundation v. Humphrys, 97 F.2d 849, 121 A.L.R. 163 \(C.C.A. 6th Cir. 1938\).](#)

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[\[FN4\]](#) [Cleveland Clinic Foundation v. Humphrys, 97 F.2d 849, 121 A.L.R. 163 \(C.C.A. 6th Cir. 1938\).](#)

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§ 381. Interest

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 309

A trustee is chargeable in the accounting with interest for which he or she is liable as a consequence of some breach of duty in the administration of the trust.[FN1] For example, a trustee is liable for interest on trust property or funds invested imprudently or unlawfully.[FN2] Moreover, the trustee must account for interest received on loans of trust funds,[FN3] Even if the trustee has made improper investments resulting in a loss.[FN4] The trustee must also account for interest on trust property or funds that he or she has wrongfully converted,[FN5] and where a trustee applies trust funds to his or her own use, the trustee may be charged with compound interest.[FN6]

A trustee derelict in his or her account is liable to beneficiaries for interest on property or funds retained from them as a consequence of such dereliction.[FN7] Where no separate account of income is received from a trust fund, the beneficiary may be deemed entitled to an amount equal to interest at the legal rate on the sum directed to be held in trust.[FN8]

[FN1] [Am. Jur. 2d, Interest and Usury §§ 30, 53, 68.](#)

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[FN2] [Am. Jur. 2d, Interest and Usury § 30.](#)

- Generally, as to the duties of trustees as to investments, see §§ [432](#) to [440](#).

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[FN3] [Magruder v. Drury, 235 U.S. 106, 35 S. Ct. 77, 59 L. Ed. 151 \(1914\).](#)

- Generally, as to the duty, power, and liabilities of a trustee as to loans of trust funds, see § § [455](#), [471](#), [495](#) to [498](#).

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[FN4] [Am. Jur. 2d, Interest and Usury § 53.](#)

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[FN5] [McComb v. Frink, 149 U.S. 629, 13 S. Ct. 993, 37 L. Ed. 876 \(1893\).](#)

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[FN6] [In re Hinkel's Estate, 218 Cal. 614, 24 P.2d 778 \(1933\).](#)

- Compound interest may properly be charged against a trustee who has been guilty of a willful wrong or who has been grossly negligent, or where, during the period of withholding money from the beneficiaries, he or she has used it for personal gain. [Fox v. Schaeffer, 131 Conn. 439, 41 A.2d 46, 157 A.L.R. 132 \(1944\).](#)

- Generally, as to the duty of a trustee not to use, apply or appropriate trust property or funds to his or her own use, see § [351](#).

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[FN7] [In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\).](#)

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[FN8] [State Bank of Chicago v. Gross, 344 Ill. 512, 176 N.E. 739, 75 A.L.R. 172 \(1931\)](#) (no accounting by the executor during the period between the testator's death and the turning over of the trust fund to the trustee).

- As to the rate of interest chargeable against a trustee, generally, see [Am. Jur. 2d, Interest and Usury § 53](#).

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§ 382. Rents and profits

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [289](#), [295](#)

Model Codes and Restatements

[Restatement Second, Trusts § 203](#)

A trustee is under a duty to account for rents and profits of the trust property, and on a refusal to account therefor is surchargeable with the reasonable value of such rents and profits.^[FN1] A constructive trustee must also account for rents and profits received on property held in trust.^[FN2]

While a trustee acting in good faith must account only for what he or she has actually received,^[FN3] where a trustee who is guilty of misconduct must account for proceeds or profits which he or she might have received from the property by the exercise of reasonable care and prudence.^[FN4]

^[FN1] [Vincent v. Real Estate Division Dept. of Commerce, 24 Or. App. 913, 548 P.2d 180 \(1976\)](#).

- The question of the disposition of net rentals from the subject of a testamentary trust can be met in the

accounting of the testamentary trustees. [In re Schick's Estate, 169 Pa. Super. 226, 82 A.2d 262, 30 A.L.R.2d 119 \(1951\).](#)

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[\[FN2\] Mischke v. Mischke, 253 Neb. 439, 571 N.W.2d 248 \(1997\).](#)

- As to constructive trusts, generally, see §§ [168](#) to [204](#).

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[\[FN3\] White Gates Skeet Club, Inc. v. Lightfine, 276 Ill. App. 3d 537, 213 Ill. Dec. 115, 658 N.E.2d 864 \(2d Dist. 1995\).](#)

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[\[FN4\] White Gates Skeet Club, Inc. v. Lightfine, 276 Ill. App. 3d 537, 213 Ill. Dec. 115, 658 N.E.2d 864 \(2d Dist. 1995\).](#)

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§ 383. Offsets and credits

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [311](#) to [313](#)

Model Codes and Restatements

[Restatement Third, Trusts \(Prudent Investor Rule\) § 213](#)

Offsets against charges or credits may be made in proper instances,[\[FN1\]](#) but an offset in favor of a trustee cannot consist of a property right in the beneficiary.[\[FN2\]](#) Thus, a trustee cannot offset a loss for which he or she is liable by a gain belonging to the trust estate and the beneficiaries.[\[FN3\]](#) Further, when a trustee has engaged in a variety of unrelated investment transactions in breach of trust, some of which resulted in losses and some in gains, the trustee cannot net out the results of his or her unauthorized activities where the breaches of trust are separate and distinct.[\[FN4\]](#) The beneficiaries are entitled to accept the benefits of the profitable investment and to reject the results of the investment on which there was a loss.[\[FN5\]](#) Only if the breaches in contest are not distinct is the trustee accountable solely for the net gain or chargeable only with the net loss that results therefrom.[\[FN6\]](#)

Observation: A trustee cannot use a private demand against the trustor or beneficiary as a setoff or counterclaim against the demand of the beneficiary for trust property or funds to which he or she is entitled; appointment as a trustee gives one no advantage or superior rights over other creditors of the cestui que trust.[\[FN7\]](#)

A trustee on accounting is entitled to proper credits, including all items of reimbursement to which he or she is entitled,[\[FN8\]](#) such as sums expended to protect and preserve trust property,[\[FN9\]](#) and advances to a beneficiary when no trust funds are available.[\[FN10\]](#)

[\[FN1\] Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 \(1931\).](#)

- Generally, as to setoff and counterclaim in actions or proceedings relating to trusts or trustees, see [§ 653](#).

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[\[FN2\] Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 \(1931\).](#)

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[\[FN3\] Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 \(1931\).](#)

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[\[FN4\] Adolph Gottscho, Inc. v. American Marking Corp., 26 N.J. 229, 139 A.2d 281, 67 A.L.R.2d 816 \(1958\); Matter of Estate of Bartlett, 1984 OK 9, 680 P.2d 369 \(Okla. 1984\).](#)

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[\[FN5\] Restatement Third, Trusts \(Prudent Investor Rule\) § 213, comment d.](#)

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[\[FN6\] Matter of Estate of Bartlett, 1984 OK 9, 680 P.2d 369 \(Okla. 1984\).](#)

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[\[FN7\] § 653.](#)

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[\[FN8\] §§ 564 to 566.](#)

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[\[FN9\] § 417.](#)

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[\[FN10\] § 569.](#)

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§ 384. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 297 to 305

As an alternative to a private settlement of a trustee's accounting,[\[FN1\]](#) the trustee may request judicial approval of the accounting,[\[FN2\]](#) or apply for settlement of the accounting by a proper court.[\[FN3\]](#)

Testamentary trustees are usually required, unless excused by the will creating the trust, to account annually, or at other regular intervals, to the court,[\[FN4\]](#) and may also be required to file an inventory of the trust estate.[\[FN5\]](#) A trustee who is appointed by a court to conduct a sale and to distribute the proceeds[\[FN6\]](#) may be required to submit an account of distribution to the court for its approval.[\[FN7\]](#) A court charged with the administration of the decedent's estate, upon being apprised of the continued failure of the trustee for many years to render any account may, upon its own motion, immediately cite the trustee to render an account.[\[FN8\]](#)

[\[FN1\]](#) § 377.

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[\[FN2\]](#) *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, Inc.*, 832 So. 2d 948 (Fla. Dist. Ct. App. 2d Dist. 2002).

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[\[FN3\]](#) *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 (1939) (noting Pennsylvania statute); *Matter of Cary*, 313 N.W.2d 625 (Minn. 1981); *In re Bushe*, 227 N.Y. 85, 124 N.E. 154, 7 A.L.R. 1590 (1919).

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[\[FN4\]](#) *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 (1939) (noting Pennsylvania statute providing for accounting and adjudication thereon every three years); *Hooker v.*

[Goodwin](#), 91 Conn. 463, 99 A. 1059 (1917); [Fraser v. Southeast First Bank of Jacksonville](#), 417 So. 2d 707 (Fla. Dist. Ct. App. 5th Dist. 1982); [In re Cosgrove's Will](#), 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 (1941).

[FN5] [Fraser v. Southeast First Bank of Jacksonville](#), 417 So. 2d 707 (Fla. Dist. Ct. App. 5th Dist. 1982); [In re Cosgrove's Will](#), 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 (1941).

[FN6] § § [214](#), [556](#).

[FN7] [Surratt v. State, to Use of Bollinger](#), 167 Md. 357, 173 A. 573, 100 A.L.R. 1116 (1934).

[FN8] [In re Leonard's Will](#), 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 (1930).

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§ 385. Application for accounting by interested parties

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [297](#) to [305](#)

Forms

Petition or application—By beneficiary—To compel accounting by testamentary trustee [Am. Jur. Pleading and Practice Forms, Trusts § 271](#)

Model Codes and Restatements

[Restatement Second, Trusts § 260](#)

A court may require a trustee to file an account of the management of a trust estate upon the application of a person in interest.[\[FN1\]](#) In the issue of who has a right to require an accounting, and on what showing, courts have held —

— each trust beneficiary,[\[FN2\]](#) including one who holds only a present interest in the remainder of the trust,[\[FN3\]](#) is entitled to petition the court for an accounting.

— the sole remainderman of a testamentary trust is entitled, by common law, to request and obtain accounting.[\[FN4\]](#)

— the next of kin of a beneficiary of a trust has no interest in the trust which would automatically entitle the next-of-kin to demand that the trustee file an accounting.[\[FN5\]](#)

— the estranged wife of a trust beneficiary did not have standing to compel an accounting of the trust.[\[FN6\]](#)

— a contingent remainderman may apply to obtain an accounting without a showing of mismanagement or waste,[\[FN7\]](#) though a contingent beneficiary of inter vivos trust established by the beneficiary's father may not be entitled to an accounting.[\[FN8\]](#)

— a petition for accounting of a trust is directed to the court in exercise of its discretion, as beneficiaries do not have an absolute right to an accounting.[\[FN9\]](#)

— when the sole remainderman of a testamentary trust seeks a court order for accounting, a petition for assumption of jurisdiction is not required.[\[FN10\]](#)

— contingent beneficiaries of trust did not have a right, under Illinois common law, to seek an accounting from former trustees, as any right for an accounting would be against the current trustees.[\[FN11\]](#)

It has been held that the trustee of a revocable trust generally has no duty to report or account to the trust beneficiaries,[\[FN12\]](#) and beneficiaries have no right to receive such accountings.[\[FN13\]](#) However, the beneficiaries of a revocable living trust are entitled to an accounting from a former trustee where the beneficiaries presented evidence of an apparent misuse of trust funds by the trustee.[\[FN14\]](#)

Observation: Where the minor beneficiaries of a trust are the only real parties in interest to the trust,[\[FN15\]](#) the trustee must account only to them[\[FN16\]](#) or to a party acting on their behalf.[\[FN17\]](#)

[\[FN1\]](#) [Rock v. Pyle, 720 A.2d 137 \(Pa. Super. Ct. 1998\).](#)

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[\[FN2\]](#) [Weiss v. Courshon, 618 So. 2d 255 \(Fla. Dist. Ct. App. 3d Dist. 1993\).](#)

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[\[FN3\] In re Estate of Ehlers, 80 Wash. App. 751, 911 P.2d 1017 \(Div. 3 1996\).](#)

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[\[FN4\] Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 \(1999\).](#)

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[\[FN5\] Rock v. Pyle, 720 A.2d 137 \(Pa. Super. Ct. 1998\).](#)

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[\[FN6\] In re Trust under Deed of Green, 2001 PA Super 186 \(PASUPER,2001\).](#)

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[\[FN7\] Cox v. Cox, 357 N.W.2d 304 \(Iowa 1984\).](#)

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[\[FN8\] In re McGuire Marital Trust, 260 Wis. 2d 815, 2003 WI App 44, 660 N.W.2d 308 \(Ct. App. 2003\),](#) review denied, [265 Wis. 2d 417, 2003 WI 126, 668 N.W.2d 557 \(2003\)](#) (where an article in the trust document directed that the trustees "shall deliver copies of accounts at regular intervals to the beneficiaries then eligible to receive the income").

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[\[FN9\] In re Estate of Ehlers, 80 Wash. App. 751, 911 P.2d 1017 \(Div. 3 1996\).](#)

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[\[FN10\] Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 \(1999\).](#)

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[\[FN11\] Godfrey v. Kamin, 19 Fed. Appx. 435 \(7th Cir. 2001\).](#)

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[\[FN12\] Johnson v. Kotyck, 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 \(2d Dist. 1999\).](#)

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[\[FN13\] Johnson v. Kotyck, 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 \(2d Dist. 1999\).](#)

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[\[FN14\] Evangelho v. Presoto, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 \(1st Dist. 1998\).](#)

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[\[FN15\] Rock v. Pyle, 720 A.2d 137 \(Pa. Super. Ct. 1998\)](#) (life insurance trust established by mother during marriage).

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[\[FN16\] Rock v. Pyle, 720 A.2d 137 \(Pa. Super. Ct. 1998\).](#)

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[\[FN17\] Rock v. Pyle, 720 A.2d 137 \(Pa. Super. Ct. 1998\).](#)

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§ 386. Jurisdiction

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[Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance, 15 A.L.R.2d 610](#)

Forms

Order—Requiring delivery of written statement of account. [Am. Jur. Pleading and Practice Forms, Trusts, § 272](#)

It is not uncommon for a court of probate or surrogacy to have jurisdiction to demand an accounting of trustees, particularly testamentary trustees,[[FN1](#)] although other courts may also have this power.[[FN2](#)] Where a fiduciary or trust relationship exists, an action for accounting is considered equitable in nature,[[FN3](#)] since proceedings involving trusts are generally within the exclusive jurisdiction of courts of equity.[[FN4](#)] Once invoked, equity retains jurisdiction over the entire action to see that complete relief is administered.[[FN5](#)]

While a court may have jurisdiction, it need not exercise its jurisdiction if to do so would cause hardship to one of the parties by forcing litigation in an inconvenient forum.[[FN6](#)] As between courts of different states or between a federal and a state court, the court first obtaining jurisdiction has exclusive jurisdiction of a suit for an accounting by a trustee.[[FN7](#)]

[[FN1](#)] [Lazzarone v. Bank of America](#), 181 Cal. App. 3d 581, 226 Cal. Rptr. 855 (3d Dist. 1986); [Matter of Acker](#), 128 A.D.2d 867, 513 N.Y.S.2d 786 (2d Dep't 1987); [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940); [In re Proctor](#), 140 Vt. 6, 433 A.2d 300 (1981).

- A probate judge is not precluded from exercising authority over trustees when the Attorney General has had

the opportunity to object to an account, but has not done so. [In re Will of Crabtree, 440 Mass. 177, 795 N.E.2d 1157 \(2003\)](#).

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[FN2] [Beaty v. Bales, 677 S.W.2d 750 \(Tex. App. San Antonio 1984\)](#), writ refused n.r.e., (Dec. 5, 1984) (holding that by statute the district court has original jurisdiction to require an accounting).

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[FN3] [Nayee v. Nayee, 705 So. 2d 961 \(Fla. Dist. Ct. App. 5th Dist. 1998\)](#).

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[FN4] [Nayee v. Nayee, 705 So. 2d 961 \(Fla. Dist. Ct. App. 5th Dist. 1998\)](#).

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[FN5] [In re Estate of Archambault, 147 Vt. 649, 520 A.2d 154 \(1986\)](#).

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[FN6] [Matter of Cary, 313 N.W.2d 625 \(Minn. 1981\)](#).

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[FN7] [Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\)](#).

- As to exclusive and concurrent jurisdiction, generally, see [§ 305](#).

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§ 387. Parties, generally

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West's Key Number Digest, [Trusts](#) 299 to 204, 305, 326

Forms

Complaint, petition, or declaration—By beneficiary against settlor-successor trustee of inter vivos trust—To compel accounting and distribution of income and corpus. [Am. Jur. Pleading and Practice Forms, Trusts § 268](#)

Request—By interested persons—That account be allowed without further notice. [Am. Jur. Pleading and Practice Forms, Trusts § 284](#)

The trustee and beneficiaries are, in general, necessary parties to the accounting.[FN1] Indeed, as a general rule, all persons in interest in any way in the estate should be made parties[FN2] and receive notice.[FN3]

Practice Guide: While it is not specifically required that a surety on the trustee's bond be named as a party in an action for an accounting, the better practice would be that all parties in interest, including the surety, receive notice of the action.[FN4]

[FN1] [Just Pants v. Bank of Ravenswood, 136 Ill. App. 3d 543, 91 Ill. Dec. 49, 483 N.E.2d 331 \(1st Dist. 1985\); Roth v. Lehmann, 741 S.W.2d 860 \(Mo. Ct. App. E.D. 1987\); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

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[FN2] [Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\).](#)

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[FN3] §§ [388](#), [389](#).

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[FN4] [Matter of Polevski's Estate, 186 N.J. Super. 246, 452 A.2d 469 \(App. Div. 1982\).](#)

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§ 388. Notice

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 305, 326

Forms

Notice—Hearing of petition or application for settlement of account. [Am. Jur. Pleading and Practice Forms, Trusts § 287](#)

Generally, advertisement and other forms of notice to interested persons are required before an audit and confirmation of the account.^[FN1] Where a statute requires that notice of an accounting be sent to the beneficiary, the trustee satisfies the notice requirement by sending notices to beneficiary at the address on the trustee's records.^[FN2] However, a statutory notice by publication provision may not satisfy the due process standard^[FN3] if that notice be reasonably calculated to reach interested parties.^[FN4] In such a case, even when notice of hearing on a trustee's account is published in a newspaper in compliance with statutory notice requirements governing hearings on accounts, the order approving the account is void ab initio due to failure of notice.^[FN5]

Where a remainderperson receives notice of accounting but fails to make a timely objection to the accounting, the remainderperson cannot challenge the trustee's handling of the trust for the period covered by the accounting.^[FN6]

^[FN1] [Princess Lida of Thurn and Taxis v. Thompson](#), 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 (1939); [Fraser v. Southeast First Bank of Jacksonville](#), 417 So. 2d 707 (Fla. Dist. Ct. App. 5th Dist. 1982); [Matter of Polevski's Estate](#), 186 N.J. Super. 246, 452 A.2d 469 (App. Div. 1982).

- Notice of the hearing of any account of a representative of a decedent's estate shall be given as the court directs. [Norris v. Estate of Norris](#), 143 Ill. App. 3d 741, 97 Ill. Dec. 639, 493 N.E.2d 121 (1st Dist. 1986).

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^[FN2] [In re Strong](#), 289 A.D.2d 798, 734 N.Y.S.2d 668 (3d Dep't 2001) (holding that there was no breach of a claimed affirmative duty to insure the accuracy of the records by the trustee's failure to discover the beneficiary had moved from the record address where he lived with his parent).

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^[FN3] [U.S. Const. Amend. 14 § 1](#).

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[\[FN4\] In re Estate of Cullen, 118 Ohio App. 3d 256, 692 N.E.2d 650 \(12th Dist. Butler County 1997\).](#)

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[\[FN5\] In re Estate of Cullen, 118 Ohio App. 3d 256, 692 N.E.2d 650 \(12th Dist. Butler County 1997\).](#)

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[\[FN6\] Matter of Will of Maxwell, 306 N.J. Super. 563, 704 A.2d 49 \(App. Div. 1997\).](#)

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§ 389. Pleadings

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [305](#), [324](#)

A cause of action for an accounting based on a breach of fiduciary duty must set forth allegations, supported by facts, that:

- a fiduciary relationship existed between the parties,[\[FN1\]](#) under which the trustee owed certain, specific duties to the plaintiff[\[FN2\]](#)
- the trustee breached those duties or the fiduciary relationship[\[FN3\]](#)
- there were resulting damages[\[FN4\]](#)

Under other authority, the four elements required to establish equitable jurisdiction for a trust accounting are: (1) the need for discovery; (2) the complicated nature of the accounts; (3) the existence of a fiduciary or trust relationship; and (4) the inadequacy of legal remedies.[FN5]

The absence of any of the required elements may be fatal to the cause of action,[FN6] though the existence of a fiduciary relationship is the most critical element to support the exercise of equitable jurisdiction.[FN7] Thus, it has been held that while an allegation that a fiduciary relationship exists may, in and of itself, be sufficient to support an accounting,[FN8] the person seeking the accounting may be required to allege that an accounting was demanded of the trustee and that this demand was refused.[FN9]

[FN1] [Chicago City Bank and Trust Co. v. Lesman](#), 186 Ill. App. 3d 697, 134 Ill. Dec. 478, 542 N.E.2d 824 (1st Dist. 1989); [Pierce v. Lyman](#), 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 (2d Dist. 1991).

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[FN2] [Chicago City Bank and Trust Co. v. Lesman](#), 186 Ill. App. 3d 697, 134 Ill. Dec. 478, 542 N.E.2d 824 (1st Dist. 1989).

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[FN3] [Chicago City Bank and Trust Co. v. Lesman](#), 186 Ill. App. 3d 697, 134 Ill. Dec. 478, 542 N.E.2d 824 (1st Dist. 1989); [Pierce v. Lyman](#), 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 (2d Dist. 1991).

- Trust beneficiaries' allegations of a breach of trust and the inadequacy of accountings were sufficient to support a motion to compel an accounting. [Corsi v. Corsi](#), 302 Ill. App. 3d 519, 236 Ill. Dec. 82, 706 N.E.2d 956 (1st Dist. 1998).

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[FN4] [Chicago City Bank and Trust Co. v. Lesman](#), 186 Ill. App. 3d 697, 134 Ill. Dec. 478, 542 N.E.2d 824 (1st Dist. 1989); [Pierce v. Lyman](#), 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 (2d Dist. 1991).

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[FN5] [Tobias v. Korman](#), 141 S.W.3d 468 (Mo. Ct. App. E.D. 2004).

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[FN6] [Pierce v. Lyman](#), 1 Cal. App. 4th 1093, 3 Cal. Rptr. 2d 236 (2d Dist. 1991).

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[FN7] [Tobias v. Korman](#), 141 S.W.3d 468 (Mo. Ct. App. E.D. 2004).

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[FN8] [Zuch v. Connecticut Bank & Trust Co., Inc.](#), 5 Conn. App. 457, 500 A.2d 565 (1985).

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[FN9] [McCormick v. McCormick](#), 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 (1st Dist. 1983).

- An allegation of demand and refusal has been required in most but not all instances, with many decisions turning on the specific facts of the particular case. [Zuch v. Connecticut Bank & Trust Co., Inc.](#), 5 Conn. App. 457, 500 A.2d 565 (1985).

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§ 390. Evidence

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [325](#)

On an accounting by a trustee, the burden is on the trustee to establish the propriety of items in the trust account.[\[FN1\]](#)

Observation: Ordinarily, if the trustee claims that he or she kept an account book but that has lost it, the trustee must bear the burden of proving the payments which the trustee alleges were shown by the book,[\[FN2\]](#) and doubts will be resolved against the trustee.[\[FN3\]](#)

Under some authority, when a trustee files specific accounts and makes a prima facie showing that the accounts are proper, the trustee has satisfied his or her burden of proof.[\[FN4\]](#) The burden of persuasion shifts to the beneficiary to produce contradictory evidence and to show specific instances of impropriety.[\[FN5\]](#) Where a trustee makes such a prima facie showing, the accuracy of the accounting can still be impeached by showing updated subsequent accounts of the trustee.[\[FN6\]](#) Under other authority, where an objectant has come forward with evidence indicating that an account is inaccurate or incomplete, the accounting trustee bears the burden of establishing that the account is accurate and proper.[\[FN7\]](#)

Sworn affidavits and unsworn memoranda, such as trust documents and canceled checks, may be considered at a court hearing regarding petition for an accounting[\[FN8\]](#) where:[\[FN9\]](#)

- (1) neither the beneficiaries nor trustee objected in trial court to any of the factual statements;
- (2) both the beneficiaries and trustee submitted trust documents and canceled checks; and
- (3) the beneficiaries and trustee did not mention the need for oral argument or formal introduction of exhibits.

[\[FN1\] Matter of Willey's Trust, 433 N.E.2d 1191 \(Ind. Ct. App. 1st Dist. 1982\); Matter of Green Charitable Trust, 172 Mich. App. 298, 431 N.W.2d 492 \(1988\); Villa Site Co. v. Copeland, 91 N.J. Eq. 503, 111 A. 39, 13](#)

[A.L.R. 356 \(Ct. Err. & App. 1920\)](#); [Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173 \(Tex. Civ. App. Corpus Christi 1979\)](#), judgment aff'd, [597 S.W.2d 752 \(Tex. 1980\)](#).

- As to evidentiary matters in other actions or proceedings involving trusts, see §§ [687](#) to [693](#).

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[FN2] [In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\)](#).

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[FN3] [In re Spengler, 228 Wis. 2d 250, 596 N.W.2d 818 \(Ct. App. 1999\)](#).

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[FN4] [Matter of Willey's Trust, 433 N.E.2d 1191 \(Ind. Ct. App. 1st Dist. 1982\)](#); [Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173 \(Tex. Civ. App. Corpus Christi 1979\)](#), judgment aff'd, [597 S.W.2d 752 \(Tex. 1980\)](#).

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[FN5] [Matter of Willey's Trust, 433 N.E.2d 1191 \(Ind. Ct. App. 1st Dist. 1982\)](#); [Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173 \(Tex. Civ. App. Corpus Christi 1979\)](#), judgment aff'd, [597 S.W.2d 752 \(Tex. 1980\)](#).

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[FN6] [Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173 \(Tex. Civ. App. Corpus Christi 1979\)](#), judgment aff'd, [597 S.W.2d 752 \(Tex. 1980\)](#).

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[FN7] [In re Application for a Judicial Settlement of Account of Beiny, 2003 N.Y. Slip Op. 51139\(U\) \(N.Y.Sur.,2003\)](#).

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[FN8] [Evangelho v. Presoto, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 \(1st Dist. 1998\)](#).

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[FN9] [Evangelho v. Presoto, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 \(1st Dist. 1998\)](#).

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§ 391. The accounting or hearing

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West's Key Number Digest, [Trusts](#) [326](#)

Forms

Notice—Hearing of petition or application for settlement of final account and distribution of trust property. [Am. Jur. Pleading and Practice Forms, Trusts § 288](#)

The accounting or hearing is generally before the court, and there may be no right to a jury trial.[\[FN1\]](#) Whether documents submitted by the trustee are so complete and correct as to make the beneficiary's demand for an accounting unreasonable and unnecessary are questions of fact and not properly a determination to make on a motion to dismiss.[\[FN2\]](#)

In a proceeding for judicial settlement of an account, the court has the power to initiate an inquiry into items of an account before approving them.[\[FN3\]](#) The scope of a proceeding involving a trustee's accounts includes virtually all controversies that might arise between trustees and beneficiaries, including trustee misconduct.[\[FN4\]](#) Questions relating to distributions already made to beneficiaries by a testamentary trustee may properly be considered.[\[FN5\]](#)

On the accounting or hearing, whether on the voluntary application of the trustee or on a citation,[\[FN6\]](#) the court has the power[\[FN7\]](#) to —

— fix the compensation of the trustee.[\[FN8\]](#) allow the trustee reimbursement.[\[FN9\]](#)

— require the trustee to take over trust investments improperly made and to restore to the trust estate the amount expended for them.[\[FN10\]](#)

— audit the account.[\[FN11\]](#)

— settle the account.[\[FN12\]](#)

However, the proper allocation of charges between income and principal cannot be decided in a proceeding for an accounting by a trustee where the account filed entirely fails to make such allocation.[\[FN13\]](#)

Practice Guide: When a party seeks an accounting, the trial court must make two separate and distinct determinations: that an accounting is required, and that a sum certain is due.[\[FN14\]](#) These determinations are traditionally made in separate hearings with separate discovery phases.[\[FN15\]](#)

A final judicial settlement of a trustee's accounting imports a finding of all facts necessary to the result, although not specified.[\[FN16\]](#)

[\[FN1\]](#) [In re Estate of Archambault, 147 Vt. 649, 520 A.2d 154 \(1986\); Texas State Bank v. Amaro, 87 S.W.3d 538 \(Tex. 2002\).](#)

[\[FN2\] Corsi v. Corsi, 302 Ill. App. 3d 519, 236 Ill. Dec. 82, 706 N.E.2d 956 \(1st Dist. 1998\).](#)

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[\[FN3\] In re Hawwa A., 9 A.D.3d 362, 779 N.Y.S.2d 578 \(App. Div. 2d Dep't 2004\).](#)

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[\[FN4\] Estate of Howard, 58 Cal. App. 3d 250, 129 Cal. Rptr. 836 \(1st Dist. 1976\).](#)

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[\[FN5\] Anderson v. Bean, 272 Mass. 432, 172 N.E. 647, 72 A.L.R. 959 \(1930\).](#)

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[\[FN6\] § 384.](#)

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[\[FN7\] Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\); Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN8\] § 577.](#)

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[\[FN9\] §§ 564 to 566.](#)

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[\[FN10\] § 437.](#)

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[\[FN11\] Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\)](#) (holding that the audit may disclose whether there is provable ground for the removal of the trustee and the appointment of another in his place).

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[\[FN12\] § 422.](#)

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[\[FN13\] In re Clyde's Estate, 329 Pa. 552, 198 A. 640, 115 A.L.R. 1412 \(1938\).](#)

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[\[FN14\] McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\).](#)

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[\[FN15\] McCormick v. McCormick, 118 Ill. App. 3d 455, 74 Ill. Dec. 73, 455 N.E.2d 103 \(1st Dist. 1983\).](#)

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[\[FN16\] Anderson v. Bean, 272 Mass. 432, 172 N.E. 647, 72 A.L.R. 959 \(1930\).](#)

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§ 392. Generally

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Forms

Order—Settling final account and directing distribution of trust estate. [Am. Jur. Pleading and Practice Forms, Trusts § 290](#)

Order—Settling final account of outgoing trustee—Discharging trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 291](#)

In the case of a continuing trust, the corpus is reawarded to the trustee for further administration.[FN1] In the case of an account filed at the close of an administration, the court has the power to decree distribution to the parties entitled thereto.[FN2] The court also has power to find against the trustee the balance owing from him or her to the trust estate,[FN3] to make such balance a lien upon the trustee's real estate,[FN4] and to issue process to enforce its decree,[FN5] including attachment for contempt.[FN6] The decree may also direct the sale of an improper investment and the application of the proceeds thereof to the payment of the decree.[FN7]

Observation: The failure of the accounting trustee to produce documents to support the account results in broad discretion being vested in the court to reach an equitable result.[FN8] A constructive trustee may be surcharged or be required to pay compensatory damages for a failure to account as required by court order.[FN9]

[FN1] [Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\).](#)

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[FN2] [Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\).](#)

- Generally, as to distribution by a trustee in accordance with an order or decree of the court, see [§ 556](#).

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[\[FN3\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN4\] Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\).](#)

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[\[FN5\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN6\]](#) As to contempt proceedings to enforce a decree or order of the court relating to trusts or trustees, generally, see [§ 670](#).

- As to contempt proceedings to enforce a decree or order for distribution of an estate, see [§ 556](#).

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[\[FN7\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\)](#) (investment in mortgage on property of wife of trustee).

- Generally, as to an improper investment as voidable, see [§ 439](#).

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[\[FN8\] In re Application for a Judicial Settlement of Account of Beiny, 2003 N.Y. Slip Op. 51139\(U\) \(N.Y.Sur.,2003\).](#)

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[\[FN9\] Hogg v. Walker, 622 A.2d 648 \(Del. 1993\).](#)

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§ 393. Finality or conclusiveness of settlement

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[Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate, 1 A.L.R.2d 1060](#)

Model Codes and Restatements

[Restatement Second, Trusts § 220](#) comment a

An order allowing a final account of a trustee has the legal effect, for res judicata purposes, of a final judgment,[\[FN1\]](#) even if the order is based on the beneficiaries' consent.[\[FN2\]](#) It has been held that the settlement of a trustee's account in a court having jurisdiction to settle his or her accounts renders res judicata matters which were open to dispute,[\[FN3\]](#) whether actually disputed.[\[FN4\]](#) The court's approval of a trust accounting generally bars any later action against the trustee on the approved matters.[\[FN5\]](#)

An order allowing the annual account of a trustee may be given the effect of a final judgment by a statute providing that such order shall be final and conclusive as to all matters thereby determined.[\[FN6\]](#) However, a decree settling and allowing a trustee's intermediate account is conclusive against the parties only as to matters or items embraced therein,[\[FN7\]](#) and is not res judicata as to matters approved[\[FN8\]](#) or not passed upon.[\[FN9\]](#) Further, matters not disclosed by the trustee, or matters that the trustee fraudulently concealed or misrepresented in the accounting, may be subject to litigation after final accounting.[\[FN10\]](#)

[\[FN1\] Matter of Trust Created by Hill on Dec. 31, 1917 for Ben. of Maud Hill Schroll, 499 N.W.2d 475 \(Minn. Ct. App. 1993\).](#)

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[\[FN2\] Matter of Trust Created by Hill on Dec. 31, 1917 for Ben. of Maud Hill Schroll, 499 N.W.2d 475 \(Minn. Ct. App. 1993\).](#)

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[\[FN3\] In re CVR 1997 Irrevocable Trust, 202 Ariz. 174, 42 P.3d 605 \(Ct. App. Div. 1 2002\).](#)

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[\[FN4\] In re CVR 1997 Irrevocable Trust, 202 Ariz. 174, 42 P.3d 605 \(Ct. App. Div. 1 2002\).](#)

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[\[FN5\] In re CVR 1997 Irrevocable Trust, 202 Ariz. 174, 42 P.3d 605 \(Ct. App. Div. 1 2002\).](#)

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[\[FN6\] Lazzarone v. Bank of America, 181 Cal. App. 3d 581, 226 Cal. Rptr. 855 \(3d Dist. 1986\); Fraser v. Southeast First Bank of Jacksonville, 417 So. 2d 707 \(Fla. Dist. Ct. App. 5th Dist. 1982\); In re Enger's Will, 225 Minn. 229, 30 N.W.2d 694, 1 A.L.R.2d 1048 \(1948\).](#)

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[\[FN7\] Lazzarone v. Bank of America, 181 Cal. App. 3d 581, 226 Cal. Rptr. 855 \(3d Dist. 1986\).](#)

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[\[FN8\] In re Hubbell's Will, 302 N.Y. 246, 97 N.E.2d 888, 47 A.L.R.2d 176 \(1951\).](#)

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[\[FN9\] Lazzarone v. Bank of America, 181 Cal. App. 3d 581, 226 Cal. Rptr. 855 \(3d Dist. 1986\).](#)

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[\[FN10\] In re CVR 1997 Irrevocable Trust, 202 Ariz. 174, 42 P.3d 605 \(Ct. App. Div. 1 2002\).](#)

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§ 394. Reopening, reconsidering, or setting aside settlement

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [327](#), [333](#)

A.L.R. Library

[Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate, 1 A.L.R.2d 1060](#)

Trial Strategy

[Self-Dealing by Trustee, 38 Am. Jur. Proof of Facts 3d 279](#)

In a proper case, the settlement of a trustee's account will be reopened and the account investigated or reconsidered and restated.^[FN1] It is immaterial that the petition to set aside an order approving the account of a trustee lacks particularity, if the evidence shows grounds for setting aside the order.^[FN2] Thus, an order or decree settling the account of a trustee may be set aside^[FN3] in the case of a fraud practiced upon the court^[FN4] or extrinsic fraud.^[FN5] Some courts take the view that the failure of a trustee to disclose self-dealing is a fraud on the court providing grounds for vacating the decree or order,^[FN6] though there is contrary authority.^[FN7]

Caution: Statutes may limit the time period in which a beneficiary can move to reopen or reconsider a settlement.^[FN8]

A judgment ordering the reopening of trust accounts is a final judgment which is appealable.^[FN9]

^[FN1] [National Academy of Sciences v. Cambridge Trust Co., 370 Mass. 303, 346 N.E.2d 879 \(1976\)](#) (holding that an account may be reopened where there are negligent misrepresentations therein).

- As to appeal and error with respect to accounts, see [§ 395](#).

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^[FN2] [In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\)](#).

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^[FN3] [Lazzarone v. Bank of America, 181 Cal. App. 3d 581, 226 Cal. Rptr. 855 \(3d Dist. 1986\)](#); [In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\)](#).

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^[FN4] [Withington v. Fidelity & Cas. Co. of New York, 237 Mass. 73, 129 N.E. 418 \(1921\)](#).

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^[FN5] [Lazzarone v. Bank of America, 181 Cal. App. 3d 581, 226 Cal. Rptr. 855 \(3d Dist. 1986\)](#).

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^[FN6] [In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\)](#).

- An order approving a trustee's account is not conclusive of the permissibility of self-dealing not disclosed by the account or petition for its allowance. [In re Enger's Will, 225 Minn. 229, 30 N.W.2d 694, 1 A.L.R.2d 1048 \(1948\)](#).

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^[FN7] [Barker v. Ensign, 191 Mass. 323, 77 N.E. 719 \(1906\)](#).

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^[FN8] [Norris v. Estate of Norris, 143 Ill. App. 3d 741, 97 Ill. Dec. 639, 493 N.E.2d 121 \(1st Dist. 1986\)](#) (court lacked jurisdiction to entertain the motion for reconsideration of a final settlement made more than 30 days after the settlement was issued).

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^[FN9] [Roche v. Boston Safe Deposit and Trust Co., 391 Mass. 785, 464 N.E.2d 1341 \(1984\)](#).

- As to finality or conclusiveness of settlement orders, generally see [§ 393](#).

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§ 395. Appeal and error

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West's Key Number Digest, [Trusts](#) [333](#)

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[Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate, 1 A.L.R.2d 1060](#)

A final judicial settlement of a trustee's accounting imports a finding of all facts necessary to the result, although not specified.[FN1] Such findings, when amply supported by the evidence, must be accepted as true on appeal,[FN2] and will not be reversed unless clearly erroneous.[FN3] Thus, in passing upon the propriety of an allowance for attorney's fees to a trustee on an accounting, the appellate court must assume that the trial court eliminated all services in connection with items that were surcharged against the trustee.[FN4]

Observation: On affirmation of a decree, it may be directed that the trustee shall have a certain period after receipt by the lower court of the mandate from the appellate court within which to pay the decree.[FN5]

[\[FN1\] § 391.](#)

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[\[FN2\] Anderson v. Bean, 272 Mass. 432, 172 N.E. 647, 72 A.L.R. 959 \(1930\).](#)

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[\[FN3\] Matter of Green Charitable Trust, 172 Mich. App. 298, 431 N.W.2d 492 \(1988\).](#)

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[\[FN4\] Turner v. Ryan, 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 \(1937\).](#)

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[\[FN5\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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§ 396. Costs and counsel fees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [330](#)

Forms

Petition or application—For settlement of account—And allowance of trustee and attorney's fees. [Am. Jur. Pleading and Practice Forms, Trusts § 283](#)

Order—Settling account—Awarding compensation to trustee and counsel fees. [Am. Jur. Pleading and Practice Forms, Trusts § 289](#)

A trustee may be allowed costs and counsel fees in a proceeding to contest or surcharge the account.^[FN1] Thus, if a fiduciary's defense is substantially successful, he or she is ordinarily entitled to recover the reasonable costs necessarily incurred in preparing his or her final account and in successfully defending it against objections.^[FN2] In fact, a testamentary trustee may be allowed a portion of his or her attorney's fees when the beneficiaries are partly successful.^[FN3] Similarly, a trustee may be reimbursed from the trust^[FN4] for attorney's fees and expenses it incurred in preparing an accounting where by statute, and under the will establishing the trust, the trustee is entitled to be reimbursed for reasonable expenses absent a showing of breach of the trustee's fiduciary duties.^[FN5]

On the other hand, attorney's fees are not chargeable against the trust estate where the litigation is caused by mismanagement or maladministration by the trustees,^[FN6] nor are they chargeable against the estate where the services are rendered for the sole protection of the trustees.^[FN7] Similarly, a trustee is chargeable on an accounting with the expense of employing an accountant, made necessary by the inadequacy of the trustee's accounts.^[FN8]

Observation: Even where a trustee may be entitled to reimbursement for attorney's fees which were incurred in defending trust property, the fees may not be assessed personally against the individual who brought the action for an accounting in good faith.^[FN9]

In an action challenging a trustee's accounting, the beneficiaries' request for attorney's fees are properly denied, where the beneficiaries did not need to employ counsel to compel the accounting and the accounting was not found to be improper.^[FN10] Indeed, a court may deny a trust beneficiary's claim for attorney's fees in connection with the contested trustee's accounting, even where the trustee was found to have breached its fiduciary duty based on its failure to diversify trust assets.^[FN11]

^[FN1] [West Coast Hospital Ass'n v. Florida Nat. Bank of Jacksonville, 100 So. 2d 807 \(Fla. 1958\)](#); [Chicago City Bank and Trust Co. v. Lesman, 186 Ill. App. 3d 697, 134 Ill. Dec. 478, 542 N.E.2d 824 \(1st Dist. 1989\)](#); [In re Howell, 215 N.Y. 466, 109 N.E. 572 \(1915\)](#); [Faulk v. Rosecrans, 1953 OK 358, 264 P.2d 300 \(Okla. 1953\)](#).

- As to the right of a trustee to costs and counsel fees in litigation by a beneficiary respecting the trust, see generally [§ 674](#).

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^[FN2] [In re Trust Created by Martin, 266 Neb. 353, 664 N.W.2d 923 \(2003\)](#).

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^[FN3] [In re Gartenlaub's Estate, 185 Cal. 648, 198 P. 209, 16 A.L.R. 520 \(1921\)](#).

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^[FN4] As to the recovery of costs, counsel fees, and expenses incurred in resisting a contest or proceeding to surcharge his or her account by the trustee from the trust estate, generally, see [§ 573](#).

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^[FN5] [In re Estate of Berthot, 2002 MT 277, 312 Mont. 366, 59 P.3d 1080 \(2002\)](#).

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^[FN6] [Shriners Hospitals for Crippled Children v. Robbins, 450 So. 2d 798 \(Ala. 1984\)](#).

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^[FN7] [Shriners Hospitals for Crippled Children v. Robbins, 450 So. 2d 798 \(Ala. 1984\)](#).

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[\[FN8\] Heller v. First Nat. Bank of Denver, N.A., 657 P.2d 992 \(Colo. Ct. App. 1982\); In re Spilka's Will, 250 Iowa 1021, 97 N.W.2d 625 \(1959\); Miller v. Pender, 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 \(1943\).](#)

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[\[FN9\] Parker v. Florida First Nat. Bank of Jacksonville, 419 So. 2d 730 \(Fla. Dist. Ct. App. 1st Dist. 1982\).](#)

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[\[FN10\] In re Estate of Ehlers, 80 Wash. App. 751, 911 P.2d 1017 \(Div. 3 1996\).](#)

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[\[FN11\] In re Estate of Saxton, 179 Misc. 2d 681, 686 N.Y.S.2d 573 \(Sur. Ct. 1998\).](#)

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A.L.R. Index: Trustee Process

A.L.R. Index: Trusts and Trustees

West's A.L.R. Digest: [Trusts](#) [161](#), [3788](#) to [3877](#)

Forms

Am. Jur. Legal Forms 2d, Trusts §§ [251:487](#), [251:488](#)

[Am. Jur. Pleading and Practice Forms, Trusts §§ 91, 167, 174, 175](#)

Model Codes and Restatements

[Uniform Trust Code §§ 105, 702](#)

[Restatement Third, Trusts § 34\(c\)](#)

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§ 397. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [161](#), [378](#) to [387](#)

Forms

Requirement of bond. [Am. Jur. Legal Forms 2d, Trusts § 251:487](#)

Waiver of bond. [Am. Jur. Legal Forms 2d, Trusts § 251:488](#)

Petition or application—For confirmation or appointment of trustee designated by will—Without sureties on bond. [Am. Jur. Pleading and Practice Forms, Trusts § 91](#)

Bond—Of substituted trustee. [Am. Jur. Pleading and Practice Forms, Trusts § 167](#)

Unless a statute or the terms of a trust require that a trustee give a bond for the faithful performance of trust duties, the necessity for a bond is left to the discretion of the court having control over the trustee.^[FN1] Generally, however, in appointing a trustee, the court will require that a bond be furnished.^[FN2] Further, the terms of the trust or a statute may provide that a trustee appointed by a court shall be required to furnish bond in order to qualify to administer the trust.^[FN3]

A testamentary trustee may be relieved of a statutory bonding requirement by the terms of the trust.^[FN4] A testamentary trustee may also be relieved from a statutory bonding requirement where clear and convincing reasons are presented to dispense with the bond or to fix it at a reduced amount.^[FN5] Such clear and convincing reasons might be consents as provided by statute from an interested party or a showing that the filing of bond is not economically feasible.^[FN6]

The effect of requiring security from a trustee is not to increase his or her duties or liabilities,^[FN7] and when a bond is required, the premiums are chargeable as expenses of administration.^[FN8]

^[FN1] [Selleck v. Hawley, 331 Mo. 1038, 56 S.W.2d 387 \(1932\).](#)

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^[FN2] [Central Sur. & Ins. Corp. v. Richardson, 1938 OK 371, 183 Okla. 38, 80 P.2d 663, 118 A.L.R. 1252 \(1938\); Talley v. Ferguson, 64 W. Va. 328, 62 S.E. 456 \(1908\).](#)

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^[FN3] [Butler v. Builders Trust Co., 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 \(1938\); In re Estate of Scheer, 153 Misc. 2d 545, 581 N.Y.S.2d 990 \(Sur. Ct. 1992\)](#) (statute requires bond from testamentary trustee where the will does not provide an exemption).

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^[FN4] [Monk v. Everett, 277 Mass. 65, 177 N.E. 797, 76 A.L.R. 1382 \(1931\); In re Estate of Scheer, 153 Misc. 2d 545, 581 N.Y.S.2d 990 \(Sur. Ct. 1992\).](#)

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^[FN5] [In re Estate of Scheer, 153 Misc. 2d 545, 581 N.Y.S.2d 990 \(Sur. Ct. 1992\).](#)

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^[FN6] [In re Estate of Scheer, 153 Misc. 2d 545, 581 N.Y.S.2d 990 \(Sur. Ct. 1992\).](#)

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^[FN7] [Birmingham Trust & Savings Co. v. Ansley, 234 Ala. 674, 176 So. 465 \(1937\).](#)

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^[FN8] [§ 567.](#)

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§ 398. Amount of bond

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [161](#), [378](#)

The terms of a trust may cover the amount of the bond and security required of a trustee.[\[FN1\]](#) In the absence of any such provision, the amount of security required to be furnished by a trustee should be reasonable, in view of the value of the property in trust and other circumstances.[\[FN2\]](#)

[\[FN1\] Butler v. Builders Trust Co., 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 \(1938\)](#) (amount not to exceed value of the property in trust).

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[\[FN2\] Butler v. Builders Trust Co., 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 \(1938\).](#)

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§ 399. Under the Uniform Trust Code and Restatement

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [161](#), [378](#)

Under the Restatement Third, Trusts, a trustee need not provide a performance bond except as required by statute, trust provision, or court order.[\[FN1\]](#)

Under the Uniform Trust Code, a trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.[\[FN2\]](#) Under the Code, the court may specify the amount of a bond, its liabilities, and whether sureties are necessary.[\[FN3\]](#) The court may also modify or terminate a bond at any time.[\[FN4\]](#) Finally, the Code provides that a regulated financial-service institution qualified to do trust business need not give bond, even if required by the terms of the trust.[\[FN5\]](#)

Comment: The Uniform Trust Code provisions dealing with bonding are consistent with the Restatement Third, Trusts and with the bonding provisions of the Uniform Probate Code.[\[FN6\]](#) Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under the Uniform Trust Code.[\[FN7\]](#) Despite the ability of the court pursuant to override a term of the trust waiving bond,[\[FN8\]](#) the court should order bond in such cases only for good reasons.[\[FN9\]](#) Similarly, the court should rarely dispense with a bond if the settlor directed that the trustee give bond.[\[FN10\]](#)

[\[FN1\]](#) Restatement Third, Trusts § 34(3).

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[\[FN2\]](#) Uniform Trust Code § 702(a).

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[\[FN3\] Uniform Trust Code § 702\(b\)](#).

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[\[FN4\] Uniform Trust Code § 702\(b\)](#).

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[\[FN5\] Uniform Trust Code § 702\(c\)](#).

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[\[FN6\] Uniform Trust Code § 702](#), comment.

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[\[FN7\] Uniform Trust Code § 702](#), comment.

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[\[FN8\] Uniform Trust Code § 105\(b\)\(6\)](#).

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[\[FN9\] Uniform Trust Code § 702](#), comment.

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[\[FN10\] Uniform Trust Code § 702](#), comment.

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§ 400. Generally

West's Key Number Digest

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Forms

Complaint, petition, or declaration—To recover on bond. [Am. Jur. Pleading and Practice Forms, Trusts § 174](#)

The surety on the bond of a trustee generally is made liable by the conditions of the bond for breaches of trust, defalcations, and deficits occurring in the administration of the trust^[FN1] in accordance with general rules and principles pertaining to the liabilities of sureties.^[FN2] Actions on bonds of trustees are governed generally by the law, practice, and procedure pertaining to actions on the bonds of fiduciaries generally,^[FN3] and by the law, practice, and procedure pertaining to actions and proceedings involving trusts and trustees generally.^[FN4]

Observation: There is difference of opinion on whether a judgment against a principal is evidence against the surety, and if so, whether conclusive or prima facie evidence.^[FN5]

^[FN1] [Olin Cemetery Ass'n of Olin v. Citizens Sav. Bank of Olin, 222 Iowa 1053, 270 N.W. 455, 112 A.L.R. 1205 \(1936\).](#)

- Generally, as to liability of trustee for losses occurring after final decree for distribution, see [§ 556](#)

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^[FN2] [Am. Jur. 2d, Suretyship §§ 19 to 26.](#)

-

^[FN3] As to actions on bonds, generally, see [Am. Jur. 2d, Bonds §§ 33 to 48.](#)

- As to actions on administration bonds, see [Am. Jur. 2d, Executors and Administrators §§ 1113 to 1117.](#)

- Generally, as to actions by creditors against sureties, see [Am. Jur. 2d, Suretyship § 114.](#)

-

^[FN4] §§ [606](#) to [608.](#)

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^[FN5] As to the effect of a judgment against an executor or administrator as binding a surety, see [Am. Jur. 2d, Executors and Administrators § 1116](#) and [Am. Jur. 2d, Suretyship §§ 129 to 132.](#)

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§ 401. Defenses; discharge

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 378, 382 to 385

Forms

Answer—Defense—Performance of conditions. [Am. Jur. Pleading and Practice Forms, Trusts § 175.](#)

Under the general rule that a surety is discharged by a material change between the principal obligor and obligee without the consent of the surety,[[FN1](#)] a surety on the bond of a trustee is discharged by a substantial change in the duties and responsibilities of the trustee.[[FN2](#)] Likewise, under the general rule that a surety is discharged by an unqualified release of the principal,[[FN3](#)] a surety on the bond of a trustee is discharged as to a beneficiary who makes such a release of the trustee.[[FN4](#)]

Fraud by a principal or trustee with regard to his or her dealings with the surety is not a defense in an action on the surety bond by a beneficiary.[[FN5](#)]

[[FN1](#)] [Am. Jur. 2d, Suretyship §§ 35 to 43.](#)

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[[FN2](#)] [McCartney v. Ridgway, 160 Ill. 129, 43 N.E. 826 \(1895\).](#)

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[[FN3](#)] [Am. Jur. 2d, Suretyship § 82.](#)

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[[FN4](#)] [State v. Northrop, 93 Conn. 558, 106 A. 504, 7 A.L.R. 1014 \(1919\).](#)

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[[FN5](#)] [Matter of Polevski's Estate, 186 N.J. Super. 246, 452 A.2d 469 \(App. Div. 1982\).](#)

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IX. Particular Acts of Management by Trustee
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Forms

Am. Jur. Legal Forms 2d, Trusts §§ [251:221](#), [251:222](#), [251:454](#), [251:456](#), [251:457](#), [251:461](#), [251:462](#)

Model Codes and Restatements

[Uniform Custodial Trust Act § 7](#)

Uniform Trustee's Power Act § 3

[Restatement Second, Trusts §§ 175 to 177](#)

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AMJUR TRUSTS IX A REF

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American Jurisprudence, Second Edition
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Trusts

Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

IX. Particular Acts of Management by Trustee
A. Taking, Holding, and Managing of Estate and Assets

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§ 402. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#) to [178](#)

Forms

Power of trustee—To retain original assets. [Am. Jur. Legal Forms 2d, Trusts § 251:221](#)

Maintenance, alterations and improvements. [Am. Jur. Legal Forms 2d, Trusts § 251:454](#)

Model Codes and Restatements

[Restatement Second, Trusts § 175](#)

Absent contrary provision in the trust instrument,[\[FN1\]](#) trustee has the power and duty to —
— collect, take possession of, and keep in his or her custody, the trust property and assets.[\[FN2\]](#)

— to hold, manage, and apply the trust.[FN3]

— to make payments and distribution to beneficiaries in accordance with the terms of the trust.[FN4]

To this end, the trustee must act as a reasonably prudent person would act to protect his or her own property.[FN5] Thus, the trustee is expected to use reasonable diligence to discover the location of the trust property and to take control of it without unnecessary delay,[FN6] and is chargeable with the value of assets lost through a failure in his or her duty to get them into his or her possession.[FN7]

Caution: A trustee was liable for the resulting loss to the trust estate when he delegated the single most important facet of the trust—obtaining the unpaid balance upon closing of a sale of real estate—to an agent and did not supervise the agent who retained trust funds and mingled them with his own funds.[FN8]

A trustee must restore to the trust estate property or funds that he or she appropriates to himself or herself,[FN9] wrongfully disburses,[FN10] or wrongfully sells or encumbers.[FN11]

[FN1] Matter of Sackler, 193 A.D.2d 806, 598 N.Y.S.2d 81 (2d Dep't 1993).

[FN2] Matter of Sackler, 193 A.D.2d 806, 598 N.Y.S.2d 81 (2d Dep't 1993); Village of Brookfield v. Pentis, 101 F.2d 516 (C.C.A. 7th Cir. 1939); Harlan v. Gleason, 180 Md. 24, 22 A.2d 579 (1941); Borough of Lewiston v. Pennsylvania Labor Relations Bd., 672 A.2d 379 (Pa. Commw. Ct. 1996), decision rev'd on other grounds, 558 Pa. 141, 735 A.2d 1240 (1999).

- It is the exclusive right and duty of the trustee to collect or reduce to possession the property and assets which belong to the estate within a reasonable time In re Hartzell's Will, 43 Ill. App. 2d 118, 192 N.E.2d 697 (2d Dist. 1963).

[FN3] Coast Indian Community v. U. S., 213 Ct. Cl. 129, 550 F.2d 639 (1977); Clear v. Moore, 14 S.W.2d 669 (Mo. Ct. App. 1929); Neel v. Clark, 193 S.C. 412, 8 S.E.2d 740 (1940); Bruce v. Republic Nat. Bank & Trust Co., 74 S.W.2d 461 (Tex. Civ. App. El Paso 1934), aff'd, 130 Tex. 136, 105 S.W.2d 882 (Comm'n App. 1937); Matter of Trusts Created by Hormel, 504 N.W.2d 505 (Minn. Ct. App. 1993); Banks v. Means, 2002 UT 65, 52 P.3d 1190 (Utah 2002).

- The trust provided that the trustees were required to conserve, maintain, manage, and improve the trust, investing, and reinvesting the funds in such manner as in their best judgment and prudence would most benefit beneficiaries. In re Loyal W. Sheen Family Trust, 263 Neb. 477, 640 N.W.2d 653 (2002).

- Under the Uniform Custodial Trust Act § 7(c), a custodial trustee shall take control of and collect, hold, manage, invest, and reinvest custodial trust property.

[FN4] §§ 549, 551 to 555.

[FN5] Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 (Iowa 2001); White Gates Skeet Club, Inc. v. Lightfine, 276 Ill. App. 3d 537, 213 Ill. Dec. 115, 658 N.E.2d 864 (2d Dist. 1995).

- Standard for evaluating trustee's actions remains whether trustee prudently managed trust assets in light of settlor's intent and beneficiary's interests. Matter of Trusts Created by Hormel, 504 N.W.2d 505 (Minn. Ct. App. 1993).

- Generally, as to the measure of care and diligence required of a trustee, see §§ 360 to 365.

[FN6] Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 105 S. Ct. 2833, 86 L. Ed. 2d 447 (1985).

[\[FN7\] Village of Brookfield v. Pentis, 101 F.2d 516 \(C.C.A. 7th Cir. 1939\).](#)

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[\[FN8\] In re Hartzell's Will, 43 Ill. App. 2d 118, 192 N.E.2d 697 \(2d Dist. 1963\).](#)

- As to delegation of powers, generally, see [§ 347](#).

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[\[FN9\] In re Griffith, 33 Del. Ch. 387, 93 A.2d 920 \(1953\).](#)

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[\[FN10\] In re First Nat. Bank of Mansfield, 37 Ohio St. 2d 60, 66 Ohio Op. 2d 162, 307 N.E.2d 23, 68 A.L.R.3d 1258 \(1974\).](#)

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[\[FN11\] § 276.](#)

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AMJUR TRUSTS § 402

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§ 403. Collection of debts; obtaining tax refunds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [181](#)

Model Codes and Restatements

[Restatement Second, Trusts § 177](#)

A trustee must enforce and collect choses in action, debts, and demands belonging to the estate.^[FN1] The trustee may also be charged with the value of assets which never came into its possession if it failed its duty to acquire them.^[FN2] But the fact that a trustee forebears to collect a debt in full by the due date does not necessarily amount to an abuse of the trustee's discretion.^[FN3]

A number of modern decisions have recognized that a trustee has a duty to file for and obtain tax refunds.^[FN4] Where a serious question of trust liability for taxes is raised and the amount involved is a substantial part of the trust corpus, a trustee has a duty to pursue the tax refund with great vigor.^[FN5] A trustee may be in breach of its duty to preserve the estate's property if it refuses to ask the Internal Revenue Service to reconsider or to amend the estate tax return and recompute the tax until the beneficiaries release all claims against the trustee.^[FN6]

Caution: A trustee who fails to file tax refund forms for the trust may be held liable to the remaindermen for the lost tax refund.^[FN7]

^[FN1] [Harlan v. Gleason, 180 Md. 24, 22 A.2d 579 \(1941\); In re Kline's Estate, 280 Pa. 41, 124 A. 280, 32 A.L.R. 926 \(1924\).](#)

- A trustee must use reasonable diligence in pursuing contract claims. [Skamania County v. State, 102 Wash. 2d 127, 685 P.2d 576 \(1984\).](#)

- A trustee must take reasonable steps to enforce all claims a testamentary trust has against the testator's personal representative. [Matter of Estate of Erlie, 190 Wis. 2d 400, 527 N.W.2d 389 \(Ct. App. 1994\).](#)

^[FN2] [Matter of Marine Midland Bank, 127 A.D.2d 999, 512 N.Y.S.2d 942 \(4th Dep't 1987\).](#)

^[FN3] [Estate of Gilliland, 73 Cal. App. 3d 515, 140 Cal. Rptr. 795 \(2d Dist. 1977\).](#)

^[FN4] [Massey v. St. Joseph Bank and Trust Co., 411 N.E.2d 751 \(Ind. Ct. App. 3d Dist. 1980\); Matter of Marine Midland Bank, 127 A.D.2d 999, 512 N.Y.S.2d 942 \(4th Dep't 1987\); Matter of Will of Herrmann, 141 Misc. 2d 214, 533 N.Y.S.2d 236 \(Sur. Ct. 1988\).](#)

^[FN5] [Massey v. St. Joseph Bank and Trust Co., 411 N.E.2d 751 \(Ind. Ct. App. 3d Dist. 1980\).](#)

^[FN6] [Matter of Estes' Estate, 134 Ariz. 70, 654 P.2d 4 \(Ct. App. Div. 1 1982\)](#) (bank-trustee included insurance proceeds in the taxable estate).

^[FN7] [Matter of Marine Midland Bank, 127 A.D.2d 999, 512 N.Y.S.2d 942 \(4th Dep't 1987\).](#)

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§ 404. Protection of estate

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [182](#)

Model Codes and Restatements

[Restatement Second, Trusts § 176](#)

One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.[FN1] A trustee has the right[FN2] and duty to safeguard,[FN3] preserve,[FN4] or protect[FN5] the trust assets and the safety of the principal.[FN6]

A trustee is expected to use his or her skill and expertise in managing a trust.[FN7] To perform this duty, the trustee must make the trust property productive,[FN8] and must not suffer the estate to waste or diminish, or fall out of repair.[FN9] In this regard, a trustee may enter into proper contracts, incur debts, and make expenditures, where necessary and proper,[FN10] or to prosecute and defend suits and proceedings in proper cases.[FN11] A trustee's duty to preserve trust assets is in accord with the trustee's fundamental duty of loyalty and fidelity owed by every trustee to his or her beneficiary.[FN12]

A trustee representing beneficiaries in succession is under a duty to successive beneficiaries to act with due regard to their respective interests and to preserve trust property for remainderpersons.[FN13] However, while trustees have the duty to preserve trust property, they do not necessarily have the duty to maintain the corpus of the trust forever, [FN14] nor is a trustee an insurer by virtue of his or her office.[FN15]

In a proper case, a trustee can use some of the trust property to preserve other trust property,[FN16] and, acting with reasonable prudence, he or she may under some circumstances abandon assets.[FN17] However, trustees act in a manner inimical to the best interests of a trust when they fail to take any action to prevent the trust's loss of control of a corporation in which the trust estate had a controlling interest.[FN18]

[FN1] [Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.](#), 472 U.S. 559, 105 S. Ct. 2833, 86 L. Ed. 2d 447 (1985).

[FN2] [Anderson v. Public Employes Retirement Bd., 134 Or. App. 422, 895 P.2d 1377, 100 Ed. Law Rep. 1175 \(1995\).](#)

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[FN3] [Vento v. Colorado Nat. Bank-Pueblo, 907 P.2d 642 \(Colo. Ct. App. 1995\); First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\).](#)

- A trustee's duty is to protect the interests of the beneficiaries of the trust by guarding the trust res. [New Haven Sav. Bank v. LaPlace, 66 Conn. App. 1, 783 A.2d 1174 \(2001\).](#)

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[FN4] [White Mountain Apache Tribe v. U.S., 249 F.3d 1364 \(Fed. Cir. 2001\), cert. granted, 535 U.S. 1016, 122 S. Ct. 1604, 152 L. Ed. 2d 619 \(2002\) and aff'd and remanded, 537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40 \(2003\); Weiss v. State, 939 P.2d 380 \(Alaska 1997\); Forest Guardians v. Wells, 201 Ariz. 255, 34 P.3d 364 \(2001\); City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329 \(1st Dist. 1998\), as modified on denial of reh'g, \(Jan. 6, 1999\); Vento v. Colorado Nat. Bank-Pueblo, 907 P.2d 642 \(Colo. Ct. App. 1995\); In re Hartzell's Will, 43 Ill. App. 2d 118, 192 N.E.2d 697 \(2d Dist. 1963\); Matter of Trust of Rosati, 177 Mich. App. 1, 441 N.W.2d 30 \(1989\); Murphey v. Dalton, 314 S.W.2d 726, 67 A.L.R.2d 1278 \(Mo. 1958\); Matter of Newhoff, 107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\); North Dakota Public Service Com'n v. Valley Farmers Bean Ass'n, 365 N.W.2d 528, 40 U.C.C. Rep. Serv. 1847 \(N.D. 1985\); Friedrich v. BancOhio Nat. Bank, 14 Ohio App. 3d 247, 470 N.E.2d 467, 53 A.L.R.4th 1285 \(12th Dist. Madison County 1984\); Matter of Estate of Campbell, 692 A.2d 1098 \(Pa. Super. Ct. 1997\); Schroeder v. Herbert C. Coe Trust, 437 N.W.2d 178 \(S.D. 1989\); First Wisconsin Trust Co. v. Perkins, 275 Wis. 464, 82 N.W.2d 331, 78 A.L.R.2d 1 \(1957\).](#)

- The trustee is bound to take all reasonable action to uphold the validity of the trust and to preserve the trust assets. [Anselmo v. Guasto, 13 S.W.3d 650 \(Mo. Ct. App. E.D. 1999\).](#)

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[FN5] [Magruder v. Drury, 235 U.S. 106, 35 S. Ct. 77, 59 L. Ed. 151 \(1914\); In re Hartzell's Will, 43 Ill. App. 2d 118, 192 N.E.2d 697 \(2d Dist. 1963\); North Dakota Public Service Com'n v. Valley Farmers Bean Ass'n, 365 N.W.2d 528, 40 U.C.C. Rep. Serv. 1847 \(N.D. 1985\); Friedrich v. BancOhio Nat. Bank, 14 Ohio App. 3d 247, 470 N.E.2d 467, 53 A.L.R.4th 1285 \(12th Dist. Madison County 1984\); Shear v. Gabovitch, 43 Mass. App. Ct. 650, 685 N.E.2d 1168 \(1997\); Anderson v. Public Employes Retirement Bd., 134 Or. App. 422, 895 P.2d 1377, 100 Ed. Law Rep. 1175 \(1995\); Matter of Joseph Heller Inter Vivos Trust, 161 Misc. 2d 369, 613 N.Y.S.2d 809 \(Sur. Ct. 1994\); Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 \(Iowa 2001\).](#)

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[FN6] [Matter of Estate of Campbell, 692 A.2d 1098 \(Pa. Super. Ct. 1997\).](#)

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[FN7] [Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 130 Ed. Law Rep. 1105 \(10th Cir. 1998\).](#)

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[FN8] [Forest Guardians v. Wells, 201 Ariz. 255, 34 P.3d 364 \(2001\); City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329 \(1st Dist. 1998\), as modified on denial of reh'g, \(Jan. 6, 1999\).](#)

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[FN9] [White Mountain Apache Tribe v. U.S., 249 F.3d 1364 \(Fed. Cir. 2001\), cert. granted, 535 U.S. 1016, 122 S. Ct. 1604, 152 L. Ed. 2d 619 \(2002\) and aff'd and remanded, 537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40 \(2003\).](#)

- Common-law trust doctrines require that a trustee must take steps to preserve the trust property from loss, damage, or diminution in value. [Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 130 Ed. Law Rep. 1105 \(10th Cir. 1998\).](#)

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[\[FN10\]](#) §§ [416](#) to [423](#).

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[\[FN11\]](#) § [594](#).

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[\[FN12\]](#) [Willers v. Wettestad](#), 510 N.W.2d 676 (S.D. 1994).

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[\[FN13\]](#) [Matter of Will of Maxwell](#), 306 N.J. Super. 563, 704 A.2d 49 (App. Div. 1997).

- As to the duty to act impartially among beneficiaries, generally, see [§ 359](#).

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[\[FN14\]](#) [Weiss v. State](#), 939 P.2d 380 (Alaska 1997).

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[\[FN15\]](#) § [360](#).

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[\[FN16\]](#) [Collins v. Hartford Accident & Indemnity Co.](#), 178 Va. 501, 17 S.E.2d 413, 137 A.L.R. 1046 (1941).

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[\[FN17\]](#) [In re Pearlman's Estate](#), 348 Pa. 488, 35 A.2d 418, 150 A.L.R. 832 (1944).

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[\[FN18\]](#) [Harvey v. Leonard](#), 268 N.W.2d 504 (Iowa 1978).

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§ 405. Surrender of possession and control

West's Key Number Digest

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[Restatement Second, Trusts § 175](#)

It is in general the duty of a trustee to retain the possession, control, and management of a trust estate after he or she accepts the trust and takes such estate into his or her custody.[\[FN1\]](#) A breach of this duty makes the trustee a guarantor against any resulting loss[\[FN2\]](#) and of the value of the trust property in question.[\[FN3\]](#) A trustee also has a duty to use due care to prevent trust property from being lost at a tax sale.[\[FN4\]](#)

[\[FN1\] Martin v. Bank of America Trust & Savings Ass'n, 4 Cal. App. 2d 431, 41 P.2d 200 \(2d Dist. 1935\).](#)

- As to the delegation of powers, see [§ 347](#).

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[\[FN2\] Martin v. Bank of America Trust & Savings Ass'n, 4 Cal. App. 2d 431, 41 P.2d 200 \(2d Dist. 1935\)](#)

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[\[FN3\] Meck v. Behrens, 141 Wash. 676, 252 P. 91, 50 A.L.R. 207 \(1927\).](#)

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[\[FN4\] Flagship Bank of Orlando v. Reinman, Harrell, Silberhorn, Moule & Graham, P.A., 503 So. 2d 913 \(Fla. Dist. Ct. App. 5th Dist. 1987\)](#) (holding that the measure of damages against a trustee who negligently breached the duty to redeem trust property from a tax deed sale was the fair market value of the lost property at the time of trial).

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§ 406. Incorporation of trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#)

Forms

Incorporation. [17C Am. Jur. Legal Forms 2d, Trusts § 251:457](#)

In the absence of such statutory authority, trustees have no power to incorporate the trust.[[FN1](#)]

[[FN1](#)] [Hillyard v. Leonard, 391 S.W.2d 211, 20 A.L.R.3d 820 \(Mo. 1965\).](#)

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§ 407. Management of estate

West's Key Number Digest

In some cases, a trustee has the power and duty to manage the trust estate as a primary, rather than an incidental, purpose of the trust.^[FN1] This may involve the continuance and operation of a business in which assets of the estate are embarked,^[FN2] or the retention, making, and handling of investments.^[FN3]

A trustee's failure to care for or maintain real property which constituted the trust res may be a breach of the trustee's fiduciary duty.^[FN4]

^[FN1] [In re Schick's Estate, 169 Pa. Super. 226, 82 A.2d 262, 30 A.L.R.2d 119 \(1951\).](#)

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^[FN2] [§ 408.](#)

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^[FN3] [§§ 432 to 440.](#)

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^[FN4] [Matter of Trust of Rosati, 177 Mich. App. 1, 441 N.W.2d 30 \(1989\)](#) (holding that the trustee did not fulfill its duty when it did nothing but act as a conduit for rents going from the tenants to the beneficiary).

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§ 408. Continuation of a trade or business

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#), 271.1

Forms

Power of trustee—To retain and operate a going business. [Am. Jur. Legal Forms 2d, Trusts § 251:222](#)

Operation of business. [Am. Jur. Legal Forms 2d, Trusts § 251:456](#)

Trust provision—Payment of taxes. [Am. Jur. Legal Forms 2d, Trusts § 251:461](#)

Operation of farm. [Am. Jur. Legal Forms 2d, Trusts § 251:462](#)

The strict, or New York, view of trust investments, is that the investment of a trust estate in trade or business is improper and requires the conversion of such investments into legal holdings as soon as practicable and within a reasonable time, unless the terms of the trust provide for the continuance of such investments.^[FN1]

However, under other authority, the continuation of the testator or settlor's business by the trustee has been held proper even in the absence of court approval.^[FN2] The Uniform Trustee's Power Act confers on trustees the power to continue or participate in the operation of any business or other enterprise,^[FN3] and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise.^[FN4] In performance of this duty, the trustee must act in good faith and as a person of reasonable intelligence and prudence would act in the management of his or her own affairs in light of the conditions.^[FN5]

^[FN1] § 478.

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^[FN2] [Harper v. Harper, 491 So. 2d 189 \(Miss. 1986\)](#).

- As to the power of an executor or administrator to conduct a business after the decedent's death, see [31 Am. Jur. 2d, Executors and Administrators §§ 525 to 534](#)

- Generally, as to the duties of a trustee in a business trust, see [Am. Jur. 2d, Business Trusts §§ 61 to 65](#).

- As to a receiver's continuance and operation of a business, see [Am. Jur. 2d, Receivers §§ 177 to 180](#).

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^[FN3] [Uniform Trustees Powers Act § 3\(c\)\(3\)](#).

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^[FN4] [Uniform Trustees Powers Act § 3\(c\)\(3\)](#).

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^[FN5] [Mann, by Elliott v. Peoples-Liberty Bank & Trust Co., 256 S.W.2d 489 \(Ky. 1953\)](#); [Collins v. Hartford Accident & Indemnity Co., 178 Va. 501, 17 S.E.2d 413, 137 A.L.R. 1046 \(1941\)](#).

- Trustees charged with the operation of an incorporated business may be required to act as manager, president, or director in keeping the business moving effectively, but all the time they are trustees. [In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\)](#).

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Am. Jur. Pleading and Practice Forms (Rev), Trusts § 320

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[Uniform Custodial Trust Act § 12](#)

[Uniform Trust Code § 1010](#)

[Restatement Second, Trusts §§ 157, 176, 262, 263\(1\), 266 to 271](#)

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1. In General

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§ 409. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [210](#) to [213](#)

Forms

Contracts. [Am. Jur. Legal Forms 2d, Trusts § 251:494.](#)

Borrowing money. [Am. Jur. Legal Forms 2d, Trusts § 251:495](#)

Trust provision—Transactions with trustor or trustor's estate. [Am. Jur. Legal Forms 2d, Trusts § 251:459](#)

What constitutes proper contracts and expenditures are governed generally by an express provision in, or reasonable implication, of the trust instrument.[FN1] In general, a trustee has the power and duty to make contracts and expenditures as required to administer the trust.[FN2] However, it is also generally held that when

a trustee contracts for expenditures in the administration of the trust, he or she does so upon his or her own responsibility and not as an agent of the trust estate,[FN3] though a trustee has the right to exoneration from liability on such contracts and to reimbursement for such expenditures out of the trust estate.[FN4]

Observation: There is a modern tendency, on the part of both courts and legislatures, to recognize the trust estate as in effect a juristic personality and to recognize that the trustee may act as its agent in making contracts and expenditures.[FN5]

Caution: Persons dealing with a trustee must take notice of the scope of his or her authority,[FN6] although with respect to and bank deposits and withdrawals, commercial considerations govern the matter.[FN7]

[FN1] [Shelby v. White, 158 Miss. 880, 131 So. 343 \(1930\)](#); [Villa Site Co. v. Copeland, 91 N.J. Eq. 503, 111 A. 39, 13 A.L.R. 356 \(Ct. Err. & App. 1920\)](#); [Ranzau v. Davis, 85 Or. 26, 158 P. 279 \(1916\)](#).

- As to the contracts of an executor or administrator, see [Am. Jur. 2d, Executors and Administrators §§ 377 to 379](#).

- As to a receiver's new contracts and expenditures, see [Am. Jur. 2d, Receivers §§ 173 to 176](#).

[FN2] [Villa Site Co. v. Copeland, 91 N.J. Eq. 503, 111 A. 39, 13 A.L.R. 356 \(Ct. Err. & App. 1920\)](#).

[FN3] [§ 410](#).

[FN4] [§§ 564 to 566](#).

[FN5] [§§ 410 to 415](#).

[FN6] [Geysler-Marion Gold-Min. Co. v. Stark, 106 F. 558 \(C.C.A. 8th Cir. 1901\)](#); [Snyder v. Collier, 85 Neb. 552, 123 N.W. 1023 \(1909\)](#).

- Generally, as to notice to a transferee of an encumbrance of trust property, see [§ 292](#).

[FN7] [10 Am. Jur. 2d, Banks and Financial Institutions §§ 829, 830](#).

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§ 410. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#), [173](#), [210](#)

Forms

Trustee not personally liable on trust contracts. [Am. Jur. Legal Forms 2d, Trusts § 251:420](#)

Complaint, petition, or declaration—By third person for breach of contract by trustee—Seeking recovery against trust estate. [Am. Jur. Pleading and Practice Forms \(Rev\), Trusts § 320](#)

Courts have held that a trustee is not an agent.^[FN1] In line with this lack of representative power of a trustee, there is authority that the trustee personally,^[FN2] and not the trust estate,^[FN3] is bound by and liable upon contracts made in the course of the administration of the trust in the absence of a stipulation in the contract that the trustee is not to be held personally liable.^[FN4] Indeed, it has been said that the trust estate cannot promise,^[FN5] and that when a trustee contracts, he or she does so for himself or herself.^[FN6] A state statute may provide that a trustee is not personally liable on contracts properly entered into in the trustee's fiduciary capacity unless the trustee fails to reveal the trustee's representative capacity in the contract.^[FN7]

The reasons for the rule of personal liability of the trustee and nonliability of the trust estate on obligations incurred in the administration of the trust are:^[FN8]

(1) the trustee is the only legal entity who promised to perform the contract because the trust is not a legal person, nor is the trust property;

(2) the beneficiary was not a party to the contract, and the trustee is not an agent for him; and

(3) the trustee does not purport in the ordinary case to sign for the cestui, or to bind the cestui's property for the performance of the obligation, but is himself or herself a principal and the only person whom the law recognizes as an obligor on the contract.

Where the rule of personal liability of the trustee and nonliability of the estate is followed the law of liability of agents to third persons^[FN9] does not apply.^[FN10]

^[FN1] [Gershaw v. Gershfield, 52 Mass. App. Ct. 81, 751 N.E.2d 424 \(2001\).](#)

- A trustee is not an agent, but a trustee is a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. [Heise v. Rosow, 62 Conn. App. 275, 771 A.2d 190 \(2001\).](#)

- As to the rules governing executors and administrators under the Uniform Probate Code and otherwise, see [Am. Jur. 2d, Executors and Administrators §§ 377 to 379](#).

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[FN2] [Taylor v. Mayo](#), 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 (1884); [Pan American Petroleum Corp v. Gibbons](#), 168 F. Supp. 867 (D. Utah 1958), judgment aff'd, 262 F.2d 852 (10th Cir. 1958); [Jones v. Burgess](#), 176 Md. 270, 4 A.2d 473 (1939); [Just Pants v. Bank of Ravenswood](#), 136 Ill. App. 3d 543, 91 Ill. Dec. 49, 483 N.E.2d 331 (1st Dist. 1985); [Maine Shipyard & Marine Ry. v. Lilley](#), 2000 ME 9, 743 A.2d 1264 (Me. 2000); [Texas Candy & Nut Co. v. Horton](#), 235 S.W.2d 518 (Tex. Civ. App. Dallas 1950), writ refused n.r.e..

- As to the personal liability of trustees or the liability of a trust estate on the contracts of a business trust, see [Am. Jur. 2d, Business Trusts § 67](#).

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[FN3] [Thomas v. Gouwens](#), 25 Ill. App. 3d 663, 323 N.E.2d 829 (1st Dist. 1975); [Jones v. Burgess](#), 176 Md. 270, 4 A.2d 473 (1939)

- The general rule is that a trustee is personally and primarily liable upon his or her contracts as trustee. [Pan American Petroleum Corp v. Gibbons](#), 168 F. Supp. 867 (D. Utah 1958), judgment aff'd, 262 F.2d 852 (10th Cir. 1958).

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[FN4] § § 413, 414.

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[FN5] [Taylor v. Mayo](#), 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 (1884).

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[FN6] [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927).

- Generally, as to the status of a trustee as an agent or representative, see [§ 10](#).

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[FN7] [Crow v. Cook](#), 215 Ga. App. 558, 451 S.E.2d 467 (1994) (holding the statute was not yet applicable to the contract in question).

- As to a similar provision in the Uniform Trust Code, see [§ 412](#).

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[FN8] [Jones v. Burgess](#), 176 Md. 270, 4 A.2d 473 (1939).

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[FN9] [Am. Jur. 2d, Agency §§ 291 to 304](#).

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[FN10] [McIntyre v. Williamson](#), 72 Vt. 183, 47 A. 786 (1900).

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a. Generally

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§ 411. Restatement view

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 171, 210

While the Restatement Second, Trusts, provides generally that the trustee is subject to personal liability upon contracts made by him or her in the course of the administration of the trust,[\[FN1\]](#) the trustee is not subject to personal liability if the contract provides that he or she shall not be personally liable.[\[FN2\]](#) Further, while a person, to whom the trustee has become liable in the course of the administration of the trust, cannot reach trust property in an action at law against the trustee,[\[FN3\]](#) that person can, by a proceeding in equity, reach trust property and apply it to the satisfaction of his or her claim under the certain stated circumstances,[\[FN4\]](#) including where the trustee makes a contract with a third person and the contract provides that the third person shall look only to the trust estate.[\[FN5\]](#) Thus, it has been held that the Restatement Second, Trusts, is in accord with the view that a contract entered into by a trustee may bind the trust estate,[\[FN6\]](#) but only if that contract was made in the course of administering the trust.[\[FN7\]](#)

[\[FN1\]](#) Restatement Second, Trusts § 262.

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[\[FN2\]](#) § 413.

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[\[FN3\]](#) Restatement Second, Trusts § 266.

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[\[FN4\]](#) Restatement Second, Trusts § 267.

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[\[FN5\]](#) § 413.

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[\[FN6\]](#) Rogaris v. Albert, 431 Mass. 833, 730 N.E.2d 869 (2000) (citing [Restatement Second, Trusts § 271](#) comment b).

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[\[FN7\]](#) Rogaris v. Albert, 431 Mass. 833, 730 N.E.2d 869 (2000).

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§ 412. Uniform Trust Code

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#), [210](#)

Under the Uniform Trust Code, a trustee is not personally liable on a contract: [\[FN1\]](#)

- properly entered into in the trustee's fiduciary capacity in the course of administering the trust
- if the trustee in the contract disclosed the fiduciary capacity
- except as otherwise provided in the contract

However, a claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, or on an obligation arising from ownership or control of trust property, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity,[\[FN2\]](#) whether the trustee is personally liable for the claim.[\[FN3\]](#)

The Uniform Custodial Trust Act contains substantially similar provisions.[\[FN4\]](#)

[\[FN1\]](#) [Uniform Trust Code § 1010\(a\)](#).

- As to a trustee's power to contract without binding himself or herself, generally, see [§ 413](#).

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[\[FN2\] Uniform Trust Code § 1010\(c\)](#).

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[\[FN3\] Uniform Trust Code § 1010\(c\)](#).

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[\[FN4\] Uniform Custodial Trust Act § 12](#).

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§ 413. Generally

West's Key Number Digest

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There is a modern tendency to recognize the power of a trustee, similar to that of a receiver[\[FN1\]](#) and an agent,[\[FN2\]](#) to contract by an instrument drawn to make it enforceable out of only the trust estate.[\[FN3\]](#) In other words, the personal liability of the trustee does not prevail over an express stipulation in the contract that negates the personal liability of the trustee.[\[FN4\]](#)

Under the Restatement Second, Trusts, the trustee is not subject to personal liability upon a contract made by him or her in the course of the administration of the trust, if by the contract it is provided that he or she shall not be personally liable.[\[FN5\]](#) If the trustee makes a contract with a third person and the contract provides that the trustee shall not be personally liable upon the contract but that the third person shall look only to the trust estate, the third person can by a proceeding in equity reach trust property and apply it to the satisfaction of his

or her claim upon the contract,[FN6] provided that the contract was properly made by the trustee in the administration of the trust.[FN7]

[FN1] [Am. Jur. 2d, Receivers § 174.](#)

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[FN2] [Am. Jur. 2d, Agency §§ 291 to 304.](#)

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[FN3] [Purdy v. Bank of American Nat. Trust & Savings Ass'n, 2 Cal. 2d 298, 40 P.2d 481 \(1935\); East River Sav. Bank v. Samuels, 284 N.Y. 470, 31 N.E.2d 906, 138 A.L.R. 149 \(1940\).](#)

- A trustee in making contracts is personally liable unless he or she expressly stipulates that the trust estate and not he or she shall be liable on the contract. [Keystone Pipe & Supply Co. v. Zweifel, 127 Tex. 392, 94 S.W.2d 412 \(Comm'n App. 1936\)](#) (overruled on other grounds in part by, [Texas Co. v. State, 154 Tex. 494, 281 S.W.2d 83 \(1955\)](#)).

- A trustee can protect himself or herself from personal liability on a contract by stipulating that he or she is not to be per se liable and that the other party is to look solely to the trust estate. [Just Pants v. Bank of Ravenswood, 136 Ill. App. 3d 543, 91 Ill. Dec. 49, 483 N.E.2d 331 \(1st Dist. 1985\).](#)

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[FN4] [East River Sav. Bank v. Samuels, 284 N.Y. 470, 31 N.E.2d 906, 138 A.L.R. 149 \(1940\).](#)

- The controlling law was that the trustee was presumed to be personally liable under any contract he or she executed on behalf of the trust estate absent specific language in the contract relieving the trustee of personal liability. [Crow v. Cook, 215 Ga. App. 558, 451 S.E.2d 467 \(1994\).](#)

- As to charging the estate through the inurement of the trustee's right to exoneration or indemnity, see [§ 415.](#)

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[FN5] [Restatement Second, Trusts § 263\(1\).](#)

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[FN6] [Restatement Second, Trusts § 271.](#)

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[FN7] [Restatement Second, Trusts § 271.](#)

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§ 414. Sufficiency of expression; construction of contract

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [171](#), [210](#)

Forms

Limitation of trustee's liability—General form—Contracts, notes and other instruments. [Am. Jur. Legal Forms 2d, Trusts § 251:410](#)

Model Codes and Restatements

[Restatement 2d, Trusts § 263\(1\)](#)

A positive and plain expression or implication of a written contract that it charges only the trust estate and does not bind the trustee personally will save the trustee from personal liability.[\[FN1\]](#) However, under some authority, merely designating or describing a party to a contract as a trustee will not save him or her from personal liability and charge only the trust estate with the contract.[\[FN2\]](#) This is true both in respect to a description or designation following the trustee's signature[\[FN3\]](#) and to one made in the body of an agreement.[\[FN4\]](#)

However, it has been held that a signature followed by the words "as trustee but not individually" is at least some indication that the trustee is not to be bound.[\[FN5\]](#) Further, the Uniform Trust Code[\[FN6\]](#) protects a trustee who reveals the fiduciary relationship either by indicating a signature as trustee or by simply referring to the trust.[\[FN7\]](#)

[\[FN1\]](#) [Taylor v. Mayo](#), 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 (1884); [Duvall v. Craig](#), 15 U.S. 45, 4 L. Ed. 180 (1817); [Goldwater v. Oltman](#), 210 Cal. 408, 292 P. 624, 71 A.L.R. 871 (1930); [Schumann-Heink v. Folsom](#), 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1927); [Knipp v. Bagby](#), 126 Md. 461, 95 A. 60 (1915); [Hallett v. Moore](#), 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 (1933); [East River Sav. Bank v. Samuels](#), 284 N.Y. 470, 31 N.E.2d 906, 138 A.L.R. 149 (1940); [Riedell v. Stuart](#), 1931 OK 475, 151 Okla. 266, 2 P.2d 929, 76 A.L.R. 1469 (1931); [Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Wallace](#), 346 Pa. 532, 31 A.2d 71, 156 A.L.R. 1 (1943).

[\[FN2\]](#) [Jones v. Burgess](#), 176 Md. 270, 4 A.2d 473 (1939).

- Under the controlling law at time that defendant executed leases the fact that defendant executed leases as

trustee did not diminish his personal liability under the leases. [Crow v. Cook, 215 Ga. App. 558, 451 S.E.2d 467 \(1994\)](#).

- As to discharge where additional words describe the payee of an instrument as any other fiduciary for a specified person or purpose, see [Am. Jur. 2d, Bills and Notes § 392](#).

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[FN3] [Taylor v. Mayo, 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 \(1884\)](#); [Knipp v. Bagby, 126 Md. 461, 95 A. 60 \(1915\)](#); [Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 \(1933\)](#).

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[FN4] [Taylor v. Mayo, 110 U.S. 330, 4 S. Ct. 147, 28 L. Ed. 163 \(1884\)](#); [Hall v. Jameson, 151 Cal. 606, 91 P. 518 \(1907\)](#); [Tuttle v. First Nat. Bank, 187 Mass. 533, 73 N.E. 560 \(1905\)](#).

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[FN5] [Spofford v. Hanna, 102 Fla. 261, 135 So. 536 \(1931\)](#).

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[FN6] [§ 412](#).

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[FN7] [Uniform Trust Code § 1010](#), comment.

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§ 415. Charging estate indirectly through right to exoneration or indemnity

West's Key Number Digest

Model Codes and Restatements

[Restatement Second, Trusts §§ 267 to 271](#)

The trustee when acting within his or her powers is entitled to exoneration or reimbursement[[FN1](#)] and the trust res may be pursued in equity by the creditor for payment.[[FN2](#)] A creditor is entitled to a bill in equity for equitable execution against the trust estate to the extent of the trustee's right of exoneration.[[FN3](#)] A trustee may agree in advance that his or her lien for expenditures made for trust purposes shall inure to the benefit of a third person furnishing money or services thus expended by the trustee.[[FN4](#)]

Observation: The rule of the Restatement Second, Trusts[[FN5](#)] allows a creditor to step into the shoes of the trustee for the purpose of asserting the trustee's right to exoneration out of the trust estate only in certain circumstances and where the creditor establishes the right to exoneration.[[FN6](#)]

[[FN1](#)] [Greenough v. Tax Assessors of City of Newport](#), 331 U.S. 486, 67 S. Ct. 1400, 91 L. Ed. 1621, 172 A.L.R. 329 (1947).

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[[FN2](#)] [Greenough v. Tax Assessors of City of Newport](#), 331 U.S. 486, 67 S. Ct. 1400, 91 L. Ed. 1621, 172 A.L.R. 329 (1947).

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[[FN3](#)] [Prudential Insurance Co of America v. Land Estates](#), 31 F. Supp. 845 (S.D. N.Y. 1939).

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[[FN4](#)] [Hallett v. Moore](#), 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 (1933).

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[[FN5](#)] [Restatement Second, Trusts § 268](#).

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[[FN6](#)] [In re Fisher's Estate](#), 461 Pa. 696, 337 A.2d 834 (1975).

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§ 416. Generally; administrative expenses

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [210](#), [211](#)

Forms

Trust expenses. [Am. Jur. Legal Forms 2d, Trusts § 251:460](#)

In general, a trust estate must bear the necessary expenses of administration of the trust,[\[FN1\]](#) and when the trustee pays these out of his or her own means he or she is entitled to reimbursement out of the trust estate therefor.[\[FN2\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Trust agreement required that trustee apportion trust's administration expenses against all of the trust's assets, including real estate distributed to trustee, as trust article on apportionment required apportionment across all of the trust assets and made no distinction between administrative expenses and tax payments. [Hanson v. Valma M. Hanson Revocable Trust, 855 N.E.2d 655 \(Ind. Ct. App. 2006\)](#).

[END OF SUPPLEMENT]

[\[FN1\]](#) [Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 5 S. Ct. 387, 28 L. Ed. 915 \(1885\); Graham v. Dubuque Speciality Mach. Works, 138 Iowa 456, 114 N.W. 619 \(1908\)](#).

- As to premiums on the bond of a trustee as administrative expenses, see [§ 567](#).

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[\[FN2\]](#) [§ 567](#).

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§ 417. Protection, preservation, and repair of trust estate

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [210](#)

Forms

Maintenance, alterations, and improvements. [Am. Jur. Legal Forms 2d, Trusts §§ 251:454](#)

Payment of encumbrances. [Am. Jur. Legal Forms 2d, Trusts § 251:479](#)

Model Codes and Restatements

[Restatement Second, Trusts § 176](#)

A trustee in general control and management of a trust estate has the power and duty to make or incur expenditures reasonably required to the protect, preserve, and repair the trust estate,^[FN1] especially as necessary to prevent a failure of the trust,^[FN2] even if the trustee is not expressly or specifically empowered or required to make those expenditures by the trust instrument.^[FN3] Such expenditures include —
— the expense of necessary litigation.^[FN4]

— the payment of taxes and special or local assessments on the trust estate.^[FN5]

— the payment of an encumbrance or the purchase of an outstanding title against the trust property in order to protect it.[[FN6](#)]

— renting a safe deposit box.[[FN7](#)]

— hiring a watchman to secure trust documents.[[FN8](#)]

Such expenses are to be borne by the trust estate.[[FN9](#)] The trustee is entitled to accounting or reimbursement where he or she has made the outlay from his or her own funds.[[FN10](#)]

Observation: Where there are cotrustees, normally both must act together, but it has been recognized that one of two trustees has authority to contract for emergency repairs.[[FN11](#)]

[[FN1](#)] [Matter of Estate of Dwight](#), 67 Haw. 139, 681 P.2d 563 (1984); [Rossi v. Davis](#), 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 (1939); [Villa Site Co. v. Copeland](#), 91 N.J. Eq. 503, 111 A. 39, 13 A.L.R. 356 (Ct. Err. & App. 1920); [Collins v. Hartford Accident & Indemnity Co.](#), 178 Va. 501, 17 S.E.2d 413, 137 A.L.R. 1046 (1941).

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[[FN2](#)] [Gisborn v. Charter Oak Life Ins. Co. of Hartford](#), 142 U.S. 326, 12 S. Ct. 277, 35 L. Ed. 1029 (1892); [Rossi v. Davis](#), 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 (1939); [Villa Site Co. v. Copeland](#), 91 N.J. Eq. 503, 111 A. 39, 13 A.L.R. 356 (Ct. Err. & App. 1920).

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[[FN3](#)] [Matter of Estate of Dwight](#), 67 Haw. 139, 681 P.2d 563 (1984); [Missouri-Kansas-Texas R. Co. v. Maltsberger](#), 1941 OK 226, 189 Okla. 363, 116 P.2d 977 (1941).

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[[FN4](#)] [Mitau v. Roddan](#), 149 Cal. 1, 84 P. 145 (1906); [Butler v. Builders Trust Co.](#), 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 (1938).

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[[FN5](#)] [Turner v. Ryan](#), 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 (1937); [City of Bangor v. Peirce](#), 106 Me. 527, 76 A. 945 (1910).

- As to the burden of an inheritance or similar tax as between a trust and a general estate or as between corpus and income, see [Am. Jur. 2d, Inheritance, Estate, and Gift Taxes § 273](#).

- As to the assessment of property held in trust, see [Am. Jur. 2d, State and Local Taxation § 665](#).

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[[FN6](#)] [§ 524](#).

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[[FN7](#)] [In re Parsons' Estate](#), 143 Misc. 368, 257 N.Y.S. 339 (Sur. Ct. 1932), aff'd as modified, [238 A.D. 883](#), 262 N.Y.S. 957 (3d Dep't 1933).

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[[FN8](#)] [James v. Echols](#), 183 Ark. 826, 39 S.W.2d 290 (1931).

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[[FN9](#)] [Williams v. Gibbes](#), 61 U.S. 535, 20 How. 535, 15 L. Ed. 1013 (1857); [Missouri-Kansas-Texas R. Co. v. Maltsberger](#), 1941 OK 226, 189 Okla. 363, 116 P.2d 977 (1941).

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[\[FN10\]](#) § § [383](#), [571](#).

- As to a lien for reimbursement, see [§ 564](#).

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[\[FN11\]](#) [Matter of Estate of Burke](#), 129 Misc. 2d 145, 492 N.Y.S.2d 892 (Sur. Ct. 1985) (holding that although the trustee authorizing such repairs was personally liable on the contract for repairs, she was entitled to be indemnified from the trust assets).

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§ 418. Protection, preservation, and repair of trust estate—Personal liability of trustee; direct liability of estate

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [210](#)

Model Codes and Restatements

[Restatement Second, Trusts § 176](#)

While substantial authority holds that a trustee is ordinarily personally liable on contracts made in the administration of a trust,[\[FN1\]](#) some authority recognizes that a trustee may charge the trust estate for services, materials, or money required to protect or preserve the trust,[\[FN2\]](#) without incurring any personal responsibility.[\[FN3\]](#)

[\[FN1\] § 410.](#)

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[\[FN2\] Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 \(1933\).](#)

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[\[FN3\] Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 \(1933\).](#)

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§ 419. Making improvements

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In the administration of a trust, the trustee may properly incur obligations to make improvements authorized by the trust instrument or declaration.[\[FN1\]](#) Improvements have been sustained in some cases as necessary and proper,[\[FN2\]](#) or as proper trust investments.[\[FN3\]](#)

[\[FN1\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\); Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\).](#)

- As to the power of a life tenant to alter premises, see [Am. Jur. 2d, Life Tenants and Remaindermen § 33](#).

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[\[FN2\] Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\)](#).

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[\[FN3\] § 454](#).

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§ 420. Employing and obtaining labor and services

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [211](#)

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[Trustee's power to employ broker or agent to sell or lease estate property, 47 A.L.R.2d 1379](#)

Forms

Employment of others. [Am. Jur. Legal Forms 2d, Trusts § 251:496](#)

Generally, a trustee cannot delegate his or her discretionary powers without breaching the trust.[\[FN1\]](#) If a trustee retains full responsibility, he or she may employ labor or obtain services,[\[FN2\]](#) including professional and skilled assistance,[\[FN3\]](#) where necessary,[\[FN4\]](#) at least in matters in which he or she is not experienced.[\[FN5\]](#) The authority of the trustee to employ assistants at the expense of the estate may depend upon the provisions of the trust instrument,[\[FN6\]](#) and is judged according to the test of reasonableness in the light of the circumstances of each case.[\[FN7\]](#)

Under the view that a trustee can, by express provision in a contract, save himself or herself from personal liability and charge the trust estate,[\[FN8\]](#) the trust estate may be made chargeable with a contract for services.[\[FN9\]](#) In other words, if the trustee acts in good faith, he or she may compensate assistants out of the assets of the trust.[\[FN10\]](#)

[\[FN1\]](#) [§ 347](#).

- As to the delegation of a trustee's powers in regard to investment decisions, see [§ 482](#).

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[\[FN2\]](#) [Cox v. Freeman, 1951 OK 16, 204 Okla. 138, 227 P.2d 670, 28 A.L.R.2d 1230 \(1951\)](#).

- A trustee acting in good faith has the power to employ assistants. [Whittlesey v. Aiello, 104 Cal. App. 4th 1221, 128 Cal. Rptr. 2d 742 \(3d Dist. 2002\)](#), review denied, (Apr. 9, 2003).

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[\[FN3\]](#) [Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 \(1926\)](#).

- In unusual and complicated cases there may be need and justification for the employment by a trustee of specialized skill in the preparation of periodic accounts and in establishing a fundamental plan of bookkeeping. [In re Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204, 172 A.L.R. 977 \(1947\)](#).

- As to the employment of an agent or broker to sell, see [§ 510](#).

- As to employment of counsel by a trustee, see [§ 421](#).

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[\[FN4\]](#) [Restatement Second, Trusts § 188](#), comment c.

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[\[FN5\]](#) [Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 \(1926\)](#).

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[\[FN6\]](#) [In re Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204, 172 A.L.R. 977 \(1947\)](#).

- A direction in a will to pay all costs and charges of administration including their own commissions authorizes the trustees to employ clerical assistance. [In re Campbell's Estate, 36 Haw. 631, 1944 WL 5190 \(1944\)](#).

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[\[FN7\]](#) [In re Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204, 172 A.L.R. 977 \(1947\)](#).

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[\[FN8\]](#) [§§ 410 to 415](#).

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[\[FN9\]](#) [Wolford v. Chambersburg Oil and Gas Co., 86 Pa. D. & C. 496, 1954 WL 4346 \(C.P. 1954\)](#).

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[\[FN10\]](#) [Whittlesey v. Aiello, 104 Cal. App. 4th 1221, 128 Cal. Rptr. 2d 742 \(3d Dist. 2002\)](#), review denied, (Apr. 9, 2003).

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§ 421. Employing and obtaining labor and services—Counsel

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[Amount of attorney's compensation in matters involving guardianship and trusts, 57 A.L.R.3d 550](#)

[Retention of private counsel by trustees of public charitable trust, 67 A.L.R.2d 1289](#)

[Right of coexecutor or cotrustee to retain independent legal counsel, 66 A.L.R.2d 1169](#)

The trust estate may be charged for the employment of counsel at a reasonable fee.[[FN1](#)]

In cases involving the retention of counsel by cotrustees, courts have held —
— an award of attorney's fees was properly denied to a minority cotrustee who brought unsuccessful action against cotrustees for alleged breach of trust where there was no finding of reasonable necessity for the litigation.[[FN2](#)]

— a cotrustee was entitled, in a controversy with a fellow trustee over the propriety of an investment, to engage counsel to be compensated from estate.[[FN3](#)]

— a coexecutrix was not entitled to reimbursement from the estate for fees for separate counsel she employed to scrutinize the work done by the attorneys for estate where the coexecutrix did not have reasonable grounds employing separate counsel.[[FN4](#)]

— a cotrustee of an irrevocable intervivos trust could not retain counsel to prepare a final, uncomplicated accounting following the revocation of his appointment.[\[FN5\]](#)

Observation: It has been held that an attorney's work must actually benefit a spendthrift trust beneficiary's interest before the trust principal may be invaded to pay fees;[\[FN6\]](#) a good-faith attempt is not sufficient.[\[FN7\]](#)

[\[FN1\]](#) [Winton v. Amos, 56 Ct. Cl. 472, 255 U.S. 373, 41 S. Ct. 342, 65 L. Ed. 684 \(1921\); Mitau v. Roddan, 149 Cal. 1, 84 P. 145 \(1906\); Murphey v. Dalton, 314 S.W.2d 726, 67 A.L.R.2d 1278 \(Mo. 1958\); Faulk v. Rosecrans, 1953 OK 358, 264 P.2d 300 \(Okla. 1953\).](#)

- Where incurred to protect the trust, attorney fees are payable from the trust corpus. [Graddick v. First Farmers and Merchants Nat. Bank of Troy, 453 So. 2d 1305 \(Ala. 1984\)](#) (remanding for a determination whether the attorney's fees were for services rendered for the benefit of the trust and its beneficiaries or, in whole or in part, for the benefit and protection of the trustee).

- As to allowance for counsel fees, generally, see §§ [673](#) to [681](#).

- As to the right of a creditor to reach a trust estate through the trustee's right of indemnity or exoneration, see [§ 415](#).

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[\[FN2\]](#) [Forth v. Forth, 409 N.E.2d 1107 \(Ind. Ct. App. 1st Dist. 1980\).](#)

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[\[FN3\]](#) [Detroit Trust Co. v. Blakely, 359 Mich. 621, 103 N.W.2d 413 \(1960\).](#)

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[\[FN4\]](#) [Wall v. Malarkey, 252 Or. 261, 449 P.2d 424 \(1969\).](#)

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[\[FN5\]](#) [Petition of Leffler, 222 A.D.2d 332, 635 N.Y.S.2d 605 \(1st Dep't 1995\)](#) (noting that the principal of trust consisted of a single account, there had only been two distributees, and both had signed general releases).

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[\[FN6\]](#) [Schreiber v. Kellogg, 50 F.3d 264 \(3d Cir. 1995\)](#) (anticipating the incorporation of [Restatement Second, Trusts § 157\(c\)](#) into Pennsylvania law).

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[\[FN7\]](#) [Schreiber v. Kellogg, 50 F.3d 264 \(3d Cir. 1995\)](#) (anticipating the incorporation of [Restatement Second, Trusts § 157\(c\)](#) into Pennsylvania law).

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§ 422. Contracts made in conduct of trust business

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 210

Forms

Power of trustee—To retain and operate a going business. [Am. Jur. Legal Forms 2d, Trusts § 251:222](#)

Operation of business. [Am. Jur. Legal Forms 2d, Trusts § 251:456](#)

Trustees who, in the administration of the trust, are carrying on a trade or business^[FN1] may be empowered to expand the business,^[FN2] and may be justified in paying retirement allowances to employees where such action corresponds with local custom.^[FN3]

Under some authority, even where charges for goods and services to carry on a business are made to the trust estate, the trustee is personally liable.^[FN4] The contrary view is that the trustee has implied authority to charge the trust estate directly for contracts made in the course of such business.^[FN5]

Observation: It has been held that if the trustee is given full control in the management of the business of the trust, the beneficiaries have no personal liability.^[FN6] Where, however, the beneficiaries retain control over the trustee in the management of the business, the trustee is regarded as the agent of the beneficiaries and will be liable upon his or her contracts.^[FN7]

^[FN1] § 408.

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^[FN2] [Holmes v. Hrobon](#), 158 Ohio St. 508, 49 Ohio Op. 450, 110 N.E.2d 574 (1953).

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^[FN3] [Phillips v. Moeller](#), 148 Conn. 361, 170 A.2d 897 (1961).

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^[FN4] [Crane v. Disabled American Veterans of the World War](#), 66 Ohio App. 259, 20 Ohio Op. 71, 32 Ohio L. Abs. 678, 31 N.E.2d 116 (1st Dist. Hamilton County 1940).

- Generally, as to the personal liability of trustees or the liability of a business trust on contracts in the

administration of such a trust, see [13 Am. Jur. 2d, Business Trusts § 67](#).

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[\[FN5\] Purdy v. Bank of American Nat. Trust & Savings Ass'n, 2 Cal. 2d 298, 40 P.2d 481 \(1935\)](#).

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[\[FN6\] Just Pants v. Bank of Ravenswood, 136 Ill. App. 3d 543, 91 Ill. Dec. 49, 483 N.E.2d 331 \(1st Dist. 1985\)](#).

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[\[FN7\] Just Pants v. Bank of Ravenswood, 136 Ill. App. 3d 543, 91 Ill. Dec. 49, 483 N.E.2d 331 \(1st Dist. 1985\)](#).

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§ 423. Insurance

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [210](#)

Forms

Insurance. [Am. Jur. Legal Forms 2d, Trusts § 251:455](#)

A trustee has implied power to insure the trust estate to an extent necessary to protect it.[\[FN1\]](#) Indeed, a trustee may have to duty to insure.[\[FN2\]](#) Thus, where the primary asset of a trust was a commercial building which was destroyed by fire, a bank which was a cotrustee with the settlor's son was properly surcharged for the amount of the loss suffered as a result of the bank-trustee's failure to insure the building for its actual cash

value, [FN3] on the ground that premium payments are for the purpose of preserving income-producing trust property against loss, such payments should be made by the trustee out of trust income.[FN4]

[FN1] [Howard Fire Ins. Co. v. Chase](#), 72 U.S. 509, 18 L. Ed. 524 (1866).

- As to the insurable interest of a trustee, see [44 Am. Jur. 2d, Insurance § 975](#).

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[FN2] [Willis v. Hendry](#), 127 Conn. 653, 20 A.2d 375 (1940).

- It is ordinarily the duty of a trustee to insure the property it holds for a remainderman. [Merchants Bank & Trust Co. v. New Canaan Historical Soc.](#), 133 Conn. 706, 54 A.2d 696, 172 A.L.R. 1275 (1947).

- As to the duty of an executor or administrator to insure, see [31 Am. Jur. 2d, Executors and Administrators § 536](#).

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[FN3] [In re Estate of Lychos](#), 323 Pa. Super. 74, 470 A.2d 136 (1983) (holding that the bank possessed greater skill in the administration of trusts than an ordinary prudent person while the son, as cotrustee possessed only the skill of an ordinary prudent person).

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[FN4] [Mulcahy v. Johnson](#), 80 Colo. 499, 252 P. 816 (1927); [Kingsley v. Spofford](#), 298 Mass. 469, 11 N.E.2d 487 (1937); [Grace v. Reed](#), 143 Miss. 427, 108 So. 799, 47 A.L.R. 516 (1926).

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[Uniform Trust Code §§ 802, 803](#)

[Restatement Third, Trusts \(Prudent Investor Rule\) § 170, 181](#)

Restatement Second, Trusts § 180

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§ 424. Power and duty of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 221

It is generally considered to be within the power and duty of a trustee to deposit trust funds in a reputable banking institution until they are invested or distributed in the administration of the trust.^[FN1] Indeed, a trustee may be held to be derelict in his or her duty if by keeping trust funds in his or her possession too long without properly depositing them.^[FN2] Statutes sometimes require that, immediately after appointment and throughout the administration of the trust, the trustee shall deposit all funds received by him or her.^[FN3] However, in making deposits the trustee must exercise the care and diligence an ordinarily prudent person would exercise in the management of his or her own money.^[FN4]

Observation: The relationship between the trustee and the depositee bank, where the deposit is general, is that of creditor and debtor.^[FN5]

^[FN1] [Brownell Co. v. Squire, 21 Ohio L. Abs. 700, 1936 WL 2067](#) (Ct. App. 2d Dist. Montgomery County 1936); [Hummer v. Wagner Supply Co., 1929 OK 390, 139 Okla. 24, 280 P. 1103 \(1929\)](#).

^[FN2] [Lucas v. Central Missouri Trust Co., 349 Mo. 537, 162 S.W.2d 569 \(1942\)](#); [Hummer v. Wagner Supply Co., 1929 OK 390, 139 Okla. 24, 280 P. 1103 \(1929\)](#).

- Where a trust fund cannot be applied immediately or within a short time to the purposes of the trust, it is the trustee's duty to invest the fund in a proper interest-bearing account. [Cook v. Cook, 559 S.W.2d 329 \(Tenn. Ct. App. 1977\)](#).

^[FN3] [McDonald v. Fulton, 125 Ohio St. 507, 182 N.E. 504, 83 A.L.R. 1107 \(1932\)](#).

^[FN4] [Fidelity & Deposit Co. of Maryland v. Redfield, 7 F.2d 800 \(C.C.A. 9th Cir. 1925\)](#); [Martin v. Meyerheim, 101 Fla. 82, 133 So. 636 \(1931\)](#); [In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 \(1936\)](#)

- As to the selection of a bank for deposit, see [§ 428](#).

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[\[FN5\] McDonald v. Fulton, 125 Ohio St. 507, 182 N.E. 504, 83 A.L.R. 1107 \(1932\); Gray v. Elliott, 36 Wyo. 361, 255 P. 593, 53 A.L.R. 554 \(1927\).](#)

- As to the bank's right of setoff against the trustee, see [10 Am. Jur. 2d, Banks and Financial Institutions § 887](#).

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§ 425. Propriety of deposit as investment; prolonged deposits

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7 Charitable Trusts: liability of trustee for permitting trust income to accumulate in noninterest-bearing account, 51 A.L.R.3d 1293](#)

At one time, it was generally held that the deposit of trust funds in a bank was an improper trust investment because such deposits were viewed as unsecured loans to the banks and therefore violated the rule prohibiting a trustee from lending trust funds without security.[\[FN1\]](#) The more modern trend, however, is to consider savings deposits and time deposits, including bank certificates of deposit, to be proper trust investments,[\[FN2\]](#) especially when insured by a federal agency such as the Federal Deposit Insurance Corporation.[\[FN3\]](#) On the

other hand, trustees fail as a matter of law to meet the standard of the prudent person investment rule by allowing trust income to accumulate in a noninterest-bearing account for some 5 years.[FN4] The trustee is liable for all losses resulting from such prolonged deposits and for interest thereon.[FN5]

[FN1] [Matter of Gershcov's Will, 261 N.W.2d 335 \(Minn. 1977\)](#).

- It was unlawful for trustees to deposit trust fund in a savings bank which required 60 days' notice for withdrawal, since such requirement made the deposit an unsecured loan to the bank. [Andrew v. Union Sav. Bank & Trust Co. of Davenport, 222 Iowa 881, 270 N.W. 465 \(1936\)](#).

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[FN2] [Matter of Gershcov's Will, 261 N.W.2d 335 \(Minn. 1977\)](#).

- Generally, as to what are proper investments for trust funds, see §§ [441](#) to [447](#).

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[FN3] [Matter of Gershcov's Will, 261 N.W.2d 335 \(Minn. 1977\)](#).

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[FN4] [Lynch v. John M. Redfield Foundation, 9 Cal. App. 3d 293, 88 Cal. Rptr. 86, 51 A.L.R.3d 1284 \(2d Dist. 1970\)](#).

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[FN5] [Olin Cemetery Ass'n of Olin v. Citizens Sav. Bank of Olin, 222 Iowa 1053, 270 N.W. 455, 112 A.L.R. 1205 \(1936\)](#).

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§ 426. Propriety of deposit as investment; prolonged deposits—Restatement view

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7 Charitable Trusts: liability of trustee for permitting trust income to accumulate in noninterest-bearing account, 51 A.L.R.3d 1293](#)

Under the Restatement Second, Trusts, a trustee can properly make general deposits of trust money in a bank[[FN1](#)] for the purpose of making the funds available from time to time for the payment of expenses or pending investment or distribution.[[FN2](#)] This is a reasonable method for safekeeping of the funds, more reasonable than keeping the funds in a safe deposit box.[[FN3](#)] A deposit in a bank at interest, as, for example, a deposit in a savings account, may be proper as a method of investing trust funds.[[FN4](#)] The trustee may also hold reasonable amounts in a checking account, even if the only "return" is to compensate for banking services on a suitable basis.[[FN5](#)]

Comment: It is normally the duty of the trustee promptly to invest cash belonging to the trust so that it will produce an appropriate rate of return for the trust estate and its beneficiaries.[[FN6](#)] The trustee is normally liable for failure to do so for a time that is, under all the circumstances, unreasonably long.[[FN7](#)] The trustee is not liable, however, if a delay is reasonable and the trustee has taken reasonable advantage of opportunities to earn interest on the funds while seeking to make what may be more suitable, longer term investments.[[FN8](#)]

[[FN1](#)] [Restatement Second, Trusts § 180](#).

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[[FN2](#)] [Restatement Second, Trusts § 180](#), comment a.

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[[FN3](#)] [Restatement Second, Trusts § 180](#), comment a.

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[[FN4](#)] [Restatement Second, Trusts § 180](#), comment a.

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[[FN5](#)] [Restatement Third, Trusts \(Prudent Investor Rule\) § 181](#), comment d.

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[[FN6](#)] [Restatement Third, Trusts \(Prudent Investor Rule\) § 181](#), comment d.

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[[FN7](#)] [Restatement Third, Trusts \(Prudent Investor Rule\) § 181](#), comment d.

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[[FN8](#)] [Restatement Third, Trusts \(Prudent Investor Rule\) § 181](#), comment d.

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§ 427. Form of deposit; commingling funds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [221](#), [358\(2\)](#)

The fact that a fiduciary deposits funds in a bank does not in itself make the deposit a special one even if the bank knows the character of the funds deposited.[FN1] While, a trustee should not commingle trust funds with his or her own,[FN2] some authority holds that a trustee commits no wrong when he or she deposits trust funds in his or her individual account.[FN3] Rather, the wrong is done when thereafter the trustee withdraws such funds and uses them as his or her own.[FN4] Where a trustee uses trust funds for his or her own benefit by commingling them with his or her own funds, the trustee will be charged the highest legal rate of interest.[FN5]

Deposits of trust funds should be made in some form indicative of their trust character if the trustee is to avoid liability for a loss resulting from the deposit.[FN6] It is sometimes provided by statute that deposits shall be made by the trustee in his or her name as trustee.[FN7] Under the Restatement Second, Trusts, the trustee has the duty properly to earmark the deposit as a deposit by him or her as trustee.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

If the trustee deposits other funds into the commingled account that is a constructive trust, it is generally held that the trustee is not replenishing trust funds. [Volvo Commercial Finance, L.L.C. The Americas v. Wells Fargo Bank, N.A., 2007 UT App 209, 163 P.3d 723 \(Utah Ct. App. 2007\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Am. Jur. 2d, Banks and Financial Institutions § 668.](#)

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[\[FN2\] §§ 351 and 353.](#)

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[\[FN3\] Grace v. Corn Exchange Bank Trust Co., 287 N.Y. 94, 38 N.E.2d 449 \(1941\).](#)

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[\[FN4\] Grace v. Corn Exchange Bank Trust Co., 287 N.Y. 94, 38 N.E.2d 449 \(1941\).](#)

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[\[FN5\] Langford v. Shamburger, 392 F.2d 939 \(5th Cir. 1968\).](#)

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[\[FN6\] Hinckley v. Gilman, C. & S.R. Co., 100 U.S. 153, 25 L. Ed. 591 \(1879\); Langford v. Shamburger, 392 F.2d 939 \(5th Cir. 1968\); In re Clark's Guardianship, 1924 OK 913, 104 Okla. 245, 107 Okla. 6113, 230 P. 891, 43 A.L.R. 595 \(1924\).](#)

- Generally, as to following trust funds into a commingled bank account, see §§ [278](#) to [286](#).

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[\[FN7\] McDonald v. Fulton, 125 Ohio St. 507, 182 N.E. 504, 83 A.L.R. 1107 \(1932\).](#)

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[\[FN8\] Restatement Second, Trusts § 180.](#)

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§ 428. Generally

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Forms

Answer—Defense—By statutorily designated depository of trust funds—No duty of management or investment of trust funds. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 214

A statute may designate the proper depositories for trust funds,[\[FN1\]](#) and such provisions must be observed.[\[FN2\]](#) Otherwise, in selecting the depository the trustee must act as would an ordinarily prudent person in attending to his or her own affairs under similar circumstances.[\[FN3\]](#)

Observation: Before the general introduction of insurance for bank deposits, it was frequently held that a trustee was liable for the loss of deposited trust funds where the bank was insolvent or was known to be in poor condition at the time of the deposit.[\[FN4\]](#)

[\[FN1\] McDonald v. Fulton, 125 Ohio St. 507, 182 N.E. 504, 83 A.L.R. 1107 \(1932\).](#)

- A statute authorizes funds held by fiduciaries to be deposited in savings banks incorporated by the state.
[Bassett v. City Bank & Trust Co., 115 Conn. 1, 160 A. 60, 81 A.L.R. 1488 \(1932\).](#)

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[\[FN2\] Bassett v. City Bank & Trust Co., 115 Conn. 1, 160 A. 60, 81 A.L.R. 1488 \(1932\).](#)

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[\[FN3\] U.S. ex rel. Willoughby v. Howard, 302 U.S. 445, 58 S. Ct. 309, 82 L. Ed. 352 \(1938\)](#) (reasonable care).

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[\[FN4\] In re Foster's Estate, 218 Iowa 1202, 256 N.W. 744 \(1934\); Walsh v. Walsh, 231 Ala. 305, 164 So. 822 \(1935\)](#)

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§ 429. Restatement rule

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [221](#)

While a trustee can properly make general deposits of trust money in a bank under the Restatement,[\[FN1\]](#) the trustee owes a duty to the beneficiary in making such a deposit to use reasonable care in selecting the bank.[\[FN2\]](#)

Comment: A trustee cannot properly deposit or leave on deposit trust money in a bank which the trustee knows or should know to be insolvent or likely to become insolvent.[\[FN3\]](#) This is an application of the duty of the trustee to use reasonable care and skill to preserve the trust property.[\[FN4\]](#)

[\[FN1\]](#) § 426.

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[\[FN2\]](#) Restatement Second, Trusts§ 180.

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[\[FN3\]](#) Restatement Second, Trusts§ 180 comment b..

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[\[FN4\]](#) Restatement Second, Trusts§ 180 comment b..

- As to the duty of the trustee to use reasonable care to preserve trust assets, see [§ 417](#).

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§ 430. Trustee's own bank or department

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 221

Under the Uniform Common Trust Fund Act, any bank or trust company qualified to act as a fiduciary may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others, as co-fiduciaries.^[FN1] Statutes of many jurisdictions permit a bank or trust company acting as trustee to become its own depository of trust funds which it holds pending distribution or investment.^[FN2] Such a statute has been held to be in derogation of the general law of trusts and so strictly construed.^[FN3] Further, although a statute authorizes a bank-trustee to deposit trust funds with itself, a court is not required to ignore the inherent conflict thus created.^[FN4]

Comment: The Restatement Third, Trusts, recognizes statutory authority may authorize a trustee to deposit funds in a financial institution operated by the trustee.^[FN5]

The view has been taken that a corporate trustee may be its own depository of the trust funds, in the absence of any expressed legislative policy requiring such a deposit in a bank other than that selected by the trustor to handle the trust funds.^[FN6] On this point, the federal statute authorizing national banks to act as trustees^[FN7] may be construed as inferentially authorizing use by a national bank of such trust funds in its business.^[FN8]

Where a statute allows a trustee to deposit trust funds with itself, the trustee is permitted to profit from the use of such self-deposited funds,^[FN9] though there is contrary authority.^[FN10]

^[FN1] [Uniform Common Trust Fund Act § 1.](#)

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^[FN2] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\); Matter of Estate of Ames, 152 Wis. 2d 217, 448 N.W.2d 250 \(Ct. App. 1989\).](#)

- Under a statute authorizing funds held by fiduciaries to be deposited in savings banks incorporated by the state, such funds may be deposited in the savings departments of trust companies in the state. [Bassett v. City Bank & Trust Co., 115 Conn. 1, 160 A. 60, 81 A.L.R. 1488 \(1932\).](#)

- As to the Uniform Trust Code, see [§ 431.](#)

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^[FN3] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

- Allowing a bank-trustee to deposit funds with itself is a practice contrary to the general law of trusts. [Conservatorship of Pelton, 132 Cal. App. 3d 496, 183 Cal. Rptr. 188 \(4th Dist. 1982\).](#)

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^[FN4] [Conservatorship of Pelton, 132 Cal. App. 3d 496, 183 Cal. Rptr. 188 \(4th Dist. 1982\).](#)

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^[FN5] [Restatement Third, Trusts \(Prudent Investor Rule\) § 170](#) comment m..

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[\[FN6\] First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\).](#)

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[\[FN7\] 12 U.S.C.A. § 92a.](#)

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[\[FN8\] First Nat. Bank v. Weaver, 225 Ala. 160, 142 So. 420, 88 A.L.R. 201 \(1932\)](#) (referring to a former version of the federal statute at [12 U.S.C.A. § 248\(k\)](#)).

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[\[FN9\] Van de Kamp v. Bank of America, 204 Cal. App. 3d 819, 251 Cal. Rptr. 530 \(2d Dist. 1988\).](#)

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[\[FN10\] New England Trust Co. v. Triggs, 334 Mass. 324, 135 N.E.2d 541 \(1956\).](#)

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§ 431. Trustee's own bank or department—Uniform Trust Code

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Under the Uniform Trust Code, the requirement that a trustee administer the trust solely in the benefit of the beneficiaries[\[FN1\]](#) does not preclude a deposit of trust money in a regulated financial-service institution operated by the trustee.[\[FN2\]](#)

Comment: The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits.[\[FN3\]](#)

[\[FN1\] Uniform Trust Code § 802\(a\)](#).

- As to the requirement that a trustee administer the trust solely in the benefit of the beneficiaries generally, see [§ 350](#).

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[\[FN2\] Uniform Trust Code § 803\(h\)\(4\)](#).

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[\[FN3\] Uniform Trust Code § 803](#), comment.

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§ 432. Generally; power and duty of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(1\)](#)

Under the Restatement of Trusts, Third Edition, a trustee is under a duty to use reasonable care and skill to make the trust property productive in a manner that is consistent with the fiduciary duties of caution and impartiality.[FN1] A trustee often has a duty to act with respect to unproductive or underproductive investments.[FN2] To this end, it is a general power and duty of a trustee, implied if not expressed, at least in the case of an ordinary trust, to keep trust funds properly invested[FN3] in productive property.[FN4] There is an implied duty to invest non-income producing assets held in trust when there is a direction by the grantor to pay over interest or income to a beneficiary.[FN5]

A trustee must consider the testator or grantor's objectives and undertake a formal analysis of the estate to establish an investment plan consistent therewith.[FN6] A grantor's desire, expressed in the trust, that the trustees exercise their conferred powers primarily for the benefit of income beneficiaries, is an objective standard to be utilized when determining the reasonableness of the trustees' investments.[FN7]

A trustee who has uninvested funds in his or her hands, has a duty to invest them[FN8] so that they will be productive of income.[FN9] A trustee cannot needlessly let trust funds lie dormant or idle,[FN10] or on deposit for a prolonged period.[FN11] Consequently, if the trustee delays for an unreasonable length of time before making investments, he or she commits a breach of trust.[FN12]

[FN1] [Restatement Third, Trusts: Prudent Investor Rule § 181](#).

- As to the care, diligence, and skill required of a trustee making investments, see §§ [476](#) to [499](#).

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[FN2] [Shear v. Gabovitch, 43 Mass. App. Ct. 650, 685 N.E.2d 1168 \(1997\)](#).

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[FN3] [Graham Bros. Co. v. Galloway Woman's College, 190 Ark. 692, 81 S.W.2d 837 \(1935\)](#); [McAnulty v. Peisen, 208 Iowa 625, 226 N.W. 144 \(1929\)](#).

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[FN4] [Riegler v. Riegler, 262 Ark. 70, 553 S.W.2d 37 \(1977\)](#)

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[FN5] [Barrientos v. Nava 94 S.W.3d 270 Tex.App.-Houston \[14 Dist.\],2002..](#)

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[FN6] [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\)](#).

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[FN7] [Feinberg v. Adolph K. Feinberg Hotel Trust, 922 S.W.2d 21 \(Mo. Ct. App. E.D. 1996\)](#).

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[FN8] [Bishop v. People's Bank & Trust Co., 218 Ky. 508, 291 S.W. 718, 51 A.L.R. 1258 \(1927\)](#).

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[\[FN9\] Lynch v. John M. Redfield Foundation, 9 Cal. App. 3d 293, 88 Cal. Rptr. 86, 51 A.L.R.3d 1284 \(2d Dist. 1970\); Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\).](#)

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[\[FN10\] Callaham v. Newsom, 251 N.C. 146, 110 S.E.2d 802 \(1959\).](#)

- The directors of a charitable trust failed as a matter of law to meet the standard of the prudent person investment rule by allowing the trust income to accumulate in a non-interest-bearing account. [Lynch v. John M. Redfield Foundation, 9 Cal. App. 3d 293, 88 Cal. Rptr. 86, 51 A.L.R.3d 1284 \(2d Dist. 1970\).](#)

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[\[FN11\] § 425.](#)

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[\[FN12\] Lynch v. John M. Redfield Foundation, 9 Cal. App. 3d 293, 88 Cal. Rptr. 86, 51 A.L.R.3d 1284 \(2d Dist. 1970\).](#)

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§ 433. Objectives; safety and income

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#)

The objects of trust investments generally are safety and income for the trust estate.[\[FN1\]](#) Safety[\[FN2\]](#) — that is, preservation of the estate[\[FN3\]](#) — generally is considered the primary factor and income a secondary consideration,[\[FN4\]](#) to the ultimate end that the trust estate will pass to the beneficiaries without loss and with profit from the income produced.[\[FN5\]](#)

Caution: Commodity trading has been held not to comply with the trust purposes of production of income and conservation of principal.[\[FN6\]](#)

In view of a trustee's obligation to deal impartially with all beneficiaries, a trustee is under a duty to the life income beneficiary to take care not merely to preserve the trust property but to make it productive so that a reasonable income will be available for such beneficiary, but he or she is also under a duty to the successor beneficiaries to preserve the principal of the trust property.[\[FN7\]](#) Consequently, the trustee is not under a duty to risk the safety of the principal in order to produce a larger income for the income beneficiary, but is under a duty not to sacrifice income for the purpose of increasing the value of the principal.[\[FN8\]](#)

[\[FN1\] Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 \(1931\); John A. Creighton Home for Poor Working Girls' Trust v. Waltman, 140 Neb. 3, 299 N.W. 261 \(1941\); Davis v. Davis Trust Co., 106 W. Va. 228, 145 S.E. 588 \(1928\).](#)

- A trustee has a duty to invest so as to obtain the largest return possible consistent with the principal's safety. [Marshall v. First Nat. Bank Alaska, 97 P.3d 830 \(Alaska 2004\).](#)

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[\[FN2\] Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\); In re Carnell's Will, 260 A.D. 287, 21 N.Y.S.2d 376 \(3d Dep't 1940\), order aff'd, 284 N.Y. 624, 29 N.E.2d 935 \(1940\); Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\).](#)

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[\[FN3\] Matter of Newhoff's Will, 107 Misc. 2d 589, 435 N.Y.S.2d 632 \(Sur. Ct. 1980\), decree aff'd by, 107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\).](#)

- A trustee has a duty to make such investments as a prudent person would make of his or her own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived from such investments. [Matter of Estate of Dwight, 67 Haw. 139, 681 P.2d 563 \(1984\).](#)

-

[\[FN4\] Title Guarantee & Trust Co. v. Bedford, 125 Conn. 349, 5 A.2d 852, 122 A.L.R. 654 \(1939\); Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\).](#)

- A trustee does nothing improper by following a conservative investment policy emphasizing income over capital gains. [Ewing v. Ruml, 892 F.2d 168, 15 Fed. R. Serv. 3d 691 \(2d Cir. 1989\) \(applying Connecticut law\).](#)

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[\[FN5\] § § 549, 552.](#)

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[\[FN6\] Matter of Hadleigh D. Hyde Trust, 458 N.W.2d 802 \(S.D. 1990\).](#)

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[\[FN7\] Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\); In re Hamill's Estate, 487 Pa. 592, 410 A.2d 770 \(1980\).](#)

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[\[FN8\] In re Hamill's Estate, 487 Pa. 592, 410 A.2d 770 \(1980\).](#)

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§ 434. Objectives; safety and income—Minimizing taxes

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(1\)](#)

A trustee does not have to consider the estate tax consequences of investments of trust funds.^[FN1] Merely demonstrating that a trustee is unaware of the tax consequences of an investment decision does not necessarily translate into a breach of the trustee's fiduciary duty to the beneficiary.^[FN2] As long as the trustee acts in good faith and from proper motives and within the bounds of reasonable judgment, the trustee bears no liability.^[FN3]

Since, where there are successive beneficiaries, the trustee has to keep in mind the interests of life beneficiaries as well as of the remainder beneficiaries, it has been pointed out that if a trustee was to invest solely in tax-free bonds, this might not be of benefit to future beneficiaries whereas if he or she were to invest solely in equities, such as securities of a low yield, this might not be of benefit to the current income beneficiary. Hence, in meeting its duty of impartiality, a trustee would be required to create as much income for the life beneficiary as possible without neglecting the interests of the remainder beneficiaries, trying to keep the interest of both as equal as possible.^[FN4] Despite trustees' duty of impartiality—which requires them not to unduly favor the interest of interim beneficiaries over remaindermen—a decision by the trustees to retain tax-exempt municipal bonds as a primary asset of the trust is within the bounds of reasonable judgment where such investment maximizes the tax benefits to elderly interim beneficiaries without imperiling the remainder interest of a charity except for a slower growth rate.^[FN5] In some instances, a trustee may be surcharged for capital gains tax resulting from the trustee's investment without regard for the tax considerations of the beneficiary.^[FN6]

^[FN1] [Wachovia Bank of Georgia v. Namik](#), 265 Ga. App. 80, 593 S.E.2d 35 (2003), cert. granted, (May 24, 2004).

^[FN2] [Matter of Estate of Ames](#), 152 Wis. 2d 217, 448 N.W.2d 250 (Ct. App. 1989).

[\[FN3\] Matter of Estate of Ames, 152 Wis. 2d 217, 448 N.W.2d 250 \(Ct. App. 1989\).](#)

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[\[FN4\] Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\).](#)

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[\[FN5\] In re Estate of Feinstein, 364 Pa. Super. 221, 527 A.2d 1034 \(1987\).](#)

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[\[FN6\] In re Rockwell Trusts, 18 Fiduc. Rep. 2d 470 \(Pa. C.P., Orphans' Ct. Div. 1994\).](#)

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§ 435. Trustee's discretionary power

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[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

The terms of a trust may be directory in respect to the manner in which the trust estate shall be invested,[FN1] or they may vest discretion in the trustee in such respect.[FN2] Where language in the trust instrument demonstrates the settlor's intent, it supersedes the trustee's usual statutory duty to produce income for the beneficiary. Thus, where a trust instrument contains language to the effect that the trustees shall have no obligation to produce income, that no person shall have any right to compel the trustees to seek any income or to compel them to dispose of stock in the trust because it may not pay dividends, the trustee is clearly authorized to retain unproductive assets.[FN3]

Under the general law and the "prudent person rule" of the statute controlling investment of funds by a trustee, he or she must exercise his or her independent discretion and judgment in reference to the investment of funds, even where broad discretionary power of investment is given,[FN4] although provisions enlarging his or her power to invest are strictly construed.[FN5]

The trustee is bound to exercise his or her discretion reasonably,[FN6] prudently,[FN7] soundly,[FN8] and in good faith,[FN9] considering income, distribution needs, preservation of capital, and methods by which prudent people dispose of their own funds.[FN10]

[FN1] [§ 445.](#)

[FN2] [In re Lawson's Will, 215 Iowa 752, 244 N.W. 739, 88 A.L.R. 316 \(1932\); Miller v. Pender, 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 \(1943\); In re Kuhn's Will, 48 Misc. 2d 70, 264 N.Y.S.2d 259 \(Sur. Ct. 1965\); Vacha v. Vacha, 19 Ohio Op. 2d 35, 87 Ohio L. Abs. 534, 179 N.E.2d 187 \(Prob. Ct. 1961\); Hoffman v. First Virginia Bank of Tidewater, 220 Va. 834, 263 S.E.2d 402 \(1980\).](#)

[FN3] [Bacon v. Marden, 518 So. 2d 925 \(Fla. Dist. Ct. App. 3d Dist. 1987\).](#)

[FN4] [In re Estate of Talbot, 141 Cal. App. 2d 309, 296 P.2d 848, 58 A.L.R.2d 658 \(1st Dist. 1956\).](#)

- As to whether a broad discretion vested in a trustee as to investments authorizes him or her to make nonlegal investments, see [§ 446.](#)

[FN5] [Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 \(1986\).](#)

[FN6] [Fox v. Harris, 141 Md. 495, 119 A. 256, 26 A.L.R. 806 \(1922\).](#)

[FN7] [§ 476.](#)

[FN8] [Lamar v. Micou, 112 U.S. 452, 5 S. Ct. 221, 28 L. Ed. 751 \(1884\); Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N.E. 573 \(1911\); Estate of Wilde, 1998 ME 55, 708 A.2d 273 \(Me. 1998\); Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 \(1931\).](#)

[FN9] [§ 467.](#)

[FN10] [Estate of Wilde, 1998 ME 55, 708 A.2d 273 \(Me. 1998\).](#)

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D. Investments
1. In General

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§ 436. Retention, disposal, or change of existing investments

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#)

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[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

When not otherwise restricted or limited by the terms of the trust, the power and duty of the trustee with respect to the retention, disposal, or change of investments belonging to the trust estate when he or she becomes trustee are in general the same as his or her power and duty with respect to the making of trust investments.^[FN1] The prime considerations are the safety of the investments and the earning of income.^[FN2] Where the trust instrument directs that all the trust assets be converted into cash, it is the trustee's duty to act accordingly, although his or her failure to do so does not necessarily result in liability.^[FN3] The mere retention of stocks which the trustee received from the settlor is not, in itself, negligence.^[FN4]

Where the existing investments that come with the trust estate are proper investments,^[FN5] the trustee should not change them unless directed or authorized to do so by the terms of the trust.^[FN6]

A trustee may take nonlegal or unauthorized trust investments where they come to him or her as part of the trust estate,^[FN7] but while it has been held that when acting in good faith and in the exercise of a sound discretion he or she retains such nonlegal investments, he or she is not liable for a depreciation in their value,^[FN8] and according to some authorities, he or she is under a duty to convert nonlegal investments that come to him or her into legal and authorized holdings^[FN9] within a reasonable time,^[FN10] unless the terms of the trust direct retention of such investments.^[FN11] Except as otherwise provided by the terms of the trust, the trustee is under a duty to the beneficiaries, within a reasonable time after the creation of the trust, to review the

contents of the trust estate and to make and implement decisions concerning the retention and disposition of original investments in order to conform to the general standard of prudent investment, applicable statutes, and trust terms.[\[FN12\]](#)

[\[FN1\] Clark v. Clark, 167 Ga. 1, 144 S.E. 787 \(1928\).](#)

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[\[FN2\] § 433.](#)

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[\[FN3\] Jones v. Heritage Pullman Bank and Trust Co., 164 Ill. App. 3d 596, 115 Ill. Dec. 653, 518 N.E.2d 178 \(1st Dist. 1987\).](#)

- As to liability for losses, see [§ 437](#).

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[\[FN4\] Estate of Pew, 440 Pa. Super. 195, 655 A.2d 521 \(1994\).](#)

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[\[FN5\] As to what are permissible trust investments, generally, see §§ 441 et seq.](#)

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[\[FN6\] Vickers v. Vickers, 189 Ky. 323, 225 S.W. 44 \(1920\); Application of Kettle, 73 A.D.2d 786, 423 N.Y.S.2d 701 \(4th Dep't 1979\).](#)

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[\[FN7\] In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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[\[FN8\] Estate of Knipp, 489 Pa. 509, 414 A.2d 1007 \(1980\).](#)

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[\[FN9\] Clark v. Clark, 167 Ga. 1, 144 S.E. 787 \(1928\); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\); In re Leitsch's Will, 185 Wis. 257, 201 N.W. 284, 37 A.L.R. 547 \(1924\).](#)

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[\[FN10\] § 489.](#)

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[\[FN11\] Clark v. Clark, 167 Ga. 1, 144 S.E. 787 \(1928\); Sebree v. Rosen, 349 S.W.2d 865 \(Mo. 1961\); In re Reese's Will, 21 Misc. 2d 29, 195 N.Y.S.2d 144 \(Sur. Ct. 1960\).](#)

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[\[FN12\] Restatement Third, Trusts: Prudent Investor Rule § 229.](#)

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§ 437. Liability for loss

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [218\(1\)](#)

Forms

Loss from investments. [Am. Jur. Legal Forms 2d, Trusts § 251:414](#)

Complaint, petition, or declaration—To recover from trustee for decline in value and loss of income from corporate investment—Improper retention of stocks by trustee. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 205

A trustee cannot be surcharged for a breach of his or her duty unless the breach causes a loss.[FN1] The liability of a trustee to the trust estate or the beneficiaries for losses arising from investments made with trust funds ordinarily is determined by the legality and propriety of the investment and the exercise of proper care and skill on his or her part in making the investment, as of the time that such investments are made, and in the light of circumstances then existing.[FN2] A fiduciary's conduct in investing the corpus of a trust must not be viewed in hindsight but rather over the entire course of the investment.[FN3] If, considered from this viewpoint, it appears that the trustee properly exercised his or her power, and complied fully with his or her duty as to the investment of trust funds, he or she is not personally liable for any loss resulting from investments made,[FN4] or for failure of the investment to produce income,[FN5] and he or she is not liable for the amount of money placed in such an investment.[FN6] If, on the other hand, the trustee violates his or her duty in respect to trust investments, by making investments in unauthorized and nonlegal investments,[FN7] failing to exercise good faith,[FN8] improperly dealing with him- or herself,[FN9] taking an investment in his or her own name and without indication of its trust character,[FN10] or failing to take adequate security for the investment,[FN11] or to exercise requisite care, diligence, and skill,[FN12] the trustee generally is liable for all losses arising from the investment,[FN13] including any decline in its value[FN14] and loss of interest.[FN15] This is true irrespective of the good faith of the trustee in the investment transaction[FN16] and of any casual relation between the breach of duty and the loss or depreciation incurred.[FN17]

Practice Guide: A trustee against whom beneficiaries have brought a claim of breach of trust duty alleging mismanagement of assets cannot prevail on his or her affirmative defense of exoneration based solely on language in the trust instrument, absent evidence that the trust instrument specifically relieves the trustee of liability for breach of trust.[FN18]

[FN1] [In re McCune, 705 A.2d 861 \(Pa. Super. Ct. 1997\).](#)

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[FN2] [Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\); Home Savings & Loan Co. v. Strain, 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 \(1935\).](#)

- A trustee is not liable to a beneficiary for following a specific investment strategy to the extent that the trustee acts in reasonable reliance on the terms of the trust. [Law v. Law, 753 A.2d 443 \(Del. 2000\).](#)

- As to the rule that the care, diligence, and skill of the trustee are to be determined as of the time of his or her conduct in question, generally, see [§ 479.](#)

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[FN3] [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\).](#)

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[FN4] [Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\); In re Saeger's Estate, 340 Pa. 73, 16 A.2d 19, 131 A.L.R. 1152 \(1940\).](#)

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[FN5] [Bishop v. People's Bank & Trust Co., 218 Ky. 508, 291 S.W. 718, 51 A.L.R. 1258 \(1927\).](#)

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[FN6] [In re Heyl's Estate, 331 Pa. 202, 200 A. 617, 117 A.L.R. 867 \(1938\).](#)

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[FN7] As to permissible trust investments, generally, see [§§ 441 et seq.](#)

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[FN8] As to good faith of the trustee, generally, see [§§ 467 to 475.](#)

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[FN9] As to self-dealing of the trustee, see [§§ 468 and 469.](#)

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[FN10] As to the trustee's failure to indicate the trust character of an investment, see [§ 470.](#)

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[FN11] As to the adequacy of security of loans and mortgages, see [§ 496.](#)

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[FN12] As to the care, diligence, and skill of the trustee, generally, see [§§ 476 to 499.](#)

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[FN13] [In re Guardianship of Bane, 120 Cal. 533, 52 P. 852 \(1898\); White v. Sherman, 168 Ill. 589, 48 N.E. 128 \(1897\).](#)

- If an investment of trust funds is made illegally, the trustee is liable for the loss occasioned thereby, regardless of the question of due care. [In re Testamentary Trust of Hamm, 124 Ohio App. 3d 683, 707 N.E.2d 524 \(11th Dist. Geauga County 1997\).](#)

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[FN14] [Hudson v. American Founders Life Ins. Co. of Denver, 151 Colo. 54, 377 P.2d 391 \(1962\); In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[FN15] [Bishop v. People's Bank & Trust Co., 218 Ky. 508, 291 S.W. 718, 51 A.L.R. 1258 \(1927\).](#)

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[FN16] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[\[FN17\] In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[\[FN18\] Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\).](#)

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§ 438. Liability for loss—Measure of damages

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(1\)](#), [218\(1\)](#)

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[Measure of trustee's liability for breach of trust in selling investment property, or changing investments, in good faith, 58 A.L.R.2d 674](#)

[Measurement of "loss" under sec. 409\(a\) of Employee Retirement Income Security Act \(29 U.S.C.A. sec. 1109\(a\)\) due to fiduciaries' improper investment of employee benefit plan assets, 78 A.L.R. Fed. 110](#)

When a trustee makes an improper investment, it is equitable for a court to put the parties in the position they would have occupied except for the breach of trust.[\[FN1\]](#) In calculating damages to be paid by a negligent trustee, a court may not merely calculate the difference between the beginning and ending balances of the trust in the hands of the trustee and conclude the difference is the result of mismanagement of trust funds without any evidence in support of such a finding;[\[FN2\]](#) rather, the court should receive evidence about specific investments

made or not made to determine whether a particular investment was made negligently or illegally, calculating the damage to the trust from the individual investments.[FN3] Where a fiduciary's imprudence consists solely of the negligent retention of assets it should have sold, the measure of damages is the value of lost capital, as calculated by determining the value of the stock on the date it should have been sold, and subtracting from that figure proceeds from the sale of the stock or, if the stock is still retained by the estate, the value of the stock at the time of accounting.[FN4]

A trustee who is liable for a loss occasioned by one breach of trust cannot reduce the amount of his or her liability by deducting the amount of a gain which has accrued through another and distinct breach of trust; but if the two breaches of trust are not distinct, the trustee is accountable only for the net gain or chargeable only with the net loss resulting therefrom.[FN5] In determining when to offset gains against losses incurred due to improper trust investments, the critical determination is whether the breaches of trust are separate and distinct.[FN6]

When a fiduciary is attempting in good faith to maximize the trust estate for his, her, or its beneficiary, yet innocently violates traditional fiduciary principles, any loss that occurs through the innocent violation may, nonetheless, be offset by any gains achieved at roughly the same time by the same means.[FN7] When breaches of trust relate to different parts of the trust property, they are more likely to be distinct than when the breaches relate to the same property or its product.[FN8]

In the case of improper investments made by trustees of employee benefit plans, the loss which results from improper investment of the plan assets is properly measured by the rate of return which available alternative proper or "prudent" investments would have realized.[FN9]

[FN1] [Lawyers Sur. Corp. v. Whitehead](#), 719 So. 2d 824 (Ala. Civ. App. 1997), aff'd in part, rev'd in part on other grounds, 719 So. 2d 833 (Ala. 1998).

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[FN2] [In re Testamentary Trust of Hamm](#), 124 Ohio App. 3d 683, 707 N.E.2d 524 (11th Dist. Geauga County 1997).

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[FN3] [In re Testamentary Trust of Hamm](#), 124 Ohio App. 3d 683, 707 N.E.2d 524 (11th Dist. Geauga County 1997).

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[FN4] [Matter of Estate of Janes](#), 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 (1997).

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[FN5] [Restatement Third: Trusts, Prudent Investor Rule § 213](#).

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[FN6] [Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A.](#), 914 S.W.2d 384 (Mo. Ct. App. W.D. 1996).

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[FN7] [State v. Morgan Stanley & Co., Inc.](#), 194 W. Va. 163, 459 S.E.2d 906 (1995).

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[FN8] [Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A.](#), 914 S.W.2d 384 (Mo. Ct. App. W.D. 1996).

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[FN9] [Donovan v. Bierwirth](#), 754 F.2d 1049, 78 A.L.R. Fed. 91 (2d Cir. 1985); [Katsaros v. Cody](#), 744 F.2d 270, 39 Fed. R. Serv. 2d 636 (2d Cir. 1984); [Davidson v. Cook](#), 567 F. Supp. 225 (E.D. Va. 1983), judgment aff'd, 734 F.2d 10 (4th Cir. 1984) and judgment aff'd, 734 F.2d 10 (4th Cir. 1984).

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§ 439. Right of beneficiary to avoid improper investment

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#)

Instead of accepting an investment involving a breach of duty by a trustee and holding the trustee liable for the losses resulting from the investment, the beneficiaries of a trust may generally elect to avoid the investment^[FN1] within a reasonable time after notice of the breach of trust,^[FN2] to compel the trustee to take or keep the investment,^[FN3] and to hold him or her liable for the trust money placed in it^[FN4] and for interest thereon,^[FN5] and for trustees' and attorney's fees charged in respect to the investment.^[FN6] This right of the beneficiary to elect to avoid an improper investment exists irrespective of any loss to the trust estate,^[FN7] good faith of the trustee in the matter in which he or she breached his or her duty,^[FN8] his or her exercise of sound discretion in such matter,^[FN9] and the fact that the trust estate received a valuable consideration.^[FN10]

In case a beneficiary makes an election to avoid an investment, the beneficiary has an equitable lien on the investment for the amount of the trust money placed in it and interest thereon.^[FN11] However, where the beneficiary has elected not to take the investment, the trustee is entitled, on full satisfaction of the beneficiary's rights, to a return of the investment and to any income on it actually received by the trust estate.^[FN12] On the other hand, the beneficiary, if he or she does not avoid the investment, is entitled to profits accruing on it.^[FN13]

^[FN1] [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\); In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

[\[FN2\] In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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[\[FN3\] In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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[\[FN4\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\).](#)

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[\[FN5\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\); In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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[\[FN6\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN7\] In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[\[FN8\] In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\); In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 \(1936\).](#)

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[\[FN9\] In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\).](#)

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[\[FN10\] In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 \(1936\).](#)

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[\[FN11\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN12\] In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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[\[FN13\] Magruder v. Drury, 235 U.S. 106, 35 S. Ct. 77, 59 L. Ed. 151 \(1914\).](#)

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§ 440. Effect of beneficiary's approval of, or acquiescence in, improper investment

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [218\(2\)](#)

The general rule that approval, consent, or ratification by a beneficiary, who is an adult sui generis, of a step or transaction in the administration of a trust, made freely, or acquiescence thereto for a long time, with full knowledge of all pertinent facts and circumstances, operates as an estoppel, waiver, or preclusion, with respect to any right of the beneficiary to object to the impropriety of such step or transaction,[\[FN1\]](#) applies fully and is frequently invoked with respect to the impropriety of trust investments, whether such impropriety lies in the making, retention, or exchange of investments, or whether it lies in the making of the investments in so-called "nonlegal securities," in the taking of the investments in the name of the trustee, or in other matters.[\[FN2\]](#) The rule has been applied with respect to a spendthrift trust.[\[FN3\]](#) Where a beneficiary has requested or consented to what essentially amounts to mismanagement by a fiduciary, equitable rather than contractual principles govern the fiduciary's liability.[\[FN4\]](#)

The failure of a beneficiary to object to one illegal investment at an accounting does not amount to consent to a later unlawful investment.[\[FN5\]](#)

Caution: The argument that where the beneficiaries in a "legal list state" have given their permission for the trustee to invest in items not on the legal list, and they have no complaint for investments that go awry has been rejected on the ground that the trustee must fulfill its duty of caution, to preserve the trust corpus above all else, while striving for regularity of income.[\[FN6\]](#)

[\[FN1\]](#) §§ [326](#) to [330](#).

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[\[FN2\]](#) [Hoyt v. Sprague](#), 103 U.S. 613, 26 L. Ed. 585 (1880); [Cary v. Cary](#), 159 Or. 578, 80 P.2d 886, 121 A.L.R. 1371 (1938); [In re Miller's Estate](#), 333 Pa. 116, 3 A.2d 370, 128 A.L.R. 1 (1939); [In re John L. Norris Trust](#), 143 Vt. 325, 465 A.2d 1385 (1983).

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[\[FN3\]](#) [In re Miller's Estate](#), 333 Pa. 116, 3 A.2d 370, 128 A.L.R. 1 (1939).

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[\[FN4\]](#) [In re Saxton](#), 274 A.D.2d 110, 712 N.Y.S.2d 225 (3d Dep't 2000).

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[\[FN5\]](#) [In re Blake's Will](#), 146 Misc. 776, 263 N.Y.S. 317 (Sur. Ct. 1933).

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[\[FN6\]](#) [First Alabama Bank of Montgomery, N.A. v. Martin](#), 425 So. 2d 415 (Ala. 1982).

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D. Investments

2. Permissible Trust Investments

a. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 441. Generally; historical background

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#)

The so-called "Massachusetts rule," which has been followed by some courts, has favored liberality in permitting a choice of investments to trustees.[\[FN1\]](#)

In support of the Massachusetts rule, the courts have declined to limit the field of trust investments to public promises, or funds, as they were called, because such investments were exceedingly limited in availability compared with the amount of trust funds to be invested, and because they doubted that any more confidence could be placed in the engagements of the public than in the promises and conduct of private corporations which are managed by substantial and prudent directors. It is said that if a more strict and precise rule should be deemed expedient, it must be enacted by the legislature.[\[FN2\]](#) It cannot be introduced by judicial decision without working great hardship and injustice.[\[FN3\]](#)

Observation: Where a statute substituted the prudent person rule for the legal list of permissible investments and the trust instrument empowered the trustee to exercise the fullest measure of authority conferred on trustees by applicable state law, it was held that the trial court was without authority to limit investments to securities issued or guaranteed by the United States.[\[FN4\]](#)

The so-called "New York rule," which also exists with respect to the standard of care in investments[\[FN5\]](#) and which generally does not stress the duty of diversification[\[FN6\]](#) is strict in limiting trust investments to those previously approved by the court or authorized by the legislature.[\[FN7\]](#) In some jurisdictions where the liberal Massachusetts rule has not been followed, or has been departed from, it has been observed that the reasons advanced for liberality as to trust investments, particularly the unavailability of government securities in

proportion to trust funds to be invested and the equality of insecurity of investments in public obligations in proportion to that in corporate obligations, are no longer true, despite the effect of public emergencies on public securities, which is no greater than their effect on stock; government obligations are not subject to the risks and chances of trade, business, and speculation.[FN8] Calamities that depress public credit seldom occur, while the risks of trade are constant.[FN9]

[FN1] [In re Dickinson, 152 Mass. 184, 25 N.E. 99 \(1890\)](#); [In re Buhl's Estate, 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569 \(1920\)](#); [Gray v. Fox, 1 N.J. Eq. 259, 1831 WL 2455 \(Ch. 1831\)](#); [Barney v. Parsons' Guardian, 54 Vt. 623, 1882 WL 7691 \(1882\)](#).

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[FN2] [In re Dickinson, 152 Mass. 184, 25 N.E. 99 \(1890\)](#).

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[FN3] [In re Dickinson, 152 Mass. 184, 25 N.E. 99 \(1890\)](#).

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[FN4] [In re Bruce Butterworth Trust, 451 So. 2d 1215 \(La. Ct. App. 4th Cir. 1984\)](#).

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[FN5] As to the care, diligence, and skill of the trustee, generally, see §§ [476](#) to [499](#).

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[FN6] As to such duty, generally, see § [490](#).

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[FN7] [Warren v. Union Bank of Rochester, 157 N.Y. 259, 51 N.E. 1036 \(1898\)](#); [Commonwealth ex rel. Algeo v. McConnell, 226 Pa. 244, 75 A. 367 \(1910\)](#).

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[FN8] [Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N.E. 573 \(1911\)](#).

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[FN9] [Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N.E. 573 \(1911\)](#).

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2. Permissible Trust Investments
a. In General

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§ 442. Statutory requirements, generally; "legal lists" of investments

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(3\)](#)

Except where a common-law, "prudent person" rule obtained,[\[FN1\]](#) the field of permissible trust investments was long governed by statutory provisions establishing lists of authorized trust investments,[\[FN2\]](#) intending, on the one hand, to render the investment of trust funds as secure as possible, and on the other hand, to widen the field of such investment as far as is reasonably consistent with safety,[\[FN3\]](#) and permit diversification in investment.[\[FN4\]](#)

Observation: It has been noted that where a statute substituted the "prudent person rule" for the legal list of permissible investments, it was undoubtedly the legislature's intent to remove per se restrictions on investments.[\[FN5\]](#)

[\[FN1\]](#) §§ 476 et seq.

[\[FN2\]](#) [Title Guarantee Loan & Trust Co. v. Woodward](#), 238 Ala. 304, 191 So. 363, 129 A.L.R. 1301 (1939); [Bishop v. People's Bank & Trust Co.](#), 218 Ky. 508, 291 S.W. 718, 51 A.L.R. 1258 (1927); [In re Taylor's Estate](#), 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 (1923).

- As to provisions giving the courts the right to establish legal trust investments or to enlarge the field thereof, see [§ 448](#).

[\[FN3\]](#) [Robertson v. Robertson's Trustee](#), 130 Ky. 293, 113 S.W. 138 (1908).

- The New Jersey prudent person investment statute has the effect of expanding the types of investments which a fiduciary in the state may legally make, by permitting an investment of not more than 40 percent of the corpus of the trust in any investment, even though not previously considered legal, provided that the appropriate degree of care and judgment is utilized and no term of the trust agreement or order of court is violated. [Fidelity Union Trust Co. v. Price](#), 11 N.J. 90, 93 A.2d 321, 35 A.L.R.2d 980 (1952).

[\[FN4\]](#) [Title Guarantee & Trust Co. v. Bedford](#), 125 Conn. 349, 5 A.2d 852, 122 A.L.R. 654 (1939).

[\[FN5\]](#) [In re Bruce Butterworth Trust](#), 451 So. 2d 1215 (La. Ct. App. 4th Cir. 1984).

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D. Investments

2. Permissible Trust Investments

a. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 443. Statutory requirements, generally; "legal lists" of investments—Permissible provisions

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(3\)](#)

Statutes governing trust investments generally are permissible rather than mandatory in form,^[FN1] in that they do not prevent a trustor from authorizing the making or retention of investments other than those prescribed by statute by a clearly express authorization to that effect.^[FN2]

Trust investment statutes, even though they are permissive in that they permit a trustor to authorize investments which they themselves do not authorize, indicate those investments which to the legislature seem to afford a maximum of safety,^[FN3] and they constitute a guidepost for trustees to observe where there is nothing in the terms of the trust to indicate the intention of the trustor or settlor that investments should be made in or confined to certain kinds of property or securities.^[FN4] They constitute a measure of protection to trustees who, by investment in the permitted securities, presumptively at least are entitled to be relieved of liability for losses resulting from the investments.^[FN5] Such statutes do not, however, free the trustee from liability if he or she fails to exercise reasonable judgment and discretion in the making of the investments.^[FN6] On the other hand, a trustee who invests in securities other than those permitted by statute, and not authorized by the terms of the trust, does so at his or her own risk.^[FN7] The trustee must bear any loss that results from such investments^[FN8] even though such investments are made by him or her in good faith, and in an exercise of what he or she considers good judgment.^[FN9]

^[FN1] [Title Guarantee Loan & Trust Co. v. Woodward](#), 238 Ala. 304, 191 So. 363, 129 A.L.R. 1301 (1939); [Merchants' Loan & Trust Co. v. Northern Trust Co.](#), 250 Ill. 86, 95 N.E. 59 (1911); [Delafield v. Barret](#), 270

[N.Y. 43, 200 N.E. 67, 103 A.L.R. 941 \(1936\).](#)

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[\[FN2\] § 362.](#)

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[\[FN3\] Delafield v. Barret, 270 N.Y. 43, 200 N.E. 67, 103 A.L.R. 941 \(1936\).](#)

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[\[FN4\] Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\).](#)

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[\[FN5\] Delafield v. Barret, 270 N.Y. 43, 200 N.E. 67, 103 A.L.R. 941 \(1936\).](#)

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[\[FN6\] §§ 476 to 479, 481 to 484.](#)

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[\[FN7\] In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\).](#)

- A prudent person investment statute does not change the rule that a trustee, if he or she would avoid being surcharged, is limited to investing in those types of investments authorized by statute, in the absence of controlling provisions in the trust agreement or an appropriate order of the court. [Fidelity Union Trust Co. v. Price, 11 N.J. 90, 93 A.2d 321, 35 A.L.R.2d 980 \(1952\).](#)

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[\[FN8\] Olin Cemetery Ass'n of Olin v. Citizens Sav. Bank of Olin, 222 Iowa 1053, 270 N.W. 455, 112 A.L.R. 1205 \(1936\); Dunnegan Grove Cemetery v. Farm & Home Sav. & Loan Ass'n, 93 S.W.2d 95 \(Mo. Ct. App. 1936\); Delafield v. Barret, 270 N.Y. 43, 200 N.E. 67, 103 A.L.R. 941 \(1936\).](#)

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[\[FN9\] In re Carnell's Will, 260 A.D. 287, 21 N.Y.S.2d 376 \(3d Dep't 1940\), order aff'd, 284 N.Y. 624, 29 N.E.2d 935 \(1940\); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\).](#)

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D. Investments

2. Permissible Trust Investments
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§ 444. Statutory requirements, generally; "legal lists" of investments—Retroactive application

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(3\)](#)

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[Retrospective application of statutes relating to trust investments, 35 A.L.R.2d 991](#)

Provisions making a trust investment statute applicable to trusts created prior to its enactment are not violative of the constitutional prohibition against impairment of the obligation of a contract.^[FN1] The courts generally hold that the propriety of a trust investment is to be determined by the terms of the statute in effect at the time when the investment is made, and not at the time when the trust was created,^[FN2] except where the language of the trust instrument, whether a will or an inter vivos agreement, in defining the powers and duties of the trustee, expressly limits the trustee to certain investments or is construed as doing so.^[FN3] Where the language of the trust instrument discloses the creator's intention to limit the trustee to specified investments, a statute enacted subsequent to creation of the trust will control only to the extent that it enlarges the class of investments specified in the trust instrument, and other provisions of the statute broadening the field of trust investments will not be given retrospective application.^[FN4]

[FN1] [Mechanicks Nat. Bank of Concord v. Brady](#), 100 N.H. 469, 129 A.2d 857 (1957); [Fidelity Union Trust Co. v. Price](#), 11 N.J. 90, 93 A.2d 321, 35 A.L.R.2d 980 (1952); [State ex rel. Preston v. Ferguson](#), 170 Ohio St. 450, 11 Ohio Op. 2d 204, 166 N.E.2d 365 (1960); [Goodridge v. National Bank of Commerce of Norfolk](#), 200 Va. 511, 106 S.E.2d 598 (1959).

[FN2] [Mechanicks Nat. Bank of Concord v. Brady](#), 100 N.H. 469, 129 A.2d 857 (1957); [In re Moser's Will](#), 58 Misc. 2d 742, 296 N.Y.S.2d 701 (Sur. Ct. 1968); [Goodridge v. National Bank of Commerce of Norfolk](#), 200 Va. 511, 106 S.E.2d 598 (1959).

[FN3] [In re Jones' Will](#), 221 Minn. 524, 22 N.W.2d 633 (1946); [In re Gottheil's Estate](#), 205 Misc. 659, 128 N.Y.S.2d 807 (Sur. Ct. 1954).

[FN4] [In re Gwynne's Estate](#), 123 N.Y.S.2d 178 (Sur. Ct. 1953), decree modified on other grounds, [284 A.D. 409](#), 131 N.Y.S.2d 485 (1st Dep't 1954).

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§ 445. Investments under terms of trust

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West's Key Number Digest, [Trusts](#) [217.3\(2\)](#)

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

In order to determine the field of permissible investments which a trustee may make in the administration of the trust, the trustee must first look to the terms of the trust instrument or declaration which will frequently contain expressions of the trustor's or settlor's intent in this regard.[FN1] According to the Restatement, the trustee has the duty to the beneficiaries to conform to the terms of the trust directing or restricting investments by the trustee.[FN2] Construction of the trust instrument with respect to trust investments should, as in other matters of construction thereof,[FN3] be governed by the cardinal principle of ascertaining the intention of the trustor as disclosed by his or her language.[FN4] That language may be directory[FN5] or invest the trustee with discretion.[FN6] Even when a trustee invests trust funds in accordance with provisions in the trust instrument, he or she must exercise the statutory standard of care.[FN7]

A provision that a trustee may change investments only with the consent of another person imposes a mandatory duty to retain unless the other person consents to a sale.[FN8]

[\[FN1\] Miller v. Pender, 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 \(1943\); Home Savings & Loan Co. v. Strain, 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 \(1935\); In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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[\[FN2\] Restatement Third, Trusts: Prudent Investor Rule § 228\(b\).](#)

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[\[FN3\] § 34.](#)

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[\[FN4\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\); Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\); First Wisconsin Trust Co. v. Perkins, 275 Wis. 464, 82 N.W.2d 331, 78 A.L.R.2d 1 \(1957\).](#)

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[\[FN5\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\); Mazzola v. Myers, 363 Mass. 625, 296 N.E.2d 481 \(1973\); Sebree v. Rosen, 349 S.W.2d 865 \(Mo. 1961\); Petition of Bowen, 68 R.I. 200, 27 A.2d 181 \(1942\); Hoffman v. First Virginia Bank of Tidewater, 220 Va. 834, 263 S.E.2d 402 \(1980\).](#)

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[\[FN6\] § 435.](#)

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[\[FN7\] Wachovia Bank of Georgia v. Namik, 265 Ga. App. 80, 593 S.E.2d 35 \(2003\), cert. granted, \(May 24, 2004\).](#)

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[\[FN8\] Ditmars v. Camden Trust Co., 10 N.J. 471, 92 A.2d 12, 35 A.L.R.2d 822 \(1952\); Rivers v. Stevenson, 169 S.C. 422, 169 S.E. 135, 89 A.L.R. 766 \(1933\).](#)

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D. Investments

2. Permissible Trust Investments
a. In General

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§ 446. Authorization of nonlegal investments

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West's Key Number Digest, [Trusts](#) [217.3\(4\)](#)

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

The general rule is that a trustor may authorize the making[FN1] or retention,[FN2] by a trustee, of nonlegal investments, that is, those not authorized by statute or by order or list of court. Such authorization, however, must be made with the utmost clarity.[FN3] The presumption is against the existence of such authorization, and the burden is upon the trustee to establish it, all doubts being resolved against it.[FN4] When such authorization is shown, it should be strictly construed.[FN5] But authorization to make or retain nonlegal investments need not be express; it can be inferred.[FN6]

Practice guide: One of the most reliable indications of an intention to permit a trustee to invest trust funds in nonlegal investments is a statement in the will or trust instrument that the trustee shall not be limited to investments which are legal for trustees, or that the trustee may invest as he or she deems best, even though the investments may not be of the character authorized by law for the investment of trust funds.[FN7]

Where there is some doubt as to whether a particular phrase authorizes a trustee to make nonlegal investments, the fact that the trust instrument also authorizes the trustee to retain the nonlegals which were turned over to him or her by the settlor or an executor is some evidence of an intention to permit the trustee to invest in nonlegals.[FN8] However, a mere power to retain the original nonlegal investments of the trust does not of itself authorize new investments in nonlegals.[FN9]

[FN1] [Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\); In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\); First Wisconsin Trust Co. v. Perkins, 275 Wis. 464, 82 N.W.2d 331, 78 A.L.R.2d 1 \(1957\).](#)

[FN2] [Clark v. Clark, 167 Ga. 1, 144 S.E. 787 \(1928\); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\).](#)

[FN3] [Home Savings & Loan Co. v. Strain, 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 \(1935\); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\); First Wisconsin Trust Co. v. Perkins, 275 Wis. 464, 82 N.W.2d 331, 78 A.L.R.2d 1 \(1957\).](#)

[\[FN4\]](#) § § [628](#), [632](#).

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[\[FN5\]](#) [Miller v. Pender](#), 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 (1943); [In re Taylor's Estate](#), 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 (1923).

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[\[FN6\]](#) [In re Trusteeship of Stone](#), 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 (1941).

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[\[FN7\]](#) [Hartford Nat. Bank & Trust Co. v. Trinity Church Parish](#), 25 Conn. Supp. 23, 195 A.2d 566 (Super. Ct. 1963); [Miller v. Pender](#), 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 (1943); [In re Sinclair's Estate](#), 61 Misc. 2d 38, 304 N.Y.S.2d 647 (Sur. Ct. 1969); [Vacha v. Vacha](#), 19 Ohio Op. 2d 35, 87 Ohio L. Abs. 534, 179 N.E.2d 187 (Prob. Ct. 1961).

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[\[FN8\]](#) [Armistead v. Trust Co. of Georgia](#), 180 Ga. 148, 177 S.E. 787 (1935).

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[\[FN9\]](#) [First Wisconsin Trust Co. v. Perkins](#), 275 Wis. 464, 82 N.W.2d 331, 78 A.L.R.2d 1 (1957).

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D. Investments

2. Permissible Trust Investments

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§ 447. Authorization of nonlegal investments—Effect of discretionary powers

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

Whether the authorization of the making or retention of nonlegal investments may be made by or inferred from the granting of broad powers or discretion to the trustee with respect to trust investments is a matter upon which the cases differ, explainable in part by the particular character of the power or discretion in question, but involving some fundamental disagreement among the courts. In a number of cases, the granting of such broad powers or discretion to a trustee has been held to have the effect of authorizing him or her, where he or she acts in good faith,[\[FN1\]](#) and with requisite care, diligence, and skill, to make[\[FN2\]](#) or retain[\[FN3\]](#) nonlegal investments or reinvestments, although more modern authority indicates that a grant of broad discretion includes the right to invest in speculative securities.[\[FN4\]](#)

This result has been reached where the language of the trust instrument and surrounding facts and circumstances tend to show the intention of the trustor that the trustee should not be limited to "legal" investments,[\[FN5\]](#) and especially where "legal investments," whether under statute or decisions of the courts, are narrowly restricted.[\[FN6\]](#) Authorization for the making or retention of nonlegal investments has been found in a direction to a trustee to obtain the greatest return possible, consistent with security,[\[FN7\]](#) or to make trust investments in such manner and on such terms as the trustee deems best,[\[FN8\]](#) especially where there is also added a provision that the trustor waives all statutory limitations and restrictions as to such investments.[\[FN9\]](#)

In many instances, the trust instrument expressly authorizes the trustee to invest only a part of the estate in nonlegals, with the result that the balance of the estate must be invested in legals.[\[FN10\]](#)

[\[FN1\]](#) § 467.

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[\[FN2\]](#) [Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\); Miller v. Pender, 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 \(1943\); Home Savings & Loan Co. v. Strain, 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 \(1935\).](#)

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[\[FN3\]](#) [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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[\[FN4\]](#) [Hoffman v. First Virginia Bank of Tidewater, 220 Va. 834, 263 S.E.2d 402 \(1980\).](#)

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[\[FN5\]](#) [Title Guarantee Loan & Trust Co. v. Woodward, 238 Ala. 304, 191 So. 363, 129 A.L.R. 1301 \(1939\)](#)

- A statute permitting a fiduciary to invest in any investments whatever, including real estate and common stocks, to the extent of a certain percent of the principal, subject to the standard of care and judgment which persons of ordinary prudence and reasonable discretion exercise in the management of their own affairs, yields to any contrary direction in the trust instrument. [In re Munger's Estate, 63 N.J. 514, 309 A.2d 205 \(1973\).](#)

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[\[FN6\]](#) [Miller v. Pender, 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 \(1943\).](#)

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[\[FN7\] In re Lawson's Will, 215 Iowa 752, 244 N.W. 739, 88 A.L.R. 316 \(1932\); In re Ziegler's Trust, 16 Misc. 2d 836, 186 N.Y.S.2d 443 \(Sup 1959\).](#)

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[\[FN8\] In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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[\[FN9\] In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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[\[FN10\] Manufacturers Trust Co. v. Earle, 32 N.J. Super. 262, 108 A.2d 115 \(Ch. Div. 1954\).](#)

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2. Permissible Trust Investments

b. Judicial Authorization

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§ 448. Generally

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West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

A trustee may properly apply to the court for instructions or advice as to the making or the propriety of making proposed trust investments or retaining investments already made when he or she deems this necessary to his or her protection or feels that the matter should not be left entirely to his or her own discretion and judgment.[\[FN1\]](#) However, in the absence of any express requirement either by the terms of the trust or by statute, it is not ordinarily necessary for a trustee selected by the trustor, not acting directly under the supervision of the court, to secure judicial approval of a trust investment in order to authorize the making of it or to save him- or herself from personal liability in respect to it.[\[FN2\]](#)

As a general rule there is no personal liability where the trustee acts in good faith and with requisite care and skill,[\[FN3\]](#) investing the trust funds in compliance with statutory requirements or the terms of the trust,[\[FN4\]](#) even though a statute authorizes but does not require the trustee to seek the approval of a court.[\[FN5\]](#)

The effect of a court order authorizing an investment is generally to protect the trustee against any liability predicated on the ground that the investment was unauthorized;[\[FN6\]](#) but such protection is not given by an order obtained fraudulently.[\[FN7\]](#)

Mere verbal approval of a trust investment by a court or judge is insufficient authorization of it to save a trustee from liability,[\[FN8\]](#) but consultation by a trustee with a court before making an investment does tend to show good faith and due care.[\[FN9\]](#)

A court's order to invest retained assets in certain low-yield investments, rather than higher-yield investments, is not an abuse of discretion, where the trust assets are retained to protect various income beneficiaries.[\[FN10\]](#)

The court may be possessed of power to enlarge the field of trust investments, as defined by statute,[\[FN11\]](#) and particularly of such power in this regard as may prevent the defeat, as a result of changed conditions, of the objects and purposes of the trust.[\[FN12\]](#)

[\[FN1\] Bishop Trust Co. v. Oahu Sugar Co., 19 Haw. 183, 1908 WL 1226 \(1908\).](#)

- As to the application for instructions and advice, see [§ 309](#).

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[\[FN2\] In re Eigenmann's Guardianship, 214 Ind. 92, 14 N.E.2d 585, 116 A.L.R. 432 \(1938\).](#)

- As to when a trustee is appointed by the court, see [§ 449](#).

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[\[FN3\] §§ 467 to 470.](#)

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[\[FN4\] Fox v. Harris, 141 Md. 495, 119 A. 256, 26 A.L.R. 806 \(1922\).](#)

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[\[FN5\] Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\).](#)

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[\[FN6\] Shanley's Estate v. Fidelity Union Trust Co., 108 N.J. Eq. 564, 5 N.J. Misc. 783, 138 A. 388 \(Ch. 1927\).](#)

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[\[FN7\] In re Lawson's Will, 215 Iowa 752, 244 N.W. 739, 88 A.L.R. 316 \(1932\).](#)

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[\[FN8\] In re Jiskra's Estate, 108 Wash. 187, 182 P. 961 \(1919\).](#)

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[\[FN9\] §§ 467, 482.](#)

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[\[FN10\] University of Maine Foundation v. Fleet Bank of Maine, 2003 ME 20 \(Me.,2003\).](#)

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[\[FN11\] In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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[\[FN12\] Morris Community Chest v. Wilentz, 124 N.J. Eq. 580, 3 A.2d 808 \(Ch. 1939\).](#)

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§ 449. Where trustee is appointed by or acting under court supervision

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(7\)](#)

In regard to the duty of the trustee to seek the approval of the court before making trust investments and his or her liability for losses from such investments, a distinction must be made between trustees appointed by the court or acting under its supervision and trustees selected by a trustor or not directly acting under the supervision of a court. Where the trustee has been appointed by, or is acting under the supervision of, the court, he or she may be required to seek the approval of the court before making trust investments,^[FN1] and any investment made without the approval of the court is unauthorized and invalid, or voidable, at least, until approved by the court,^[FN2] and is at the trustee's risk.^[FN3]

[FN1] [Indiana Trust Co. v. Griffith](#), 176 Ind. 643, 95 N.E. 573 (1911); [Fox v. Harris](#), 141 Md. 495, 119 A. 256, 26 A.L.R. 806 (1922).

[FN2] [Easton v. Somerville](#), 111 Iowa 164, 82 N.W. 475 (1900).

[FN3] [Commonwealth ex rel. Algeo v. McConnell](#), 226 Pa. 244, 75 A. 367 (1910).

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2. Permissible Trust Investments

b. Judicial Authorization

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 450. Effect of approval subsequent to making of investment

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#)

A.L.R. Library

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

There is authority for the view that where the trustee has acted in good faith and with ordinary prudence in making an investment, the subsequent order constitutes authorization of the investment or saves the trustee from liability for a loss occurring after, but not before, the time of procuring the court's approval, where all facts were fully disclosed to the court.[FN1]

Where a fiduciary has received nonlegal investments owned by the testator at his or her death, the will authorizes a retention of nonlegal investments, and the court has approved an account which shows the retention of the investments, the general rule is that persons objecting on a subsequent accounting cannot have the fiduciary surcharged for negligence in retaining them during the period covered by the first account.[FN2] However, such a decree does not serve as an excuse for continuing to hold the assets after the decree, and the trustee must thereafter exercise that degree of care, skill, diligence, and fidelity which is required of a fiduciary with respect to the disposition or retention of nonlegal investments.[FN3]

[\[FN1\] In re Lawson's Will, 215 Iowa 752, 244 N.W. 739, 88 A.L.R. 316 \(1932\).](#)

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[\[FN2\] In re Hubbell's Will, 302 N.Y. 246, 97 N.E.2d 888, 47 A.L.R.2d 176 \(1951\).](#)

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[\[FN3\] Liberty Title & Trust Co. v. Plews, 142 N.J. Eq. 493, 60 A.2d 630 \(Ch. 1948\), opinion supplemented, 142 N.J. Eq. 632, 61 A.2d 297 \(Ch. 1948\) and judgment modified, 6 N.J. Super. 196, 70 A.2d 784 \(App. Div. 1950\), judgment rev'd on other grounds, 6 N.J. 28, 77 A.2d 219 \(1950\).](#)

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b. Judicial Authorization

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§ 451. Authorization of investments not authorized by terms of trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(7\)](#)

Forms

Answer—Defense—Consent of beneficiary to investment. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 210

While, under ordinary circumstances, a court will not authorize a trustee to place funds in investments of a sort not within the terms of the will or trust instrument,[\[FN1\]](#) in a proper case, a court may authorize a trust investment not authorized by, or actually in derogation of, the terms of the trust.[\[FN2\]](#)

The prime consideration in permitting an investment not authorized by the terms of the trust is the necessity for the preservation of the estate, and not merely a greater benefit to beneficiaries.[FN3] A proper case for investment outside the terms of the trust may arise by reason of changes in conditions not foreseen by the trustor that will defeat the ultimate object of the trust unless such an investment is permitted,[FN4] because of the unavailability or the failure of the investments mentioned in the trust declaration.[FN5]

[FN1] [Title Guarantee & Trust Co. v. Bedford](#), 125 Conn. 349, 5 A.2d 852, 122 A.L.R. 654 (1939); [Reiner v. Fidelity Union Trust Co.](#), 127 N.J. Eq. 377, 13 A.2d 291, 128 A.L.R. 964 (Ct. Err. & App. 1940).

[FN2] [In re Snyder's Will](#), 136 N.Y.S. 670 (Sup 1912); [Toledo Trust Co. v. Toledo Hospital](#), 117 Ohio App. 425, 24 Ohio Op. 2d 237, 192 N.E.2d 674 (6th Dist. Lucas County 1962), judgment aff'd, [174 Ohio St. 124](#), 21 Ohio Op. 2d 386, 187 N.E.2d 36 (1962).

[FN3] [Rogers v. English](#), 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812 (1943).

[FN4] [In re Stack's Will](#), 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

[FN5] [In re Stack's Will](#), 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

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§ 452. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

A trustee may make long-term investments and is required to consider the effect of an investment plan on both income beneficiaries and remaindermen.[\[FN1\]](#)

Under the liberal or Massachusetts rule of trust investments, a trustee may be permitted to invest trust funds in a business, or in corporate securities[\[FN2\]](#) which, under the strict or New York rule of trust investments, would not be permissible[\[FN3\]](#) in the absence of authorization therefor by the terms of the trust, statute, or order of court.[\[FN4\]](#)

A trustee may generally invest trust funds in bank accounts or certificates of deposit,[\[FN5\]](#) and where a trustee is given authority by the trust instrument to invest and reinvest the trust estate from time to time in any property real or personal, even though such investments, by reason of their character, amount, proportion to the total trust estate, or otherwise would not be considered appropriate for a fiduciary, it is not improper for the trustee to purchase antiques as an investment.[\[FN6\]](#)

[\[FN1\]](#) [Matter of Haberstich, 169 Misc. 2d 543, 646 N.Y.S.2d 937 \(Sur. Ct. 1996\).](#)

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[\[FN2\]](#) [§ 460.](#)

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[\[FN3\]](#) [Warren v. Union Bank of Rochester, 157 N.Y. 259, 51 N.E. 1036 \(1898\).](#)

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[\[FN4\]](#) [§§ 461, 462.](#)

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[\[FN5\]](#) [§ 425.](#)

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[\[FN6\]](#) [Pachter, Gold & Schaffer v. Yantis, 742 F. Supp. 544, 14 U.C.C. Rep. Serv. 2d 212 \(W.D. Ark. 1990\) \(applying Arkansas law\).](#)

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§ 453. Real estate, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

A.L.R. Library

[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

The law has been conservative and strict in generally holding that a fiduciary may not properly invest trust funds in real estate without specific authority given by statute, judicial permission, or the instrument itself, by reason of the undue amount of risk and speculation involved and the need for business management talents to make such property productive.^[FN1] Thus, an investment in real estate should be made by a trustee only upon an order of the court,^[FN2] and a trustee should not retain real property for investment purposes.^[FN3] In some jurisdictions, however, it has been held that trust investments in realty which are not in contravention of the terms of the trust or of some statutory limitation are permitted,^[FN4] as long as they are not imprudently made.^[FN5] Where foreign trust investments are permitted,^[FN6] such an investment may be placed in foreign real estate if such investment is otherwise proper.^[FN7]

Trust investments in real estate may be authorized by the terms of the trust,^[FN8] even where they are speculative.^[FN9]

Where investments in real property are not expressly authorized, the trustor's intention in the matter is to be gathered from the entire trust instrument,^[FN10] giving due consideration to the duration of the trust, the amount of the estate, and the character and extent of powers conferred upon the trustee.^[FN11] Where an instrument authorizes the investment of the trust corpus in such "securities" as might in the discretion of the trustee seem proper (regardless of whether such securities were of the type prescribed by law for the investment of trust funds), the trustee is not empowered to invest in real estate since "securities" is a term in common parlance with the well-known connotation of stocks, bonds, debentures, mortgages, and other evidences of secured and unsecured debt and ownership, but is not used to include real estate.^[FN12]

^[FN1] [In re Munger's Estate, 63 N.J. 514, 309 A.2d 205 \(1973\).](#)

- As to the rule against speculative investments, see [§ 483.](#)

-

^[FN2] [In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\).](#)

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[\[FN3\] Jones v. Heritage Pullman Bank and Trust Co., 164 Ill. App. 3d 596, 115 Ill. Dec. 653, 518 N.E.2d 178 \(1st Dist. 1987\).](#)

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[\[FN4\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

- As to mortgage investments, see § § [457](#), [495](#) to [498](#).

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[\[FN5\] § 494.](#)

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[\[FN6\] § 459.](#)

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[\[FN7\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

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[\[FN8\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\); Sebree v. Rosen, 349 S.W.2d 865 \(Mo. 1961\).](#)

- Where a trust instrument authorizes the trustee to invest in leases, and where a trust owned 50 percent of a corporation so that the benefits from the corporation's success in the restaurant business ultimately accrued to the trust, the trust's action in guaranteeing the corporation's performance of the lease agreement was within the powers granted to the trust. [Transamerican Leasing Co. v. Three Bears, Inc., 586 S.W.2d 472 \(Tex. 1979\).](#)

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[\[FN9\] Hoffman v. First Virginia Bank of Tidewater, 220 Va. 834, 263 S.E.2d 402 \(1980\).](#)

-

[\[FN10\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

-

[\[FN11\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

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[\[FN12\] In re Munger's Estate, 63 N.J. 514, 309 A.2d 205 \(1973\).](#)

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§ 454. Improvements of trust property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

The authority of a trustee to make investment of trust funds may, under particular circumstances, give him or her authority to make improvements upon property held as part of the trust estate, improvements being regarded as tantamount to investments.^[FN1] Where the trust charge is to control and manage the trust estate as the trustor could him- or herself, so as to provide the beneficiary with care and maintenance during his or her life, and where an improvement is the only apparent way to raise sufficient income from the trust estate to carry out the trustor's object, the trustee has authority under the charge to make such an improvement.^[FN2]

^[FN1] [Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\).](#)

- As to the authority of a trustee to make improvements, generally, see [§ 419](#).

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^[FN2] [In re Lueft, 129 Wis. 534, 109 N.W. 652 \(1906\).](#)

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§ 455. Loans

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(1\)](#), [222](#)

A.L.R. Library

[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

Trust investments in certain loans have long been recognized as a valid practice,^[FN1] and indeed, it is the duty of a trustee to properly invest trust funds in loans unless he or she otherwise invests them.^[FN2] The duty to lend the trust funds at interest may be expressly enjoined by the terms of the trust.^[FN3] General principles of trust law include a strong presumption in favor of trustees accepting collateral security when making a loan.^[FN4]

Unsecured loans or loans secured only by a prospective or contingent interest in the trust res cannot properly be made to beneficiaries of the trust, at least where they are not entitled to receive any part of the income or principal, except an annuity, until the termination of the trust.^[FN5] An unsecured loan to a beneficiary is not justified because it is made to enable him or her to pay taxes on income that he or she receives from the trust, even though a trustor may not have anticipated such a tax, and the tax reduces net sums available to the beneficiary,^[FN6] at least where a proper construction of the trust instrument leads to the conclusion that the trustor intended primarily a particular distribution of his or her estate, although including annual payments to the beneficiary,^[FN7] rather than primarily the provision for the maintenance, support, and education of the beneficiary.^[FN8] However, there is no absolute rule that trustees must accept collateral security in addition to personal security in lending trust assets.^[FN9]

^[FN1] [Mason v. Mason, 33 Ga. 435, 1863 WL 1025 \(1863\).](#)

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^[FN2] [Leach v. Gray, 201 Ala. 47, 77 So. 341, 7 A.L.R. 890 \(1917\); Bishop v. People's Bank & Trust Co., 218 Ky. 508, 291 S.W. 718, 51 A.L.R. 1258 \(1927\).](#)

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^[FN3] [Bishop v. People's Bank & Trust Co., 218 Ky. 508, 291 S.W. 718, 51 A.L.R. 1258 \(1927\).](#)

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^[FN4] [Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 \(1986\).](#)

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^[FN5] [Rogers v. English, 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812 \(1943\).](#)

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^[FN6] [Rogers v. English, 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812 \(1943\).](#)

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[\[FN7\] Rogers v. English, 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812 \(1943\).](#)

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[\[FN8\] Henton's Trustees v. Henton, 244 Ky. 377, 50 S.W.2d 964 \(1932\).](#)

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[\[FN9\] Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 \(1986\).](#)

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§ 456. Loans—To trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(1\)](#), [222](#)

A trustee has a duty of protecting the client's assets from wasteful depletion, which prohibits the trustee from making ill-advised loans from the trust for the benefit of the trustee.[\[FN1\]](#) Although a trustee who loans money to him- or herself may be found to have breached the duty of loyalty,[\[FN2\]](#) such a loan is not considered to be per se improper.[\[FN3\]](#) Statutes sometimes prohibit a trustee from making loans to him- or herself.[\[FN4\]](#)

A trustee's transfers of funds from a trust into his or her own account are not loans even though the trustee returns the funds with interest above bank rates, where contemporaneous notations indicate otherwise, the estate receives no notes or other loan-evidencing documentation, the trust instrument does not expressly authorize the trustee to make loans to him- or herself, and the trustee never seeks court approval.[\[FN5\]](#)

[\[FN1\] In re Cohen, 8 P.3d 429 \(Colo. 1999\).](#)

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[\[FN2\] § 349.](#)

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[\[FN3\] Helman v. Mendelson, 138 Md. App. 29, 769 A.2d 1025 \(2001\).](#)

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[\[FN4\] Office of Disciplinary Counsel v. Kurtz, 82 Ohio St. 3d 55, 1998-Ohio-278, 693 N.E.2d 1080 \(1998\)](#)
(absent express authorization to make loans to the trustee, the trustee was prohibited by statute from doing so).

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[\[FN5\] Office of Disciplinary Counsel v. Kurtz, 82 Ohio St. 3d 55, 1998-Ohio-278, 693 N.E.2d 1080 \(1998\).](#)

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§ 457. Loans—Secured by mortgages

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [222](#)

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

The general rule, sometimes stated by statute, is that trust investments may be made in loans secured by mortgages that are a first encumbrance on real estate,[FN1] where the value of the mortgaged property affords an adequate margin of safety.[FN2] In many jurisdictions, trust investments in participations in mortgages may, under certain safeguards, be made.[FN3]

Where a trustee is given a discretionary power in respect of the investment of trust funds, he or she may invest in a mortgage which is not a legal investment if the loan is one which a prudent person might make for a trust.[FN4]

Ordinarily, a second mortgage is not a proper investment for a trustee.[FN5] Nevertheless, not all second liens or second mortgages are to be condemned.[FN6]

Caution: A direction to keep a trust estate invested in "interest-bearing securities" does not authorize an investment in a nonlegal mortgage.[FN7]

[FN1] In re Lawson's Will, 215 Iowa 752, 244 N.W. 739, 88 A.L.R. 316 (1932); Bishop v. People's Bank & Trust Co., 218 Ky. 508, 291 S.W. 718, 51 A.L.R. 1258 (1927); In re Heyl's Estate, 331 Pa. 202, 200 A. 617, 117 A.L.R. 867 (1938).

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[FN2] § 496.

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[FN3] §§ 463 to 466.

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[FN4] In re Lawson's Will, 215 Iowa 752, 244 N.W. 739, 88 A.L.R. 316 (1932).

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[FN5] Estate of Collins, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (2d Dist. 1977).

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[FN6] Pike v. Camden Trust Co., 128 N.J. Eq. 414, 16 A.2d 634 (Ch. 1940).

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[FN7] In re Allen's Estate, 218 Wis. 349, 259 N.W. 848 (1935).

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§ 458. Public securities and obligations

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

Investment by a trustee in public securities and obligations, particularly those of his or her own state or of the United States, have long been recognized as proper subjects for trust fund investments.[\[FN1\]](#)

Investment in securities of municipal or other public corporations or divisions may be permitted by local statutes,[\[FN2\]](#) and investment in the securities and obligations of certain other states may be permitted under statute or the terms of the trust, although it seems that in the absence of such authorization, investment in securities of this kind is not proper.[\[FN3\]](#)

Caution: While public securities are proper subjects for trust fund investments, some courts may impose an obligation on the trustee not to place all his or her eggs in that one basket, particularly where there is a duty to diversify.[\[FN4\]](#)

[\[FN1\]](#) [Lamar v. Micou](#), 112 U.S. 452, 5 S. Ct. 221, 28 L. Ed. 751 (1884); [In re Buhl's Estate](#), 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569 (1920).

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[\[FN2\]](#) [Home Savings & Loan Co. v. Strain](#), 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 (1935).

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[\[FN3\]](#) [Pabst v. Goodrich](#), 133 Wis. 43, 113 N.W. 398 (1907).

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[\[FN4\]](#) [Baker Boyer Nat. Bank v. Garver](#), 43 Wash. App. 673, 719 P.2d 583 (Div. 3 1986).

- As to the duty to diversify investments see §§ [490](#) and [491](#).

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§ 459. Foreign investments

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

In the absence of authorization by statute or by the terms of the trust, there is some disagreement in the matter of the propriety of trust investments in foreign property and securities and obligations, that is, where the property or debtor is outside the state.[FN1] Some courts, while not establishing or following an inflexible rule on the subject, refuse their sanction to such investments,[FN2] and some hold them to be at the peril of the trustee,[FN3] in the absence of special circumstances making such investments advisable or necessary.

The desirability of investment in the place of residence of beneficiaries in order to accomplish the purpose of the trust, the size of the trust estate, the difficulty of investing it, the proximity of the foreign investment, as where it is in a nearby town, and existing foreign investments held by the trust estate, are, however, all special circumstances tending to justify foreign investments within the rule stated above.[FN4] Other courts determine the propriety of foreign and domestic investments by the same tests applicable to investments within the state, namely, good faith and the care, diligence, and skill of an ordinarily prudent person.[FN5]

It has been asserted that it is the tendency to broaden the powers of trustees with respect to trust investments in other states,[FN6] and such investments frequently are authorized by statute.[FN7]

[FN1] [Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

- As to foreign corporate and railroad investments, see §§ [460](#) to [462](#).

[\[FN2\] Wilcox v. Hollar, 115 Kan. 27, 222 P. 758 \(1924\).](#)

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[\[FN3\] Pabst v. Goodrich, 133 Wis. 43, 113 N.W. 398 \(1907\).](#)

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[\[FN4\] In re Pessano's Estate, 269 A.D. 337, 55 N.Y.S.2d 786 \(1st Dep't 1945\), order aff'd, 296 N.Y. 564, 68 N.E.2d 866 \(1946\).](#)

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[\[FN5\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

- As to the good faith of the trustee generally in his or her investments, see §§ [467](#) to [470](#).

- As to the care, diligence, and skill of a trustee generally in his or her investments, generally, see §§ [476](#) to [484](#).

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[\[FN6\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

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[\[FN7\] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

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(2) Corporate Securities

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§ 460. Generally

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West's Key Number Digest, [Trusts](#) [217.4](#)

A.L.R. Library

[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

The terms of the trust instrument or declaration may give the trustee authority to invest in stocks and bonds of private corporations, and the statutes regulating investment of trust funds may permit investment thereof in such securities, but aside from such authorization, or of authorization by order of court, there is still some diversity of opinion with respect to the propriety of trust investments in corporate stocks and bonds.

Under the older or so-called "New York" rule of trust investments,[[FN2](#)] a trustee was not permitted to invest trust funds in stocks and bonds of private and quasi-public corporations,[[FN3](#)] in the absence of authorization by the terms of the trust, statute, or order of court, even where such stocks or bonds are considered good investments by prudent businesspersons who evince their confidence by investing their own funds therein.[[FN5](#)] Such an unauthorized investment was considered a breach of trust and was at the personal risk of the trustee.[[FN6](#)]

The more modern approach to trust investment in stocks is exemplified by "prudent man" statutes and by the more liberal "Massachusetts" rule of trust investments,[[FN7](#)] which permits a trustee acting with that measure of care, diligence, and skill required of a trustee with respect to trust investments to invest funds in his or her hands in dividend- or interest-paying corporate stocks or bonds.[[FN8](#)]

Under the view that trust investments may be made in corporate stock under the terms of the trust, where they give the trustee exceedingly broad power and discretion with respect to such investments,[[FN9](#)] such an investment may be made by a trustee in good faith and with prudence in bank stock.[[FN10](#)]

Under certain circumstances, investments in the stock of foreign corporations have been permitted, but there is also authority to the contrary.[[FN11](#)]

[\[FN2\] § 441.](#)

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[\[FN3\] Robertson v. Robertson's Trustee, 130 Ky. 293, 113 S.W. 138 \(1908\); Dunnegan Grove Cemetery v. Farm & Home Sav. & Loan Ass'n, 93 S.W.2d 95 \(Mo. Ct. App. 1936\); Mertz v. Guaranty Trust Co. of New York, 247 N.Y. 137, 159 N.E. 888, 57 A.L.R. 1114 \(1928\); Home Savings & Loan Co. v. Strain, 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 \(1935\); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\); Davis v. Davis Trust Co., 106 W. Va. 228, 145 S.E. 588 \(1928\); In re Leitsch's Will, 185 Wis. 257, 201 N.W. 284, 37 A.L.R. 547 \(1924\).](#)

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[\[FN5\] Randolph v. East Birmingham Land Co., 104 Ala. 355, 16 So. 126 \(1894\).](#)

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[\[FN6\] Home Savings & Loan Co. v. Strain, 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 \(1935\).](#)

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[\[FN7\] § 441.](#)

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[\[FN8\] Lamar v. Micou, 112 U.S. 452, 5 S. Ct. 221, 28 L. Ed. 751 \(1884\); In re Eigenmann's Guardianship, 214 Ind. 92, 14 N.E.2d 585, 116 A.L.R. 432 \(1938\); Chase v. Pevear, 383 Mass. 350, 419 N.E.2d 1358 \(1981\); In re Buhl's Estate, 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569 \(1920\).](#)

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[\[FN9\] § 461.](#)

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[\[FN10\] Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\).](#)

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[\[FN11\] § 459.](#)

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

The terms of a trust may authorize[\[FN1\]](#) or deny,[\[FN2\]](#) expressly or by implication,[\[FN3\]](#) to a trustee the power to make or retain trust investments in corporate stocks and bonds. The object of construction of a trust

instrument in this connection is to determine the intention of the trustor from a reading of the entire instrument.[FN4]

Although a trust may direct the continuance of an existing investment in corporate stocks or bonds, departure from it in an emergency may be justifiable.[FN5] The terms of the trust may authorize investments in corporate stocks and bonds even where they are nonlegal investments, that is, not authorized by trust investment statutes,[FN6] but such authorization by the terms of the trust must be made with the utmost clarity and established by the trustee.[FN7]

[FN1] Sebree v. Rosen, 349 S.W.2d 865 (Mo. 1961); Mertz v. Guaranty Trust Co. of New York, 247 N.Y. 137, 159 N.E. 888, 57 A.L.R. 1114 (1928); Home Savings & Loan Co. v. Strain, 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 (1935); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 (1923).

[FN2] In re Trusteeship of First Minneapolis Trust Co., 202 Minn. 187, 277 N.W. 899 (1938).

[FN3] In re Baldwin's Will, 157 Misc. 692, 284 N.Y.S. 754 (Sur. Ct. 1935), aff'd, 250 A.D. 767, 295 N.Y.S. 480 (2d Dep't 1937).

[FN4] Title Guarantee & Trust Co. v. Bedford, 125 Conn. 349, 5 A.2d 852, 122 A.L.R. 654 (1939).

- When shares of stock in a family business are put in trust for the benefit of the family, it is not necessary that the intent of the settlor that the trust hold nondividend paying stock be expressed in the trust document if it is evident from the circumstances in which the trust was created. Shear v. Gabovitch, 43 Mass. App. Ct. 650, 685 N.E.2d 1168 (1997).

[FN5] Mertz v. Guaranty Trust Co. of New York, 247 N.Y. 137, 159 N.E. 888, 57 A.L.R. 1114 (1928).

[FN6] Title Guarantee & Trust Co. v. Bedford, 125 Conn. 349, 5 A.2d 852, 122 A.L.R. 654 (1939); Fox v. Harris, 141 Md. 495, 119 A. 256, 26 A.L.R. 806 (1922).

[FN7] Home Savings & Loan Co. v. Strain, 130 Ohio St. 53, 3 Ohio Op. 104, 196 N.E. 770, 99 A.L.R. 903 (1935); In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 (1923).

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§ 462. Exchange incident to reorganizations, consolidations, and mergers

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[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

Where a trustee is directed or authorized by the terms of the trust or by statute to continue an existing investment in stock, he or she may, upon exchange or disposition of such stock incident to a corporate reorganization, merger, or consolidation, exchange the old stock for new and retain the new stock, where the consequence is merely formal and is not a substantial departure from the intention of the trustor that the investment continue in a certain enterprise without substantial change, and not in a particular corporate entity.[FN1]

The intention of the trustor to prohibit only substantial and not formal changes in trust investments in corporate stock is indicated by a direction to retain the personal estate in its present form of investment,[FN2] or a direction to retain investments in the capital stock of the business of a corporation.[FN3] No impropriety attaches to such an exchange because the new stock, under the corporate bylaws, must first be offered to the corporation at a price to be fixed by agreement or by appraisal by the directors before sale, where the old stock was similarly restricted except that the price was to be fixed by a third person, to be selected.[FN4]

A retention provision is not applicable where the company whose stock was involved was merged into a company whose stock was not substantially equivalent to the retained stock.[FN5] Where, the reorganization, merger, or consolidation constitutes a transformation of the essence of an enterprise contemplated by the trustor in making such a direction, the trustee, although accepting the substitute stock, need not retain it, and, under some circumstances at least, is under a duty to dispose of it.[FN6]

Where a discretion vested in a trustee by the terms of a trust is broad enough to authorize him or her to invest in nonlegal investments, that is, those not authorized by the terms of the trust, statute, or order of court, a trustee may, incident to a reorganization, exchange existing stocks and bonds for new stocks and bonds although the latter are "nonlegal" investments.[FN7]

[FN1] [Moeller v. English, 118 Conn. 509, 173 A. 389, 93 A.L.R. 1513 \(1934\); Mazzola v. Myers, 363 Mass. 625, 296 N.E.2d 481 \(1973\).](#)

[\[FN2\] Moeller v. English, 118 Conn. 509, 173 A. 389, 93 A.L.R. 1513 \(1934\).](#)

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[\[FN3\] Anderson v. Bean, 272 Mass. 432, 172 N.E. 647, 72 A.L.R. 959 \(1930\).](#)

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[\[FN4\] Anderson v. Bean, 272 Mass. 432, 172 N.E. 647, 72 A.L.R. 959 \(1930\).](#)

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[\[FN5\] Hirsh v. Hirsh, 209 Va. 630, 166 S.E.2d 286 \(1969\).](#)

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[\[FN6\] Mertz v. Guaranty Trust Co. of New York, 247 N.Y. 137, 159 N.E. 888, 57 A.L.R. 1114 \(1928\).](#)

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[\[FN7\] Title Guarantee Loan & Trust Co. v. Woodward, 238 Ala. 304, 191 So. 363, 129 A.L.R. 1301 \(1939\).](#)

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§ 463. Generally

West's Key Number Digest

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Definition: A common trust fund in its technical sense means a fund composed of funds contributed by estates, trusts, and guardianships established, maintained, and operated by a bank or trust company for the exclusive use

of its own estates, trusts, and guardianships, under authority or permission of the law of the state in which the bank or trust company is located, according to rules and regulations promulgated by the Board of Governors of the Federal Reserve System.[FN1]

Common trust funds are utilized by trust companies having large sums of money in trust for several trusts; combinations of these trust moneys in a single investment, or in a group of investments, present possibilities not present where each trust must be kept separate for the purpose of investment. Such possibilities clearly relate to such matters as magnitude of the investment, financial return, control of subjects of investment, and promotion of enterprises.[FN2] Other possibilities of advantage include less overhead expense in making and managing comparatively large investments, a greater availability of safe and income-producing investments for trust funds, diversification of investments for each trust, and the protection of all participants through a common trustee having no personal interest to serve in conflict with its duties as a trustee.[FN3]

There are, however, a number of objections to the use of common trust funds. The first objection that occurs with respect to the investment of a common trust fund or a trust fund in a participating share or part of a single investment or group of investments is that it necessarily involves a commingling of the trust funds with other funds.[FN4] Another objection is that the identity of the trust funds may not be sufficiently preserved; they may not continue earmarked so that they can be known, traced, and, hence, not lost.[FN5] A third objection is the possibility of self-dealing and divided loyalty involved in the practice.[FN6]

A trustee can sell shares of its stock and invest the proceeds in its common trust funds without breaching its fiduciary duty to achieve investment results at least equal to those a prudent investor would have achieved.[FN7]

An investment in mutual funds by a trustee of a common trust fund does not constitute delegation of the trustee's management duties in violation of statutes and regulations, since the trustee still maintains ultimate managerial control of the investment by retaining paramount authority to buy, retain, or sell shares of the mutual fund investment.[FN8]

[FN1] [Mechanicks Nat. Bank of Concord v. D'Amours, 100 N.H. 461, 129 A.2d 859, 64 A.L.R.2d 260 \(1957\).](#)

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[FN2] [In re Union Trust Co. of New York, 219 N.Y. 514, 114 N.E. 1057 \(1916\).](#)

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[FN3] [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\).](#)

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[FN4] [In re Hodges' Estate, 66 Vt. 70, 28 A. 663 \(1894\).](#)

- As to the duty of a trustee not to commingle trust funds with the trustee's own, see [§ 351](#).

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[FN5] [Chapter House Circle of King's Daughters v. Hartford Nat. Bank & Trust Co., 121 Conn. 558, 186 A. 543, 106 A.L.R. 260 \(1936\).](#)

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[FN6] [Chapter House Circle of King's Daughters v. Hartford Nat. Bank & Trust Co., 121 Conn. 558, 186 A. 543, 106 A.L.R. 260 \(1936\).](#)

- As to the duty of singleness of loyalty, see [§ 350](#).

- As to the duty of loyalty with respect to trust investments, see [§ 467](#).

- As to self-dealing by a trustee, see [§ 351](#).

- As to self-dealing with respect to common trust funds, see [§ 474](#).

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[FN7] [In re Strong, 289 A.D.2d 798, 734 N.Y.S.2d 668 \(3d Dep't 2001\).](#)

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[\[FN8\] Matter of OnBank & Trust Co., 166 Misc. 2d 763, 637 N.Y.S.2d 647 \(Sur. Ct. 1996\)](#), order aff'd, [227 A.D.2d 20, 649 N.Y.S.2d 592 \(4th Dep't 1996\)](#), rev'd, [90 N.Y.2d 725, 665 N.Y.S.2d 389, 688 N.E.2d 245 \(1997\)](#).

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§ 464. Statutory authorization; Uniform Common Trust Fund Act

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[Construction of the Uniform Common Trust Fund Act, 64 A.L.R.2d 268](#)

Although common trust funds were permitted in some states even in the absence of statutory authorization,[\[FN1\]](#) any doubt about the legality of such funds was eliminated by the adoption of statutes regulating such funds.[\[FN2\]](#) Under the Uniform Common Trust Fund Act, qualified banks are authorized to set up common trust funds from the assets of particular trusts which contain no prohibition against investment in common trust funds.[\[FN3\]](#) Investment by a national bank acting as sole trustee of a testamentary trust in a common trust fund established by it pursuant to a statute following the Uniform Common Trust Fund Act is not

restricted by the general statute governing investments by trustees so as to limit an investment in the common trust fund to a part of the assets of the trust.[FN4]

A national bank acting as sole trustee of a testamentary trust may invest all or any part of the assets the Uniform Common Trust Fund Act, and administered consistently with a detailed written plan adopted in accordance with Federal Reserve Board regulations, where the will contains no provision expressly or impliedly prohibiting such investment.[FN5]

[FN1] § § [463](#), [465](#).

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[FN2] [Mechanicks Nat. Bank of Concord v. D'Amours](#), 100 N.H. 461, 129 A.2d 859, 64 A.L.R.2d 260 (1957).
- A common trust fund is a statutory right that was nonexistent under common law and, thus, a court must not, when interpreting the statutory right, restrict or expand upon the legislative creation where a literal construction of the statute complies with the apparent purpose of the law. [Matter of OnBank & Trust Co.](#), 166 Misc. 2d 763, 637 N.Y.S.2d 647 (Sur. Ct. 1996), order aff'd, 227 A.D.2d 20, 649 N.Y.S.2d 592 (4th Dep't 1996), rev'd on other grounds, 90 N.Y.2d 725, 665 N.Y.S.2d 389, 688 N.E.2d 245 (1997).

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[FN3] [Uniform Common Trust Fund Act § 1](#).

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[FN4] [Mechanicks Nat. Bank of Concord v. D'Amours](#), 100 N.H. 461, 129 A.2d 859, 64 A.L.R.2d 260 (1957).

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[FN5] [Mechanicks Nat. Bank of Concord v. D'Amours](#), 100 N.H. 461, 129 A.2d 859, 64 A.L.R.2d 260 (1957).

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§ 465. Investment in absence of legislation

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The practice of combining trust funds has long been recognized as proper for a trustee.^[FN1] Thus, the investment of trust funds in a share or part of a single security or pool of securities, where the trustee holds the security or securities and assigns participations therein to a trust or trusts being administered by the trustee, has been upheld in a number of cases, even in the absence of express authorization by statute or the terms of the trust.^[FN2] The view has been taken that the practice should be validated, if at all, at least where it involves the trustee's taking the securities in its own name without disclosure of the trust on the face of the securities,^[FN3] only by carefully considered legislation.^[FN4] Also, it has been held that a trustee administering plural trusts cannot invest them together, prorating the income, since it is only by keeping them separate that losses and charges can be allocated properly.^[FN5]

While it has been held that there is no legal inhibition against the action of a trustee in setting up a special or independent trust in property other than its own and in becoming the trustee for the securities issued thereunder, even though done for the sole purpose of selling such securities as an investment to other trusts for which he or she may also be trustee,^[FN6] a trustee cannot set up a trust in its own property or securities for the purpose of selling participations therein to trusts which it is administering.^[FN7]

^[FN1] [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\).](#)

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^[FN2] [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\).](#)

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^[FN3] [§ 470.](#)

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^[FN4] [Chapter House Circle of King's Daughters v. Hartford Nat. Bank & Trust Co., 121 Conn. 558, 186 A. 543, 106 A.L.R. 260 \(1936\).](#)

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^[FN5] [Moore v. McKenzie, 112 Me. 356, 92 A. 296 \(1914\).](#)

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^[FN6] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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^[FN7] [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

- As to a duty not to self-deal, see § § [468](#) and [469](#).

- As to a duty not to take profits, benefits, or advantages in the administration of a trust, see [§ 351](#).

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

The propriety of trust investments in common trust funds or participations may depend upon the terms of the trust, which, on the one hand, may authorize,[\[FN1\]](#) or on the other hand, may prohibit[\[FN2\]](#) such trust investments.

While, according to some decisions, a direction to invest in first-class interest-bearing mortgages requires an investment in mortgages owned entirely by the trustees for the trust,[\[FN3\]](#) there is authority for the view that such a direction is complied with by an investment in a participation in a mortgage pool consisting entirely of mortgages possessing the requisites of legal trust investments.[\[FN4\]](#)

[\[FN1\]](#) [In re D'Happart's Estate, 132 Pa. Super. 326, 200 A. 927 \(1938\).](#)

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[\[FN2\]](#) [In re Shaw's Estate, 122 N.J. Eq. 536, 195 A. 525 \(Prerog. Ct. 1937\).](#)

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[\[FN3\]](#) [In re Mendel's Will, 164 Wis. 136, 159 N.W. 806 \(1916\).](#)

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[\[FN4\]](#) [In re D'Happart's Estate, 132 Pa. Super. 326, 200 A. 927 \(1938\).](#)

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3. Good Faith of Trustee

a. In General

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§ 467. Generally; loyalty

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Investments of trust property and funds must be attended by that degree of good faith required of a trustee generally. [FN1] Such investments must be free from any element of favoritism.[FN2]

The duty of loyalty imposed upon a trustee is not necessarily violated by the fact that he or she considers the social consequences of investment decisions; if the costs of considering such consequences are de minimis, the trustee ordinarily will not have transgressed that duty.[FN3]

Good faith and an honest exercise of judgment, based on an actual consideration of existing conditions, is required of a trustee who changes trust investments upon the ground that the existing investments were nonlegal, unauthorized, or unsafe.[FN4] But a trustee's breach of a testamentary trust by failing to sell an apartment building and to invest the proceeds, as directed by the trust instrument, was found to be technical in nature where it was not done in bad faith.[FN5]

[FN1] [Lamar v. Micou](#), 112 U.S. 452, 5 S. Ct. 221, 28 L. Ed. 751 (1884); [Creed v. McAleer](#), 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 (1931); [Delafield v. Barret](#), 270 N.Y. 43, 200 N.E. 67, 103 A.L.R. 941 (1936).

- As to good faith of trustees, generally, see §§ [349](#) to [359](#).

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[\[FN2\] Hines v. Ayotte, 135 Me. 103, 189 A. 835 \(1937\).](#)

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[\[FN3\] Board of Trustees of Employees' Retirement System of City of Baltimore v. Mayor and City Council of Baltimore City, 317 Md. 72, 562 A.2d 720 \(1989\).](#)

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[\[FN4\] In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\)](#)

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[\[FN5\] Jones v. Heritage Pullman Bank and Trust Co., 164 Ill. App. 3d 596, 115 Ill. Dec. 653, 518 N.E.2d 178 \(1st Dist. 1987\).](#)

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

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[Self-Dealing by Trustee, 38 Am. Jur. Proof of Facts 3d 279](#)

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Petition or application—For removal of trustee, injunctive relief, and damages—Self-dealing trustee. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 209

Answer—Defense to action for self-dealing—Respondent did not engage in self-dealing. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 213

The general rule which condemns dealings by a trustee in his or her own interest to the prejudice of the interests of the trust estate^[FN1] applies to investments of trust property or funds.^[FN2] Generally, unless so authorized by the terms of the trust,^[FN3] a trustee cannot properly invest trust property or funds in the purchase of property owned by him or her or in which he or she has an interest,^[FN4] of property of a corporation in which he or she is interested as a stockholder or officer,^[FN5] or of securities in which he or she is interested by way of a commission, promotion, or profit^[FN6] or through the interest of his spouse or a relative therein.^[FN7] Furthermore, it has been said that the law has moved from the common-law presumptive avoidance of transactions involving trustee self-dealing to one of limited legislative approval of trustee banks self-dealing in situations involving uninvested trust funds.^[FN8]

In the absence of such approval, however, a trustee is liable to the trust estate for any loss from an investment involving self-dealing,^[FN9] or the transaction may within a reasonable time be avoided.^[FN10]

Generally, the prohibition against self-dealing does not depend upon proof of bad faith, but is absolute so as to avoid the possibility of fraud and the temptation of self-interest.^[FN11] It is generally immaterial to the liability of the trustee or the voidability of the transaction that the trustee acted in good faith,^[FN12] and paid a valuable consideration;^[FN13] neither is a causal connection between the trustee's self-dealing and the loss or depreciation incurred always necessary.^[FN14] However, in some jurisdictions, the prudent person rule, not a per se rule, governs trustee self-dealing.^[FN15]

A beneficiary may avoid the transaction although no loss occurred from the investment.^[FN16]

^[FN1] § 351.

^[FN2] [Driver v. Blakeley](#), 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 (1940); [Wheeler By and Through Wheeler v. Mann](#), 763 P.2d 758 (Utah 1988); [In re Cosgrove's Will](#), 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 (1941).

^[FN3] [Finley v. Exchange Trust Co.](#), 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 (1938).

^[FN4] [Magruder v. Drury](#), 235 U.S. 106, 35 S. Ct. 77, 59 L. Ed. 151 (1914); [Dean v. Shingle](#), 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156 (1926); [Old Dominion Copper Mining & Smelting Co. v. Bigelow](#), 203 Mass. 159, 89 N.E. 193 (1909), *aff'd*, 225 U.S. 111, 32 S. Ct. 641, 56 L. Ed. 1009 (1912); [In re Trusteeship of Stone](#), 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 (1941).

- As to trust investments by a corporate trustee in its own stock, see [§ 473](#).

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[\[FN5\] In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 \(1936\).](#)

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[\[FN6\] In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

- As to the application of the rule against self-dealing to investments in corporate stock, see § § [472](#), [473](#).

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[\[FN7\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN8\] Matter of Estate of Ames, 152 Wis. 2d 217, 448 N.W.2d 250 \(Ct. App. 1989\).](#)

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[\[FN9\] Fairhope Single Tax Corp. v. Rezner, 527 So. 2d 1232 \(Ala. 1987\); In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[\[FN10\] First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\); In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\); In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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[\[FN11\] Wheeler By and Through Wheeler v. Mann, 763 P.2d 758 \(Utah 1988\).](#)

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[\[FN12\] Estate of Pitzer, 155 Cal. App. 3d 979, 202 Cal. Rptr. 855 \(2d Dist. 1984\); In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\); In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 \(1936\).](#)

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[\[FN13\] In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 \(1936\).](#)

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[\[FN14\] In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[\[FN15\] Matter of Estate of Ames, 152 Wis. 2d 217, 448 N.W.2d 250 \(Ct. App. 1989\).](#)

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[\[FN16\] First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\); In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\); Wheeler By and Through Wheeler v. Mann, 763 P.2d 758 \(Utah 1988\).](#)

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3. Good Faith of Trustee

a. In General

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§ 469. Self-dealing—Consent of beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#)

Forms

Answer—Defense to action for self-dealing—Respondent's actions authorized by beneficiary. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 211

Consent to self-dealing must be clearly proven and made with a full knowledge of all the material particulars and circumstances, including the full extent of the beneficiary's legal rights.[FN1] Even if the beneficiaries consent to self-dealing, the transaction is voidable unless the trustee has disclosed to the beneficiaries all the material facts which he or she knew or should have known concerning the transaction and the transaction was fair and reasonable in all respects.[FN2]

Exculpatory clauses in a trust agreement concerning matters relating to the management of the trust corpus, giving trustees broad discretion to exercise powers and rights incident to ownership of trust property, but which do not grant to the trustees the right to prefer their own interests to those of the trust, or to appropriate for their own account trust opportunities, will be assumed to have established a good-faith business judgment in the handling of trust investments.[FN3]

[FN1] [Renz v. Beeman, 589 F.2d 735 \(2d Cir. 1978\).](#)

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[FN2] [Wheeler By and Through Wheeler v. Mann, 763 P.2d 758 \(Utah 1988\).](#)

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[FN3] [Renz v. Beeman, 589 F.2d 735 \(2d Cir. 1978\).](#)

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§ 470. Failure to indicate trust character of investment

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#)

In the absence of a provision in the trust instrument authorizing the trustee to take an investment in his or her own name without indication of his or her fiduciary capacity,[FN1] it is the rule applicable, with some limitations,[FN2] to corporate trustees as well as to individual trustees[FN3] that trust investments should, and in general must, be taken in a form indicative of their trust character; it is improper and a breach of trust for a trustee to take a trust investment in his or her own name without indicating his trust capacity.[FN4] This rule, sometimes incorporated into the trust investment statutes,[FN5] is predicated on the fundamental duties of a trustee not to deal with the trust estate on his or her own account, and not to commingle the trust property or funds with his or her own.[FN6]

[FN1] [Miller v. Pender](#), 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 (1943).

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[FN2] [In re Saeger's Estate](#), 340 Pa. 73, 16 A.2d 19, 131 A.L.R. 1152 (1940).

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[FN3] [First Nat. Bank v. Basham](#), 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 (1939); [Chapter House Circle of King's Daughters v. Hartford Nat. Bank & Trust Co.](#), 121 Conn. 558, 186 A. 543, 106 A.L.R. 260 (1936); [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940).

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[FN4] [Mitchell v. Moore](#), 95 U.S. 587, 24 L. Ed. 492 (1877); [Miller v. Pender](#), 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 (1943).

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[\[FN5\] In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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[\[FN6\] First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\); In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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b. Good Faith as to Particular Investment

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§ 471. Generally; loans and mortgages

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(7\)](#)

In regard to trust investments in loans or mortgage securities, as in any other case, the trustee must exercise good faith^[FN1] and avoid self-dealing with respect thereto.^[FN2] A trustee cannot, at least without the consent of the beneficiary, properly borrow for him- or herself from the trust estate,^[FN3] or invest trust funds in mortgages on his or her private property,^[FN4] and, as a general rule, cannot properly lend trust funds to, or invest such funds in mortgages on the property of, his or her spouse or other close relatives.^[FN5] Consent to such investments, however, when given with full knowledge by a beneficiary of all pertinent facts and circumstances, or subsequent ratification thereof, will prevent the beneficiary from objecting to the impropriety of the investment.^[FN6]

A trustee cannot properly take mortgage securities, purchased with trust funds, in his or her own name.^[FN7] Where investments are purchased by a trustee for the benefit of a trust, it is necessary not only that such purchases be made for the trust, but also, in order to avoid a charge of self-dealing, that immediate transfer

and allocation of the securities to the trust for which they were purchased be made, accompanied by clear evidence that they have been so purchased and allocated.[FN8]

A trustee cannot invest trust funds in notes and mortgages purchased from a bank of which he is a director and officer, especially at a time when the bank is hard pressed in maintaining its required cash reserve, and bank assets are, due to a depression, generally frozen.[FN9] And a loan of trust funds by a trustee to a corporation of which he is an officer has been held to be a conversion of the funds.[FN10]

[FN1] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[FN2] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\); Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

- As to a rule against self-dealing, see §§ [468](#), [469](#).

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[FN3] [Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[FN4] [Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[FN5] [In re Randolph, 134 N.Y.S. 1117 \(Sur. Ct. 1911\), aff'd, 150 A.D. 902, 135 N.Y.S. 1138 \(1st Dep't 1912\).](#)

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[FN6] [In re Cosgrove's Will, 236 Wis. 554, 295 N.W. 784, 132 A.L.R. 1514 \(1941\).](#)

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[FN7] [Chapter House Circle of King's Daughters v. Hartford Nat. Bank & Trust Co., 121 Conn. 558, 186 A. 543, 106 A.L.R. 260 \(1936\).](#)

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[FN8] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[FN9] [In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 \(1936\).](#)

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[FN10] [First Nat. Bank v. Selmsler Fuel & Grain Co., 55 S.D. 586, 227 N.W. 62 \(1929\).](#)

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§ 472. Corporate stock and bonds

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#), [217.4](#)

Forms

Complaint, petition, or declaration—By trustee—To rescind purchase of corporate stock—Illegal investment —
Good faith of trustee in making purchase. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 207

A trustee's duty of good faith in investing trust funds exists fully, of course, in respect of trust investments in corporate stock or bonds.[FN1] The prohibition of self-dealing by a trustee must not be violated by a trustee in any transaction relating to such an investment.[FN2] Where trust funds are invested in the securities of a corporation of which the trustee is an officer, it is the duty of the trustee to the cestui que trust not to do anything wrongful to the corporation which will diminish the value of the stock or securities held by him or her as trustee;[FN3] and obviously, wrongful conversion of the corporate assets is a violation of such a duty to the cestui que trust.[FN4]

The propriety of a trustee's owning stock in both his or her individual and his or her fiduciary capacities in the same corporation generally depends upon the circumstances.[FN5] The action of a trustee in accepting stock from a corporation, in which the trust estate had a controlling interest, with knowledge that the consequence of such issue would be to reduce the control of the trust estate in the corporation falls within the prohibition against self-dealing transactions with the trust, resulting in the obtaining of personal advantage from dealing with trust property.[FN6]

[FN1] [In re Balfe's Will, 245 A.D. 22, 280 N.Y.S. 128 \(2d Dep't 1935\).](#)

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[FN2] [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\); In re Johnson's Estate, 187 Wash. 552, 60 P.2d 271, 106 A.L.R. 217 \(1936\).](#)

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[FN3] [In re Auditore's Will, 249 N.Y. 335, 164 N.E. 242, 62 A.L.R. 551 \(1928\).](#)

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[FN4] [In re Auditore's Will, 249 N.Y. 335, 164 N.E. 242, 62 A.L.R. 551 \(1928\).](#)

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[FN5] [Wootten v. Wootten, 151 F.2d 147, 161 A.L.R. 1027 \(C.C.A. 10th Cir. 1945\).](#)

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[\[FN6\] Harvey v. Leonard, 268 N.W.2d 504 \(Iowa 1978\).](#)

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§ 473. Corporate stock and bonds—Investment by corporate trustee in own securities

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.4](#)

A.L.R. Library

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

The rule against self-dealing extends beyond a trust fund's trustee's dealing with him- or herself as an individual; a trustee breaches a duty of loyalty if the trustee lends funds to a corporation of which he or she owns all or a substantial part of the shares, or to a corporation of which he or she is a principal officer.[\[FN1\]](#)

Unless authorized to do so by the terms of the trust,[\[FN2\]](#) or by statute,[\[FN3\]](#) a corporate trustee cannot, as a general rule, properly make or retain a trust investment in its own stock or bonds. Such a transaction involves self-dealing, or at least divided loyalty.[\[FN4\]](#) The beneficiary may, however, by his or her consent, acquiescence, or ratification, be estopped from complaining of an investment by a trustee which might otherwise be improper.[\[FN5\]](#) Furthermore, a corporate trustee may be authorized by the terms of the trust to

make or retain trust investments in its own stock or bonds,[FN6] but such authorization does not arise merely from provisions for broad authority and discretion in the trustee in the administration of the trust.[FN7]

[FN1] [Wheeler By and Through Wheeler v. Mann, 763 P.2d 758 \(Utah 1988\).](#)

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[FN2] [In re Roche's Will, 245 A.D. 192, 281 N.Y.S. 77 \(4th Dep't 1935\).](#)

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[FN3] [In re Riker's Estate, 124 N.J. Eq. 228, 1 A.2d 213 \(Prerog. Ct. 1938\)](#), decree aff'd by, [125 N.J. Eq. 349, 125 N.J. Eq. 350, 125 N.J. Eq. 351, 5 A.2d 685 \(Ct. Err. & App. 1939\).](#)

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[FN4] [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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[FN5] [In re O'Brien's Estate, 18 Pa. D. & C. 501, 1933 WL 3585 \(Orphans' Ct. 1933\).](#)

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[FN6] [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\); Stephan v. Equitable Sav. and Loan Ass'n, 268 Or. 544, 522 P.2d 478 \(1974\).](#)

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[FN7] [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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§ 474. Common trust funds; participations

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 217.4

Trust investments in participations or common trust funds, when permissible,[\[FN1\]](#) must be made with that measure of good faith generally required of a trustee.[\[FN2\]](#) Such investments must be free from self-dealing by and profit to the trustee,[\[FN3\]](#) at least where there is not full disclosure to beneficiaries.[\[FN4\]](#) The trustee should have no beneficial ownership in the securities subject to the participations, so that he may not be tempted to self-dealing or profit-taking; purchases of securities by a trustee for the purpose of participating trust investments therein should be made for the benefit of the trusts, and immediate transfer and allocation of the securities to the trusts should be made,[\[FN5\]](#) with a full record thereof.[\[FN6\]](#) However, a corporate trustee's practice of taking investments purchased with advances out of its own funds, in its own name, earmarking them for future trust participations as trust funds for such purpose become available, and later making such trust investments, has been approved.[\[FN7\]](#)

Under the rule that a trustee can advance its own money, at a reasonable charge, to the trust estate in order to make a profitable investment for the trust estate, where such an advance is necessary by reason of the present unavailability of such money in the trust estate, such an advance may be made in the purchase of a participation for a trust estate.[\[FN8\]](#)

[\[FN1\]](#) §§ [463](#) to [466](#).

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[\[FN2\]](#) [First Nat. Bank v. Basham](#), 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 (1939); [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940); [Driver v. Blakeley](#), 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 (1940).

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[\[FN3\]](#) [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940).

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[\[FN4\]](#) [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940).

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[\[FN5\]](#) [In re Trusteeship of Stone](#), 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 (1941).

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[\[FN6\]](#) § § [475](#).

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[\[FN7\]](#) [First Nat. Bank v. Basham](#), 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 (1939).

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[\[FN8\]](#) [First Nat. Bank v. Basham](#), 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 (1939); [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940).

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§ 475. Common trust funds; participations—Record, indication, and notice of investment

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.4](#)

Trust investments in participations are proper only where the interest and proportion of the trust investment are sufficiently designated and recorded;[\[FN1\]](#) and statutes authorizing such investments ordinarily make such a requirement.[\[FN2\]](#) The fact that the securities in which the participating trust investments are made are payable to bearer is not fatal to the propriety of the participating investments on the ground that loss of identity of the separate trust interests results, where such interests are in fact evidenced, designated, or recorded.[\[FN3\]](#)

The recording of a trust investment in a participation must be sufficient to negative any charge of self-dealing by the trustee.[\[FN4\]](#) An appropriate method of creating such a sufficient record may be by a written resolution of the trustee board of directors providing for such purchase and allocation to the several trusts participating in it.[\[FN5\]](#) But some other recording may be sufficient if it is actually made in the due course of business and clearly discloses the participation.[\[FN6\]](#)

Statutes may require prompt notice of a participating investment to the beneficiary thereof, as essential to the validity of the investment.[\[FN7\]](#)

[\[FN1\]](#) [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\).](#)

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[\[FN2\]](#) [In re Guthrie's Estate, 320 Pa. 530, 182 A. 248, 103 A.L.R. 1186 \(1936\).](#)

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[\[FN3\]](#) [In re Union Trust Co. of New York, 219 N.Y. 514, 114 N.E. 1057 \(1916\).](#)

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[\[FN4\]](#) [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[\[FN5\] In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[\[FN6\] In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[\[FN7\] In re Roche's Will, 245 A.D. 192, 281 N.Y.S. 77 \(4th Dep't 1935\).](#)

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4. Care, Diligence, and Skill of Trustee

a. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 476. Generally; prudent person rule

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.2](#), [217.3\(5\)](#)

Forms

Complaint, petition, or declaration—By beneficiary—For damages from trustee's breach of fiduciary duty. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 206

The cardinal rule regarding the conduct of a fiduciary holding funds for investment is the "prudent man rule,"[\[FN1\]](#) which standard is recognized in some jurisdictions.[\[FN2\]](#) Consequently, the general rule that a trustee must exercise, in the administration of the trust, the care, diligence, and skill of an ordinary prudent person in the conduct of his or her private affairs under similar circumstances,[\[FN3\]](#) applies to the making,[\[FN4\]](#) retention, disposal, or change of trust investments.[\[FN5\]](#) The standard of care imposed upon a

trustee is that which a person of ordinary prudence would practice in the care of his or her own estate.[FN6] A broader rule has also been recognized; thus, it has been said that a trustee is required to be cautious, as well as careful and skillful, in the investment of trust assets.[FN7] But a trustee is not charged with forecasting economic conditions,[FN8] and if a trustee commits a breach of trust resulting in a loss, the trustee may not be chargeable with the amount of the loss if it would have occurred in the absence of a breach of trust.[FN9] Nor does a trustee have a duty to undertake estate planning.[FN10]

Observation: There is some authority to the effect that the prudent person rule may be waived by the settler.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

As constrained by the Prudent Person Rule at time of childrens' action for accounting and compensatory damages based on custodians' transfer of Uniform Transfers to Minors Act (UTMA) funds to other accounts, custodians of children's UTMA account had a duty to the children to use reasonable care and skill to preserve the UTMA funds. West's [V.C.A. § 31–37 et seq.](#); [Restatement \(Second\) of Trusts § 176](#). [Carlson v. Wells, 281 Va. 173, 705 S.E.2d 101 \(2011\)](#).

Prudent person rule, rather than Prudent Investor Rule, applied to father, as custodian of children's Uniform Transfers to Minors Act (UTMA) funds when he bought stock using UTMA funds in company he knew was on the brink of bankruptcy; although the General Assembly had previously enacted the Uniform Prudent Investor Act (UPIA), UPIA did not apply until UTMA was amended to incorporate the UPIA, which was after father's actions. West's [V.C.A. §§ 26–45.3 et seq., 26–45.13](#); § 31–48(B) (2006). [Carlson v. Wells, 281 Va. 173, 705 S.E.2d 101 \(2011\)](#).

[END OF SUPPLEMENT]

[FN1] [Harvard College v. Amory, 26 Mass. 446, 9 Pick. 446, 1830 WL 2554 \(1830\)](#).

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[FN2] [First Alabama Bank of Montgomery, N.A. v. Martin, 425 So. 2d 415 \(Ala. 1982\)](#); [Matter of Newhoff, 107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\)](#).

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[FN3] [§ 360](#).

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[FN4] [Lamar v. Micou, 112 U.S. 452, 5 S. Ct. 221, 28 L. Ed. 751 \(1884\)](#); [Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\)](#); [Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 \(1931\)](#); [Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\)](#).

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[FN5] [§§ 485 to 489](#).

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[FN6] [In re Estate of Scharlach, 2002 PA Super 279, 809 A.2d 376 \(2002\)](#).

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[FN7] [Johnson v. Johnson, 212 N.J. Super. 368, 515 A.2d 255 \(Ch. Div. 1986\)](#).

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[\[FN8\] § 479.](#)

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[\[FN9\] Estate of Stetson, 463 Pa. 64, 345 A.2d 679, 88 A.L.R.3d 878 \(1975\).](#)

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[\[FN10\] Wachovia Bank of Georgia v. Namik, 265 Ga. App. 80, 593 S.E.2d 35 \(2003\), cert. granted, \(May 24, 2004\) \(revocable living trust\).](#)

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[\[FN11\] Perling v. Citizens and Southern Nat. Bank, 250 Ga. 674, 300 S.E.2d 649 \(1983\).](#)

- The trust instrument waived the prudent person rule by necessary implication where it expressly authorized the trustee to refrain from diversification. [Hoffman v. First Virginia Bank of Tidewater, 220 Va. 834, 263 S.E.2d 402 \(1980\).](#)

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D. Investments

4. Care, Diligence, and Skill of Trustee

a. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 477. Prudent investor rule

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(5\)](#), (6)

Trial Strategy

[Trustee's Representation that it Possessed Expert Knowledge or Skill, 19 Am. Jur. Proof of Facts 2d 45](#)

Forms

Complaint, petition, or declaration—Allegation—Failure of trustee to use proper care, diligence, and skill in making investments. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 208

Answer—Defense—Exercise of due care and diligence by trustee in making investment. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 212

Pursuant to the Restatement Third of Trusts, the trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.^[FN1] The prudent investor rule focuses on the performance of the trustee, not the results of the trust.^[FN2] In determining whether a trustee complied with the prudent investor standard in the management of trust assets, a court's initial focus must be on the terms of the trust.^[FN3] Furthermore, under the Uniform Prudent Investor Act, a trustee must invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee must exercise reasonable care, skill, and caution.^[FN4]

The prudent investor standard for trustees judges prudence by reference to risk management and an underlying determination of the appropriate level of risk for a particular portfolio.^[FN5] This rule provides a trustee with greater flexibility in individual investments by recognizing that consideration should be given to a portfolio as a whole.^[FN6]

Whether a fiduciary has acted prudently with regard to investments is a factual determination to be made by the trial court.^[FN7] In weighing the propriety of any investment decision, the trustee should consider—
— the amount of the trust estate.^[FN8]

— the situation of the beneficiaries.^[FN9]

— the trend of prices and the cost of living.^[FN10]

— the prospect of inflation and deflation.^[FN11]

— the marketability of the investment.^[FN12]

— possible tax consequences.^[FN13]

A court can consider the conflicted circumstances of a case in its determination of the reasonable and prudent investment standard for a trust, taking into account the disruptive behavior of a beneficiary or other party.^[FN14]

^[FN1] [Restatement Third, Trusts: Prudent Investor Rule § 227.](#)

- A trustee has a duty to use reasonable care and skill to make the trust property productive, and to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust. [Marshall v. First Nat. Bank Alaska, 97 P.3d 830 \(Alaska 2004\).](#)

- Trustees are held to a prudent investor standard in the management and investment of a trust's assets or

property. [Law v. Law, 753 A.2d 443 \(Del. 2000\).](#)

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[FN2] [Matter of Estate of Cooper, 81 Wash. App. 79, 913 P.2d 393 \(Div. 3 1996\).](#)

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[FN3] [In re Estate of Cavin, 728 A.2d 92 \(D.C. 1999\).](#)

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[FN4] [Uniform Prudent Investor Act § 2\(a\).](#)

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[FN5] [Matter of Siegel, 174 Misc. 2d 698, 665 N.Y.S.2d 813 \(Sur. Ct. 1997\).](#)

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[FN6] [Matter of Bankers Trust Co., 219 A.D.2d 266, 636 N.Y.S.2d 741 \(1st Dep't 1995\).](#)

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[FN7] [Matter of Estate of Janes, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[FN8] [Matter of Estate of Janes, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[FN9] [Matter of Estate of Janes, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[FN10] [Matter of Estate of Janes, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[FN11] [Matter of Estate of Janes, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[FN12] [Matter of Estate of Janes, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[FN13] [Matter of Estate of Janes, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[FN14] [Champagne v. Champagne, 54 Conn. App. 321, 734 A.2d 1048 \(1999\).](#)

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D. Investments
4. Care, Diligence, and Skill of Trustee
a. In General

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 478. Duty distinguished from that applying to trustee's own property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(5\)](#)

A.L.R. Library

[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

Some courts take the position that in making investments for a trust, the proper standard of care and skill is that of a prudent person in conserving the property, and not that which a person of ordinary prudence would exercise in dealing with his or her own property.[FN1] A trustee is charged with the responsibility of recognizing that the kind of investment which may be appropriate for an individual investor seeking to reap substantial profits is not suitable for a trust.[FN2] To a similar effect, it has been said that a trustee in making trust investments must exercise more than ordinary diligence and vigilance,[FN3] or that a trustee does not have unlimited authority to invest as an ordinarily prudent person would invest his or her own funds.[FN4] However, when a settlor allows a trustee to exercise discretion in making investments, the settlor frees the trustee to act as a prudent person rather than as a prudent person seeking to conserve the property.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Under former statute, duty of custodian of Uniform Transfers to Minors Act (UTMA) funds to make only such investments as a prudent person would make of his own property having in view the preservation of the estate, is not met whenever a fiduciary to whom the rule applies invests his beneficiary's money however he invests his own; rather, while a person of intelligence may make a disposition which is speculative in character with a view to increasing his property instead of merely preserving it, such a disposition is not a proper trust investment, because it is not a disposition which makes the preservation of the fund a primary consideration. West's [V.C.A. § 31–48\(B\)](#) (2006); [Restatement \(Second\) of Trusts § 227](#) comment. [Carlson v. Wells, 281 Va. 173, 705 S.E.2d 101 \(2011\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\); Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 \(1986\); Miller v. Pender, 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 \(1943\).](#)

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[\[FN2\] Matter of Newhoff's Will, 107 Misc. 2d 589, 435 N.Y.S.2d 632 \(Sur. Ct. 1980\), decree aff'd by, 107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\).](#)

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[\[FN3\] In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438 \(1936\).](#)

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[\[FN4\] In re Buhl's Estate, 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569 \(1920\).](#)

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[\[FN5\] Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 \(1986\).](#)

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D. Investments

4. Care, Diligence, and Skill of Trustee

a. In General

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§ 479. Requisite foresight; present circumstances as test

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.2](#), [217.3\(5\)](#)

A.L.R. Library

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

With regard to the investment of funds, a trustee is not to be held to any standard or measure of skill constituting accurate prophecy, and his or her conduct is to be judged in the light of acts and circumstances existing at the time that he or she makes, retains, sells, or changes trust investments.[FN1] To determine whether the prudent person standard has been violated, the court should engage in a balanced and perceptive analysis of [the trustee's] consideration and action in the light of the history of each individual investment, viewed at the time of its action or its omission to act.[FN2] The propriety of an investment by a trustee must be judged as it appeared at the time it was made, and not viewed in light of subsequent events.[FN3] Whether a trustee is prudent in the doing of an act depends upon the circumstances as they reasonably appear to the trustee at the time when he or she does the act, and not at some subsequent time when his or her conduct is called into question.[FN4] Trustees acting in good faith, with requisite prudence, and within the limits of their trust, are not liable for mere errors of judgment in respect to trust investments.[FN5] The courts do not require investment infallibility, nor hold a trustee to prescience in investment decisions.[FN6] Hindsight is not to be substituted for foresight with the consequence of charging a trustee with want of due care, diligence, and skill in trust investments.[FN7] The test to determine whether a trustee acted prudently is not whether, in hindsight, a more lucrative investment could have been made measured from the standpoint of safety, value, income or tax consequences, but whether, under the circumstances then prevailing, a prudent man would have acted differently.[FN8]

A trustee is not to be condemned for investments merely because of the occurrence or recurrence of economic depressions or recessions,[FN9] at least where the investments were made in good faith,[FN10] or merely because the investments turn out to be unsafe.[FN11] Ordinary prudence, however, requires a trustee to look forward in the light of the past with respect to investments,[FN12] and to take the safeguards of prudent investors, such as noting fluctuating values, taking adequate margins of value, and the like.[FN13]

[FN1] Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 (1956); In re Saeger's Estate, 340 Pa. 73, 16 A.2d 19, 131 A.L.R. 1152 (1940).

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[FN2] In re Rowe, 274 A.D.2d 87, 712 N.Y.S.2d 662 (3d Dep't 2000).

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[FN3] Estate of Pew, 440 Pa. Super. 195, 655 A.2d 521 (1994).

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[FN4] Restatement Second, Trusts § 174 comment b..

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[FN5] Fortune v. First Trust Co. of St. Paul, 200 Minn. 367, 274 N.W. 524, 112 A.L.R. 346 (1937); In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 (1931).

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[FN6] In re Bank of New York, 35 N.Y.2d 512, 364 N.Y.S.2d 164, 323 N.E.2d 700 (1974).

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[FN7] In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 (1941).

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[FN8] Wachovia Bank of Georgia v. Namik, 265 Ga. App. 80, 593 S.E.2d 35 (2003), cert. granted, (May 24, 2004).

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[FN9] Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 (1931); Miller v. Pender, 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 (1943); Matter of Newhoff's Will, 107 Misc. 2d 589, 435 N.Y.S.2d 632 (Sur. Ct.

1980), decree aff'd by, [107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\)](#); [In re Heyl's Estate, 331 Pa. 202, 200 A. 617, 117 A.L.R. 867 \(1938\)](#).

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[FN10] [Miller v. Pender, 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 \(1943\)](#).

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[FN11] [Old Colony Trust Co. v. Comstock, 290 Mass. 377, 195 N.E. 389, 101 A.L.R. 1 \(1935\)](#).

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[FN12] [Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\)](#).

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[FN13] [First Nat. Bank v. Basham, 238 Ala. 500, 191 So. 873, 125 A.L.R. 656 \(1939\)](#).

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4. Care, Diligence, and Skill of Trustee

a. In General

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§ 480. Effect of court order, statute, or trust provisions authorizing investments; waiver

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(6\)](#)

The required standard or measure of care, diligence, and skill of a trustee in making investments is not met merely by the fact that particular investments are authorized by statute; the trustee must exercise such care, diligence, and skill in purchasing authorized investments.[FN1]

Although there is some authority to the effect that the prudent person rule may be waived by the settlor,[FN2] even unlimited investment authority given in a will does not relieve a fiduciary from the

obligation of due care and prudence.[FN3] A trustee does not breach a trust by failing to follow the alleged purpose of the trust to provide income to the income beneficiaries where the purpose of the trust is to preserve trust assets for later distribution to residual beneficiaries.[FN4]

[FN1] [Delafield v. Barret, 270 N.Y. 43, 200 N.E. 67, 103 A.L.R. 941 \(1936\).](#)

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[FN2] [§ 476.](#)

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[FN3] [Union Commerce Bank v. Kusse, 21 Ohio Misc. 217, 49 Ohio Op. 2d 413, 50 Ohio Op. 2d 423, 251 N.E.2d 884 \(Prob. Ct. 1969\).](#)

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[FN4] [In re Estate of Berthot, 2002 MT 277, 312 Mont. 366, 59 P.3d 1080 \(2002\).](#)

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§ 481. Rule as to corporate trustee and its directors

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(5\)](#)

Where a trust company holds itself out to the world as possessing a higher degree of skill and ability than that of an ordinary person with respect to the investments of trust estates, it should be held to that higher degree

of skill and ability,[FN1] but the requirement of the law in this connection should not be so onerous as to discourage the service that trust companies perform in the business world.[FN2]

In determining whether a trustee, under the duty to diversify investments of the trust property, should have sold corporate stock which was the only property held by the trust, the trustee's knowledge, as a director of the corporation, of antitrust actions against the corporation has at least a small bearing on the question whether and when it was prudent to sell the stock. [FN3] The standard or measure of this duty has been subjected to the "ordinarily prudent investor" test.[FN4] The directors may be entitled to rely on subordinate officers and employees for information as to what the facts are with respect to a particular security about to be purchased for a trust estate, but the ultimate question of the safety of such proposed investment is for the directors.[FN5]

[FN1] [Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\); Trust of Munro v. Commonwealth Nat. Bank, 373 Pa. Super. 448, 541 A.2d 756 \(1988\).](#)

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[FN2] [In re Binder's Estate, 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 \(1940\).](#)

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[FN3] [In re Mueller's Trust, 28 Wis. 2d 26, 135 N.W.2d 854, 24 A.L.R.3d 714 \(1965\).](#)

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[FN4] [Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\).](#)

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[FN5] [Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\).](#)

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4. Care, Diligence, and Skill of Trustee
a. In General

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§ 482. Delegation of responsibility; advice or employment of agents

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#), [217.3\(1\)](#)

In accordance with the general rule precluding trustees from delegating to others powers invested in him or her which involve the exercise of judgment and discretion,[\[FN1\]](#) a trustee will be found to have failed in his or her duty to deal prudently with trust assets where he or she delegates all authority over trust investments to a cotrustee.[\[FN2\]](#) A trustee may not delegate his or her investment authority to a beneficiary or others;[\[FN3\]](#) even with acquiescence by some beneficiaries, a duty to the nonconsenting beneficiaries will remain.[\[FN4\]](#) Even the fact that the trustee is an inexperienced investor and that the cotrustee is an investment counselor is immaterial where the trustee fails to exercise any control over the selection of investments.[\[FN5\]](#) On the other hand, it is a matter of common prudence for a trustee to seek expert advice on investments and to consult with interested beneficiaries.[\[FN6\]](#)

Observation: The decision of a trustee to have the trust professionally managed by an investment firm is prudent and does not preclude an award of a statutory trustee's commission, particularly where the trustee cannot delegate legal responsibility to the investment firm.[\[FN7\]](#)

A trustee may employ qualified agents to advise him or her as to trust investments,[\[FN8\]](#) especially where the trustee does not have the background or experience of managing large amounts of capital,[\[FN9\]](#) subject always to the rules against delegation by a trustee of his or her powers and against abandonment of the trust estate to another.[\[FN10\]](#) The requirement that a trust company have exclusive management when administering a trust fund does not preclude the trust company from utilizing investment agents and advisors, as long as the trustee reviews and approves all investment recommendations and does not delegate any discretionary responsibility.[\[FN11\]](#) A bank, acting as trustee, may consult a stockbroker in making investment decisions.[\[FN12\]](#)

Caution: Where trustees retain a bank to act as the trustees' agent in the investment of the fund's assets, giving the agent absolute and uncontrolled discretion in investment matters, the trustees cannot complain if the agent does not comply with their requests; if dissatisfied, they can only terminate the agreement.[\[FN13\]](#)

The fact that a trustee acted after consultation with, and advice from, his or her attorney[\[FN14\]](#) or the court[\[FN15\]](#) as to investments generally tends to show proper care on his or her part. The trustee's failure to secure legal advice as to legal matters indicates want of proper care.[\[FN16\]](#) Language in the trust instrument permitting the trustee to employ attorneys, accountants, agents, and brokers merely constitutes an express recognition of the trustee's obligation to obtain expert advice and does not authorize the trustee to delegate investment decisions to a third party.[\[FN17\]](#)

[\[FN1\]](#) § 347.

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[\[FN2\]](#) [Shriners Hospitals for Crippled Children v. Gardiner, 152 Ariz. 527, 733 P.2d 1110 \(1987\).](#)

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[\[FN3\]](#) [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\).](#)

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[\[FN4\]](#) [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\).](#)

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[\[FN5\]](#) [Shriners Hospitals for Crippled Children v. Gardiner, 152 Ariz. 527, 733 P.2d 1110 \(1987\).](#)

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[\[FN6\] In re Estate of Talbot, 141 Cal. App. 2d 309, 296 P.2d 848, 58 A.L.R.2d 658 \(1st Dist. 1956\).](#)

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[\[FN7\] In re Arnold O., 279 A.D.2d 774, 719 N.Y.S.2d 174 \(3d Dep't 2001\).](#)

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[\[FN8\] In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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[\[FN9\] Will of Axe, 132 Misc. 2d 137, 502 N.Y.S.2d 943 \(Sur. Ct. 1986\).](#)

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[\[FN10\] In re Estate of Talbot, 141 Cal. App. 2d 309, 296 P.2d 848, 58 A.L.R.2d 658 \(1st Dist. 1956\).](#)

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[\[FN11\] Matter of Estate of Venner, 235 A.D.2d 805, 653 N.Y.S.2d 150 \(3d Dep't 1997\).](#)

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[\[FN12\] Ewing v. Ruml, 892 F.2d 168, 15 Fed. R. Serv. 3d 691 \(2d Cir. 1989\) \(applying Connecticut law\).](#)

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[\[FN13\] Local Union No. 422, U. A. of Joliet, Ill. v. First Nat. Bank of Joliet, 93 Ill. App. 3d 890, 49 Ill. Dec. 250, 417 N.E.2d 1077 \(3d Dist. 1981\).](#)

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[\[FN14\] Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\).](#)

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[\[FN15\] Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 \(1909\).](#)

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[\[FN16\] In re Seamans' Estate, 333 Pa. 358, 5 A.2d 208, 122 A.L.R. 793 \(1939\).](#)

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[\[FN17\] Shriners Hospitals for Crippled Children v. Gardiner, 152 Ariz. 527, 733 P.2d 1110 \(1987\).](#)

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§ 483. Rule against speculation

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West's Key Number Digest, [Trusts](#) [217.1](#)

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[Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7](#)

Under the rule of care, diligence, skill, and prudence as applied to trust investments, a trustee is not generally authorized to make or retain trust investments that are speculative,[[FN1](#)] even where they are of such promise and character that a prudent person might make them for himself.[[FN2](#)]

Where a trustee violates his duty not to speculate in trust investments, the risk is his or her own, but the profits inure to the beneficiary.[[FN3](#)]

Caution: Language in a trust instrument relieving a trustee from liability for investing in speculative stocks does not also relieve the trustee from its duty to review the trust periodically and to diversify the corpus of the trust when warranted.[[FN4](#)]

[[FN1](#)] [Title Guarantee & Trust Co. v. Bedford, 125 Conn. 349, 5 A.2d 852, 122 A.L.R. 654 \(1939\); Fortune v. First Trust Co. of St. Paul, 200 Minn. 367, 274 N.W. 524, 112 A.L.R. 346 \(1937\); Matter of Newhoff's Will, 107 Misc. 2d 589, 435 N.Y.S.2d 632 \(Sur. Ct. 1980\), decree aff'd by, 107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\).](#)

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[[FN2](#)] [Barney v. Saunders, 57 U.S. 535, 16 How. 535, 14 L. Ed. 1047 \(1853\); Title Guarantee & Trust Co. v. Bedford, 125 Conn. 349, 5 A.2d 852, 122 A.L.R. 654 \(1939\); Fortune v. First Trust Co. of St. Paul, 200 Minn. 367, 274 N.W. 524, 112 A.L.R. 346 \(1937\).](#)

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[[FN3](#)] [Richards v. Lowery, 1929 OK 8, 135 Okla. 243, 275 P. 335 \(1929\).](#)

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[[FN4](#)] [Jewett v. Capital Nat. Bank of Austin, 618 S.W.2d 109 \(Tex. Civ. App. Waco 1981\), writ refused n.r.e., \(Nov. 4, 1981\)](#)

- As to the duty to diversify, generally, see §§ [490](#), [491](#).

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a. In General

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§ 484. Rule against speculation—What constitutes speculation

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.1](#)

Commodity trading has been characterized as speculative in nature, and is therefore considered an improper trust investment,[\[FN1\]](#) as is investment as a limited partner in a trading partnership.[\[FN2\]](#) "Penny stocks" are deemed speculative,[\[FN3\]](#) and a number of courts have indicated that real-estate investment trusts (REITs) are speculative and that it is imprudent for a trustee to invest in REITs which involve the highly risky area of construction and development loans and which were not widely held by financial institutions when they were first instituted.[\[FN4\]](#)

[\[FN1\]](#) [Matter of Hadleigh D. Hyde Trust, 458 N.W.2d 802 \(S.D. 1990\)](#)

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[\[FN2\]](#) [Chase v. Pevear, 383 Mass. 350, 419 N.E.2d 1358 \(1981\).](#)

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[\[FN3\]](#) [Sartore v. Buder, 759 P.2d 785 \(Colo. Ct. App. 1988\)](#), decision aff'd, [774 P.2d 1383 \(Colo. 1989\)](#).

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[\[FN4\]](#) [First Alabama Bank of Montgomery, N.A. v. Martin, 425 So. 2d 415 \(Ala. 1982\)](#); [Matter of Newhoff, 107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\)](#).

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D. Investments

4. Care, Diligence, and Skill of Trustee

b. Duties as to Retention or Conversion of Existing Investments

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§ 485. Generally

West's Key Number Digest

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[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

Forms

Retention of investments. [17A Am. Jur. Legal Forms 2d, Trusts § 251:447](#)

With regard to the retention, disposal, or change of trust investments coming into the hands of the trustee with the trust estate, a trustee must exercise the care, diligence, and skill of an ordinarily prudent person under similar circumstances; that is, the trustee must be concerned with the safety and income of the investment,^[FN1] and must make sure that the investment is productive.^[FN2] This is true although a statute permits a trustee to continue investments as they come to him or her, unless it is otherwise ordered by the court or by the instrument creating the trust.^[FN3] The same rule applies also as to the retention, disposal, or change of trust investments made by a trustee him- or herself.^[FN4] A trustee acts in bad faith by refusing to sell underproductive trust properties, despite the trustee's claim that he or she strove to keep them in the family in accordance with the settlor's wishes, where the trustee sells some properties and never offers the properties to other family members

in order to keep them in the family.[FN5] Likewise, a trustee will not be held liable for mere errors of judgment in failing to sell investments received by him or her as part of the trust estate; [FN6] nor will the mere retention of stock that a trustee receives from a settlor constitute negligence by the trustee.[FN7]

Under the Restatement Third of Trusts, the trustee is under a duty to the beneficiaries, within a reasonable time after the creation of the trust, to review the contents of the trust estate and to make and implement decisions concerning the retention and disposition of original investments in order to conform to the requirements of the prudent investor rule.[FN8]

[FN1] Ditmars v. Camden Trust Co., 10 N.J. 471, 92 A.2d 12, 35 A.L.R.2d 822 (1952); In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 (1931); In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 (1941).

[FN2] In re Hubbell's Will, 302 N.Y. 246, 97 N.E.2d 888, 47 A.L.R.2d 176 (1951)

[FN3] Bassett v. City Bank & Trust Co., 115 Conn. 1, 160 A. 60, 81 A.L.R. 1488 (1932).

[FN4] Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 (1931).

[FN5] Rutanen v. Ballard, 424 Mass. 723, 678 N.E.2d 133 (1997).

[FN6] Fortune v. First Trust Co. of St. Paul, 200 Minn. 367, 274 N.W. 524, 112 A.L.R. 346 (1937); Ditmars v. Camden Trust Co., 10 N.J. 471, 92 A.2d 12, 35 A.L.R.2d 822 (1952); In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 (1931).

- A trustee is not liable for damages for the unforeseen drop in value of trust assets if, before the drop in value, his or her decision not to sell assets was reasonable and was made without neglect or breach of good faith. Rutanen v. Ballard, 424 Mass. 723, 678 N.E.2d 133 (1997).

[FN7] In re McCune, 705 A.2d 861 (Pa. Super. Ct. 1997).

[FN8] Restatement Third, Trusts: Prudent Investor Rule § 229.

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D. Investments

4. Care, Diligence, and Skill of Trustee

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§ 486. Retention authorized or mandated under terms of trust

West's Key Number Digest

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[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

The terms of a trust may direct the retention of a trust investment which otherwise it would be the duty of a trustee to convert into other holdings.[FN1] A trustee will not generally be held to personal accountability for continuing an investment which he or she is specifically authorized to continue under the terms of the trust;[FN2] one who excepts to the trustee's account has the burden of proving that retention of the stock was negligent.[FN3]

The fact that a trustee is vested with discretion to retain assets does not excuse the trustee from the duty of making the retention decision prudently.[FN4] However, the retention of existing investments may be prudent on the part of a trustee where the purchase of such investments by him or her would be imprudent;[FN5] a person in the conduct of his or her own investments will, acting prudently, retain investments rather than sell them at a loss, although under existing conditions he or she would not purchase such investments.[FN6]

If by the terms of the trust instrument a trustee is specifically directed to retain certain investments, such trustee is subject to liability if such investments are not retained (absent impossibility, illegality, or a judicially determined change of circumstances).[FN7] However, if by the terms of the trust the trustee is authorized, but not directed, to retain such investments, the trustee is not liable for retaining them unless under the circumstances it would be an abuse of discretion to retain them.[FN8] Thus, a trustee who sells securities in order to obtain diversification, although authorized to retain them, is not liable merely because the securities later rise in value.[FN9] Absent evidence that the retention of certain investments is mandated under the terms of the trust, the trustee is not liable for breach of his or her fiduciary duty for failing to keep those investments.[FN10]

[FN1] [In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 \(1931\)](#); [Rhode Island Hospital Trust Co. v. Tucker, 51 R.I. 507, 155 A. 661, 83 A.L.R. 1253 \(1931\)](#), supplemented, [52 R.I. 277, 160 A. 465 \(1932\)](#); [Baldus v. Bank of California, 12 Wash. App. 621, 530 P.2d 1350 \(Div. 1 1975\)](#).

[\[FN2\] In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 \(1931\).](#)

- Trustees who kept entire corpus of trust in stock of one corporation with declining value were not liable for breach of fiduciary duty where the trust instrument specifically designated any investment retained in good faith to be proper even though the investment was not suitable for the trustee. [Perling v. Citizens and Southern Nat. Bank, 250 Ga. 674, 300 S.E.2d 649 \(1983\).](#)

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[\[FN3\] In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 \(1931\); Trust of Munro v. Commonwealth Nat. Bank, 373 Pa. Super. 448, 541 A.2d 756 \(1988\).](#)

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[\[FN4\] Estate of Knipp, 489 Pa. 509, 414 A.2d 1007 \(1980\).](#)

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[\[FN5\] Matter of Hahn, 93 A.D.2d 583, 462 N.Y.S.2d 924 \(4th Dep't 1983\), order aff'd, 62 N.Y.2d 821, 477 N.Y.S.2d 604, 466 N.E.2d 144 \(1984\).](#)

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[\[FN6\] Fortune v. First Trust Co. of St. Paul, 200 Minn. 367, 274 N.W. 524, 112 A.L.R. 346 \(1937\); In re Clark's Will, 257 N.Y. 132, 177 N.E. 397, 77 A.L.R. 499 \(1931\).](#)

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[\[FN7\] Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\).](#)

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[\[FN8\] Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\).](#)

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[\[FN9\] Attorney General v. Olson, 346 Mass. 190, 191 N.E.2d 132 \(1963\); Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\).](#)

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[\[FN10\] Smith v. Baptist Foundation of Oklahoma, 2002 OK 57, 50 P.3d 1132 \(Okla. 2002\).](#)

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D. Investments

4. Care, Diligence, and Skill of Trustee
b. Duties as to Retention or Conversion of Existing Investments

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 487. Retention of nonlegal, unauthorized, or imprudent investments

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(5\)](#), (9)

A.L.R. Library

[Absence of market therefor as justifying trustee's retention of unauthorized or nonlegal securities received from creator of trust, 88 A.L.R.3d 894](#)

Forms

Checklist—Drafting complaint in action by beneficiary against trustee—Improper or illegal investment. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 203

The duty of a trustee in respect to the retention or conversion of nonlegal or unauthorized trust investments—those not authorized by the terms of the trust, statute, or order of court—coming into the hands of the trustee with the trust estate^[FN1] or becoming unauthorized and nonlegal while in his or her hands,^[FN2] is measured by the standard of the care, diligence, and skill of an ordinarily prudent person under similar circumstances.^[FN3] Where practicable, the conversion of unauthorized or nonlegal investments into legal holdings must be made promptly and within a reasonable time.^[FN4] What constitutes a reasonable time for a fiduciary to divest an imprudently held investment varies from case to case and is not fixed or arbitrary; rather, the test is the diligence and prudence of prudent and intelligent persons in the management of their own affairs.^[FN5] Although a trustee has a duty to dispose of stock in a trust fund when such stock becomes an unauthorized investment due to adverse business developments, the refusal to dispose of the stock may be justified on proof that disposition of the stock is impossible because no market for it exists and the absence of a market is not due to the trustee's failure to exercise skill, prudence, and diligence.^[FN6]

A trustee has a discretion in determining when it is wise to convert unauthorized trust investments, although he or she would have no such discretion to make such investments in the first instance.^[FN7]

Where a trustee has wrongfully retained nonlegal securities forming a part of the original trust estate, he or she cannot offset the losses sustained in the eventual sale of some of the securities with the gains realized in the sale of others,^[FN8] though there is also authority to the contrary.^[FN9]

^[FN1] [In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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^[FN2] [In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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[\[FN3\] In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\).](#)

- As to the duty to dispose of existing investments, see [§ 436](#).

- As to the authorization of nonlegal investments under the terms of a trust, see [§ 446](#).

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[\[FN4\] § 489.](#)

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[\[FN5\] Matter of Estate of Janes, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[\[FN6\] Estate of Stetson, 463 Pa. 64, 345 A.2d 679, 88 A.L.R.3d 878 \(1975\).](#)

- As to the right to retain nonlegal investments where no market exists for such investments, see [§ 488](#).

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[\[FN7\] In re Seamans' Estate, 333 Pa. 358, 5 A.2d 208, 122 A.L.R. 793 \(1939\).](#)

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[\[FN8\] Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 \(1931\).](#)

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[\[FN9\] McInnes v. Goldthwaite, 94 N.H. 331, 52 A.2d 795, 171 A.L.R. 1414 \(1947\).](#)

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4. Care, Diligence, and Skill of Trustee

b. Duties as to Retention or Conversion of Existing Investments

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§ 488. Absence of market

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(5\)](#), (9)

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[Absence of market therefor as justifying trustee's retention of unauthorized or nonlegal securities received from creator of trust, 88 A.L.R.3d 894](#)

Where a trust was created by the transfer of specific assets which would have been costly or difficult to liquidate, such as stock for which there was no market,[FN1] the trustee will not incur liability for retaining such stock; nor is the trustee liable for surcharge because of his retention of unauthorized or nonlegal securities, received by him as part of the trust assets, where there was no market for the securities and the absence of a market was not due to the trustee's negligence.[FN2] Where the security in question is stock in a small incorporated family business, there may be no market for the stock, but the trustee may have the option of liquidating the corporation's assets.[FN3]

[FN1] [Chrisman v. Cornell University, 132 N.J. Eq. 178, 27 A.2d 627 \(Ch. 1942\).](#)

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[FN2] [Estate of Stetson, 463 Pa. 64, 345 A.2d 679, 88 A.L.R.3d 878 \(1975\); In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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[FN3] [In re Glauser's Estate, 350 Pa. 192, 38 A.2d 64 \(1944\).](#)

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4. Care, Diligence, and Skill of Trustee

b. Duties as to Retention or Conversion of Existing Investments

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§ 489. Time for conversion

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(5\)](#), (9), 217.4

A.L.R. Library

[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

A conversion of trust investments into other property, cash, or investments should be made within a reasonable time after circumstances make it apparent or should make it apparent to the trustee that the trust investments are becoming unsafe, of doubtful value,[\[FN1\]](#) or increasingly unproductive, or are wasting,[\[FN2\]](#) assuming, of course, that the situation is such that it is practicable or possible to make conversion into another and suitable investment.[\[FN3\]](#) A trustee incurs liability when he or she fails to promptly tender bonds being held for investment upon receipt of notice that the bonds have been subjected to early redemption, causing the trust to lose the use of the money invested.[\[FN4\]](#) It is not, per se, imprudent for a trustee, vested with absolute discretion to hold property, to refrain from immediately diversifying a large block of stock received at the commencement of administration.[\[FN5\]](#)

Where practicable, the conversion of unauthorized or nonlegal investments into legal holdings must be made promptly[\[FN6\]](#) and within a reasonable time.[\[FN7\]](#) Except as otherwise provided by the terms of the trust, the trustee is under a duty to the beneficiary within a reasonable time after the creation of the trust to dispose of any part of the trust property included in the trust at the time of its creation which would not be a proper investment for the trustee to make.[\[FN8\]](#) What is such a reasonable time is a question of fact or a mixed question of law and fact, not answerable by any rigid criterion, and dependent, instead, on the circumstances of the particular case,[\[FN9\]](#) such as the duration of the trust for a short or long period,[\[FN10\]](#) or the condition of the market for the investment in question.[\[FN11\]](#) While it is his or her duty to make the sale within a reasonable time and for the best price obtainable, in the exercise of reasonable diligence, the time and manner of sale, within such limits, rests in his or her discretion.[\[FN12\]](#)

[\[FN1\]](#) [Bowker v. Pierce, 130 Mass. 262, 1881 WL 11134 \(1881\).](#)

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[\[FN2\]](#) [In re Seamans' Estate, 333 Pa. 358, 5 A.2d 208, 122 A.L.R. 793 \(1939\).](#)

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[\[FN3\]](#) [Rhode Island Hospital Trust Co. v. Tucker, 51 R.I. 507, 155 A. 661, 83 A.L.R. 1253 \(1931\), supplemented, 52 R.I. 277, 160 A. 465 \(1932\).](#)

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[\[FN4\]](#) [New York State Medical Care Facilities Finance Agency v. Bank of Tokyo Trust Co., 163 Misc. 2d 551, 621 N.Y.S.2d 466 \(Sup 1994\), aff'd, 216 A.D.2d 126, 629 N.Y.S.2d 3 \(1st Dep't 1995\).](#)

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[\[FN5\]](#) [Estate of Knipp, 489 Pa. 509, 414 A.2d 1007 \(1980\).](#)

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[\[FN6\]](#) [In re Seamans' Estate, 333 Pa. 358, 5 A.2d 208, 122 A.L.R. 793 \(1939\).](#)

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[\[FN7\] Stark v. National City Bank of N. Y., 278 N.Y. 388, 16 N.E.2d 376, 123 A.L.R. 99 \(1938\); In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\); In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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[\[FN8\] Restatement Second, Trusts § 230.](#)

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[\[FN9\] In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\)](#)

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[\[FN10\] In re Taylor's Estate, 277 Pa. 518, 121 A. 310, 37 A.L.R. 553 \(1923\).](#)

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[\[FN11\] In re Casani's Estate, 342 Pa. 468, 21 A.2d 59, 135 A.L.R. 1513 \(1941\).](#)

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[\[FN12\] Stark v. National City Bank of N. Y., 278 N.Y. 388, 16 N.E.2d 376, 123 A.L.R. 99 \(1938\).](#)

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D. Investments

4. Care, Diligence, and Skill of Trustee
c. Diversification of Investments

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 490. Generally

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[Duty of trustee to diversify investments, and liability for failure to do so, 24 A.L.R.3d 730](#)

[Construction and application of ERISA provision \(29 U.S.C.A. sec. 1106\) enumerating prohibited transactions by plan fiduciaries, 103 A.L.R. Fed. 10](#)

Trial Strategy

[Trustee's Failure to Diversify Investments, 14 Am. Jur. Proof of Facts 2d 253](#)

Forms

Character of investments—Diversification required. [Am. Jur. Legal Forms 2d, Trusts § 251:441](#)

The trustee, as a prudent person, generally, has a duty to diversify.[FN1]

Observation: and under the Restatement Third of Trusts, it is provided that the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.[FN2] Furthermore, under the Uniform Prudent Investor Act it is provided that a trustee must diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.[FN3] The rationale for this rule is that the trustee should attempt to distribute the risk of loss in order to preserve the corpus of the trust.[FN4] The intent of the settlors is a factor that may be considered when deciding whether and to what extent to diversify investment of the trust.[FN5]

A trustee's policy of investing trust assets so as to balance the need to produce income for the life income beneficiary against the need to increase and preserve the principal for the remainder beneficiaries, resulting in the trustee's refusal to reallocate the asset mix so as to increase income, does not constitute a failure to administer the trust in good faith.[FN6]

Observation: The basic rule that a trustee should diversify investments so as to minimize the risk of loss applies to both the making of investments and the retention of investment.[FN7] Thus, the duty to distribute the risk of loss by diversification includes the disposal or sale of investments included within the trust at the time of its creation which, although otherwise proper investments for the trustee to retain, are improper because not properly diversified.[FN8] But if the language of the trust directing retention is mandatory, the trustee cannot be held liable for not diversifying.[FN9]

There exists a minority view to the effect that diversification is not mandatory.[FN10] It would appear that in those jurisdictions holding that there is no duty on a trustee to diversify, the mere lack of diversification cannot render a trustee liable, and lack of diversification in and of itself does not constitute negligence for which the trustee should be held liable.[FN11] However, lack of diversification may constitute evidence that the trustee has failed to exercise proper skill and prudence.[FN12]

The prudent investor rule requiring diversification does not permit review of a trustee's actions by hindsight or by singling out the performance of one investment that the trustee retains as the trust's principal investment.[FN13] All of the facts and circumstances of the case must be examined to determine whether a concentration of a particular stock in an estate's portfolio violates the prudent person standard for the administration of a trust investment by a trustee.[FN14]

Courts generally recognize that there are two exceptions to the duty of the trustee to diversify:

(1) where the trust instrument contains an express provision relieving the trustee of the duty to diversify;[\[FN15\]](#) and

(2) where circumstances dictate that it is not prudent to diversify.[\[FN16\]](#) or

(3) if a trust is not damaged by a trustee's failure to diversify, the trustee is not liable.[\[FN17\]](#)

It follows from the first exception noted that a trustee may not diversify where the trust instrument specifically bars such action.[\[FN18\]](#) An investment direction agreement (IDA) signed by a trust's beneficiaries, which allows a trustee to continue to hold a single stock rather than follow the normal procedure of diversification, and which holds the trustee harmless from decreases in value, does not protect a trustee from liability for its breach of fiduciary duty in failing to diversify the trust assets where the trustee holds itself out as a professional fiduciary and where there is known disagreement among the beneficiaries.[\[FN19\]](#)

Observation: Although the first exception is worded in terms of an express provision relieving the trustee of the duty to diversify, the rule also appears to apply to situations where the duty is impliedly waived.[\[FN20\]](#)

However, a trust document which empowers the trustee bank to invest funds as it saw fit "regardless of any lack of diversification" has been held not to relieve the trustee of a duty to the beneficiaries imposed by the "prudent person" standard.[\[FN21\]](#) A fortiori, if an exculpatory clause which confers "absolute discretion" upon the trustees is specifically limited by the requirement that the trustees are "subject always to the discharge of . . . fiduciary obligations," and the trust instrument makes no mention of a discretion not to diversify, the trustees are subject to surcharge for failure to diversify.[\[FN22\]](#)

A fiduciary is entitled to rely on an investment directive from the beneficiaries in contravention of the normal policy of the fiduciary with respect to diversification of investments for a reasonable period of time, or until such time that there is a demonstrated disagreement among the beneficiaries, provided that the fiduciary does not completely abdicate its fiduciary responsibility to periodically advise the beneficiaries of time-tested formulas for protecting their investments from the inroads of a fluctuating market.[\[FN23\]](#)

[\[FN1\] Steiner v. Hawaiian Trust Co., 47 Haw. 548, 393 P.2d 96 \(1964\); In re Sanders' Estate, 304 Ill. App. 57, 25 N.E.2d 923 \(2d Dist. 1940\); Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N.E. 573 \(1911\); Security Trust Co. v. Appleton, 303 Ky. 328, 197 S.W.2d 70 \(1946\); Mazzola v. Myers, 363 Mass. 625, 296 N.E.2d 481 \(1973\); Matter of Irrevocable Inter Vivos Trust Established by R. R. Kemske by Trust Agreement Dated October 24, 1969, 305 N.W.2d 755 \(Minn. 1981\); First Nat. Bank of Kansas City v. Hyde, 363 S.W.2d 647 \(Mo. 1962\); Commercial Trust Co. of N. J. v. Barnard, 27 N.J. 332, 142 A.2d 865 \(1958\); Knox County v. Fourth & First Nat. Bank, 181 Tenn. 569, 182 S.W.2d 980 \(1944\); Jewett v. Capital Nat. Bank of Austin, 618 S.W.2d 109 \(Tex. Civ. App. Waco 1981\), writ refused n.r.e., \(Nov. 4, 1981\); Baker Boyer Nat. Bank v. Garver, 43 Wash. App. 673, 719 P.2d 583 \(Div. 3 1986\); In re Mueller's Trust, 28 Wis. 2d 26, 135 N.W.2d 854, 24 A.L.R.3d 714 \(1965\).](#)

- The trustee of a charitable trust acted negligently and imprudently in retaining certain stock and in failing to diversify the trust's investments, where the stock's dividends did not satisfy the burden of having to pay out a certain amount to charities annually, which required capital to be depleted to supplement the shortfall, where the stock's volatility and downward trend made it unsuitable for fulfilling the trust's investment goals, and where the trustee did not conduct more than routine reviews of the stock and gave no consideration to the unique needs of the trust. [In re Rowe, 274 A.D.2d 87, 712 N.Y.S.2d 662 \(3d Dep't 2000\).](#)

- [\[FN2\] Restatement Third, Trusts: Prudent Investor Rule § 227\(b\).](#)

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[FN3] [Uniform Prudent Investor Act § 3.](#)

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[FN4] [Dowsett v. Hawaiian Trust Co., 47 Haw. 577, 393 P.2d 89 \(1964\); First Nat. Bank of Kansas City v. Hyde, 363 S.W.2d 647 \(Mo. 1962\); In re Mueller's Trust, 28 Wis. 2d 26, 135 N.W.2d 854, 24 A.L.R.3d 714 \(1965\).](#)

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[FN5] [Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\).](#)

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[FN6] [In re Couch Trust, 723 A.2d 376 \(Del. Ch.,1998\)](#) (the income beneficiary also refused to approve recommendations that would have increased the income from the trust).

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[FN7] [In re Mueller's Trust, 28 Wis. 2d 26, 135 N.W.2d 854, 24 A.L.R.3d 714 \(1965\).](#)

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[FN8] [Stevens v. National City Bank, 45 Ohio St. 3d 276, 544 N.E.2d 612 \(1989\).](#)

- A trustee did not timely divest the trust of imprudently held stock when, after being informed by the beneficiary, who had previously protested, that it remained under a continuing obligation to immediately develop and present a diversification plan in the face of the declining value of the single stock held in the trust, it failed to do so within 30 days. [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\).](#)

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[FN9] [Steiner v. Hawaiian Trust Co., 47 Haw. 548, 393 P.2d 96 \(1964\).](#)

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[FN10] [Matter of Newhoff's Will, 107 Misc. 2d 589, 435 N.Y.S.2d 632 \(Sur. Ct. 1980\), decree aff'd by, 107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\); In re McCune, 705 A.2d 861 \(Pa. Super. Ct. 1997\).](#)

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[FN11] [Central Hanover Bank & Trust Co. v. Clark, 81 N.Y.S.2d 883 \(Sup 1948\); Estate of Knipp, 489 Pa. 509, 414 A.2d 1007 \(1980\); In re Saeger's Estate, 340 Pa. 73, 16 A.2d 19, 131 A.L.R. 1152 \(1940\).](#)

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[FN12] [In re Mendleson's Will, 46 Misc. 2d 960, 261 N.Y.S.2d 525 \(Sur. Ct. 1965\); Estate of Knipp, 489 Pa. 509, 414 A.2d 1007 \(1980\).](#)

- Although the failure to diversify will not automatically result in liability, neither is a fiduciary automatically insulated from liability based on the mere failure to diversify where the lack of diversification itself presents an unreasonable risk to the assets of the trust. [Matter of Fleet Trust Co., 173 Misc. 2d 539, 662 N.Y.S.2d 360 \(Sur. Ct. 1997\), order rev'd, 256 A.D.2d 465, 683 N.Y.S.2d 860 \(2d Dep't 1998\).](#)

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[FN13] [Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\).](#)

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[FN14] [In re Rowe, 274 A.D.2d 87, 712 N.Y.S.2d 662 \(3d Dep't 2000\).](#)

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[FN15] [Hanson v. Minette, 461 N.W.2d 592 \(Iowa 1990\); First Nat. Bank v. Truesdale Hospital, 288 Mass. 35, 192 N.E. 150 \(1934\); Baker Boyer Nat. Bank v. Garver, 43 Wash. App. 673, 719 P.2d 583 \(Div. 3 1986\).](#)

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[FN16] [Hanson v. Minette, 461 N.W.2d 592 \(Iowa 1990\); Baker Boyer Nat. Bank v. Garver, 43 Wash. App. 673, 719 P.2d 583 \(Div. 3 1986\).](#)

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[\[FN17\] Pickereel v. Huntington Nat. Bank, 2002-Ohio-1259, 2002 WL 416970 \(Ohio Ct. App. 10th Dist. Franklin County 2002\), appeal not allowed, 96 Ohio St. 3d 1467, 2002-Ohio-3910, 772 N.E.2d 1203 \(2002\).](#)

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[\[FN18\] Trust of Munro v. Commonwealth Nat. Bank, 373 Pa. Super. 448, 541 A.2d 756 \(1988\).](#)

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[\[FN19\] In re Estate of Saxton, 179 Misc. 2d 681, 686 N.Y.S.2d 573 \(Sur. Ct. 1998\).](#)

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[\[FN20\] Hoffman v. First Virginia Bank of Tidewater, 220 Va. 834, 263 S.E.2d 402 \(1980\).](#)

- Where a trust instrument grants the trustee broad discretion to retain assets placed into the trust by the settlors, neither the prudent person standard nor the prudent investor rule applies to absolutely require the trustee to diversify, providing the trustee with an affirmative defense of authorization to retain property. [Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\)](#) (the trust granted the trustee the power to retain assets for as long as the trustee deemed "advisable" and "without being limited in the selection of investments by any statutes, rules of law, custom or usage.")

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[\[FN21\] First Alabama Bank of Huntsville, N.A. v. Spragins, 475 So. 2d 512 \(Ala. 1985\).](#)

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[\[FN22\] Estate of Collins, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 \(2d Dist. 1977\).](#)

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[\[FN23\] In re Estate of Saxton, 179 Misc. 2d 681, 686 N.Y.S.2d 573 \(Sur. Ct. 1998\).](#)

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§ 491. Types of investments

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(1\)](#), (6), 217.4

A.L.R. Library

[Duty of trustee to diversify investments, and liability for failure to do so, 24 A.L.R.3d 730](#)

Investment of the entire corpus in governmental securities has been upheld on the rationale, inter alia, that the purpose of diversification was to minimize risk and that such investments were so relatively risk-free as to relieve the trustee of this duty,[\[FN1\]](#) but in another jurisdiction a trustee was held liable for loss as a result of failure to diversify where he held only tax-exempt, fixed-income municipal bonds, and the court determined that a prudent investor would have placed 40 to 60 percent of assets in equity stocks.[\[FN2\]](#)

A trustee may be liable for losses resulting from investing the entire corpus in real estate,[\[FN3\]](#) or investing almost all the assets in mortgages,[\[FN4\]](#) or investing the great majority of the trust assets in a single kind of stock or bond.[\[FN5\]](#)

[\[FN1\] Commercial Trust Co. of N. J. v. Barnard, 27 N.J. 332, 142 A.2d 865 \(1958\).](#)

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[\[FN2\] Baker Boyer Nat. Bank v. Garver, 43 Wash. App. 673, 719 P.2d 583 \(Div. 3 1986\).](#)

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[\[FN3\] Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\).](#)

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[\[FN4\] Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Gillmore, 142 N.J. Eq. 27, 59 A.2d 24 \(Ch. 1948\).](#)

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[\[FN5\] Chase v. Pevear, 383 Mass. 350, 419 N.E.2d 1358 \(1981\).](#)

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§ 492. Extent of liability for losses

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(1\)](#), (6)

A.L.R. Library

[Duty of trustee to diversify investments, and liability for failure to do so, 24 A.L.R.3d 730](#)

Where the trustee is under a duty to diversify trust investments, he or she is liable for only losses which result from the failure to diversify.^[FN1] Thus, he or she is subject to liability for losses caused by investing too much of the trust estate in a particular security of a corporation.^[FN2] Accordingly, a trustee was properly held liable for loss as a result of failure to diversify assets, by holding only tax-exempt, fixed-income municipal bonds, where a prudent investor would have had 40% to 60% of assets in other equity stock.^[FN3]

In computing the loss resulting from failure to diversify, a trial court may determine the amount of loss by weighing the actual value of the trust principal against what the value would have been had it been prudently managed.^[FN4]

^[FN1] [First Nat. Bank v. Truesdale Hospital, 288 Mass. 35, 192 N.E. 150 \(1934\).](#)

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^[FN2] [Steiner v. Hawaiian Trust Co., 47 Haw. 548, 393 P.2d 96 \(1964\).](#)

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^[FN3] [Baker Boyer Nat. Bank v. Garver, 43 Wash. App. 673, 719 P.2d 583 \(Div. 3 1986\).](#)

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^[FN4] [First Alabama Bank of Huntsville, N.A. v. Spragins, 515 So. 2d 962 \(Ala. 1987\).](#)

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§ 493. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#), [217.4](#)

The requisite of due care, diligence, and skill, in respect to the investment of trust funds, of an ordinarily prudent person in the conduct of his or her own affairs under similar circumstances, applies to trust investments in real estate,[\[FN1\]](#) to trust investments in mortgage securities,[\[FN2\]](#) and in corporate stocks and bonds,[\[FN3\]](#) and to trust investments in participations in mortgages or other securities or in pools of securities.[\[FN4\]](#) Investing a testamentary trust's assets in government tax free fixed-income securities, rather than the stock market to increase the corpus, does not breach the fiduciary duty to act with the same care and skill as a person of ordinary prudence.[\[FN5\]](#)

[\[FN1\]](#) § 494.

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[\[FN2\]](#) § 495.

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[\[FN3\]](#) § 499.

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[\[FN4\]](#) [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940); [Finley v. Exchange Trust Co.](#), 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 (1938); [Driver v. Blakeley](#), 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 (1940).

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[\[FN5\]](#) [Law v. Law](#), 753 A.2d 443 (Del. 2000) (the trustees were the testator's children, were not professional investors, and were also beneficiaries).

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§ 494. Real estate

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#), (9)

The general rule requiring the care, diligence, and skill of an ordinarily prudent investor in the investment of trust funds applies to trust investments in real estate.^[FN1] Accordingly, a trustee who has the power to purchase realty^[FN2] may be held liable for acting imprudently where he or she fails to properly inspect or investigate the property and consequently fails to determine the reasonableness of the purchase price.^[FN3] Trustees are likewise required to sell under-productive trust property.^[FN4]

Certain types of real-estate investments, such as real-estate investment trusts (REITs) may be considered not to be prudent investments.^[FN5]

^[FN1] [Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 \(1911\).](#)

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^[FN2] [§ 453.](#)

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^[FN3] [Matter of Estate of Dwight, 67 Haw. 139, 681 P.2d 563 \(1984\).](#)

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[\[FN4\] *Rutanen v. Ballard*, 424 Mass. 723, 678 N.E.2d 133 \(1997\).](#)

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[\[FN5\] *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So. 2d 415 \(Ala. 1982\); *Matter of Newhoff*, 107 A.D.2d 417, 486 N.Y.S.2d 956 \(2d Dep't 1985\).](#)

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§ 495. Loans and mortgages

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West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

Forms

Complaint, petition, or declaration—By beneficiary—To avoid improper investment and compel trustee to restore money to corpus—For recovery of lost income—Investment by trustee in second mortgage. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 204

In making trust investments in loans[\[FN1\]](#) and mortgages,[\[FN2\]](#) it is the duty of a trustee to exercise that care, diligence, and skill which an ordinarily prudent person in the conduct of his or her own affairs under similar circumstances would exercise, having in view the fact that the trustee is a fiduciary under duty to make investments that are first safe, and second income-producing.[\[FN3\]](#) Trustees have a duty to make inquiry as to the soundness of an investment in a mortgage.[\[FN4\]](#)

Among the facts and circumstances to be taken into consideration in determining the soundness of the investment are:

- (1) the ratio of the trust investment to, or its percentage of, the value of the property subject to the mortgage;[\[FN5\]](#)
- (2) payment or delinquency of payments of principal and interest in the case of an investment in an existing mortgage;[\[FN6\]](#)
- (3) payment or delinquency of taxes on the mortgaged property;[\[FN7\]](#)
- (4) insurance on such property;[\[FN8\]](#)
- (5) the solvency and personal credit of the mortgagor or his estate or other personal security, such as the personal obligation of an indorser of the mortgage note or bond;[\[FN9\]](#) and
- (6) the income that is being earned or may be expected from the investment, both as it relates to the object of the trust to have the trust estate productive and to a lesser extent as it relates to the question of safety.[\[FN10\]](#)

In the light of existing facts and circumstances, exercised due care, skill, and diligence, the trustee is not liable for losses resulting from such an investment.[\[FN11\]](#)

[\[FN1\] Bishop v. People's Bank & Trust Co., 218 Ky. 508, 291 S.W. 718, 51 A.L.R. 1258 \(1927\).](#)

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[\[FN2\] Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\); In re Heyl's Estate, 331 Pa. 202, 200 A. 617, 117 A.L.R. 867 \(1938\).](#)

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[\[FN3\] Bogart v. Van Velsor, 4 Edw. Ch. 718, 6 N.Y. Ch. Ann. 1031, 1848 WL 4558 \(N.Y. Ch. 1848\).](#)

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[\[FN4\] Estate of Collins, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 \(2d Dist. 1977\).](#)

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[\[FN5\] § 497.](#)

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[\[FN6\] Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\).](#)

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[\[FN7\] Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\).](#)

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[\[FN8\] Finley v. Exchange Trust Co., 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 \(1938\).](#)

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[\[FN9\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN10\] § 433.](#)

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[\[FN11\] In re Saeger's Estate, 340 Pa. 73, 16 A.2d 19, 131 A.L.R. 1152 \(1940\).](#)

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§ 496. Loans and mortgages—Adequacy of security

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

The terms of a trust may indicate what security is to be taken on trust investments or may dispense with any such security,^[FN1] but in the absence of any express authorization to the contrary, trust investments in loans must be adequately secured.^[FN2] Such an investment without security is at the personal risk of the trustee.^[FN3] As a general rule, adequate security means the security of a first mortgage of a first lien; ordinarily, a loan of trust money secured by a second mortgage is improper.^[FN4]

A loan to a beneficiary, even though it could otherwise be made,^[FN5] cannot be made on merely the security of the interest of the beneficiary, at least where such interest is only contingent or prospective.^[FN6]

^[FN1] [Merchants' Loan & Trust Co. v. Northern Trust Co.](#), 250 Ill. 86, 95 N.E. 59 (1911).

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^[FN2] [Appeal of Burke](#), 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 (1954); [In re Leonard's Will](#), 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 (1930).

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^[FN3] [Lamar v. Micou](#), 112 U.S. 452, 5 S. Ct. 221, 28 L. Ed. 751 (1884); [Birmingham Trust & Savings Co. v. Ansley](#), 234 Ala. 674, 176 So. 465 (1937).

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[\[FN4\] Davis v. Woods, 273 Ky. 210, 115 S.W.2d 1043 \(1938\).](#)

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[\[FN5\] § 455.](#)

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[\[FN6\] Rogers v. English, 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812 \(1943\).](#)

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§ 497. Loans and mortgages—Ratio, percentage, or margin of safety

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

Aside from a statutory provision or some express provision in the trust declaration, a trust investment in a real-estate mortgage can be made, as a general rule, only where the mortgage is in such ratio to, or constitutes such percentage of, the value of the property mortgaged, as to provide an adequate margin of security for the trust investment,[\[FN1\]](#) judged by the test of what an ordinarily prudent man under similar circumstances and with a similar object in view would consider an adequate margin of security.[\[FN2\]](#)

[\[FN1\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\); In re Saeger's Estate, 340 Pa. 73, 16 A.2d 19, 131 A.L.R. 1152 \(1940\).](#)

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[\[FN2\] Bogart v. Van Velsor, 4 Edw. Ch. 718, 6 N.Y. Ch. Ann. 1031, 1848 WL 4558 \(N.Y. Ch. 1848\).](#)

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§ 498. Loans and mortgages—Consideration of income from mortgaged property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [217.3\(7\)](#)

While income from real property securing a mortgage in which funds of a trust are invested is doubtless a factor that may properly be considered in determining the value of the property,[\[FN1\]](#) the propriety of investment of trust funds upon the security of a mortgage on real estate is considered primarily with reference to the value of the land at the time of the investment, and its availability for sale in case of foreclosure, rather than with reference to the income which it produces. If a trustee in making such an investment exercises requisite care and skill in taking mortgage security in the proper ratio to the estimated value of salable land, taking into consideration the character of the land, its location, trend of values in the neighborhood, and like factors, his or her investment of trust funds therein is not improper merely because the property produces no income or does not produce income sufficient to meet the taxes and the interest on the mortgage.[\[FN2\]](#)

Where the question has been raised whether a trustee may show the rental value of property at the time of making an investment in a mortgage loan, consideration has been given to such a showing, but it has been regarded as of little weight as against the percentage of the mortgage to a correct valuation of the property mortgaged, in determining whether the trustee acted with requisite care, diligence, and skill.[\[FN3\]](#)

[\[FN1\] In re Lyon's Will, 251 A.D. 327, 296 N.Y.S. 308 \(2d Dep't 1937\).](#)

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[\[FN2\] In re Heyl's Estate, 331 Pa. 202, 200 A. 617, 117 A.L.R. 867 \(1938\).](#)

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[\[FN3\] Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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§ 499. Corporate securities and obligations

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West's Key Number Digest, [Trusts](#) [217.3\(7\)](#), [217.4](#)

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[Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187](#)

The general rule that a trustee must exercise as to trust investments the care, diligence, and skill of an ordinarily prudent man under similar circumstances and with a similar object in view is applicable to the making, retention, disposal, or change of investments in corporate stock and bonds.[\[FN1\]](#) Also, the rule against speculation in trust investments, which is a corollary of the ordinarily prudent person rule, in the light of the material circumstance that a trustee is handling the funds of another with the object in view of a long-time and

safe investment,[FN2] applies fully in the case of investments in corporate stock and bonds.[FN3] The trustee, before investing in corporate stock or bonds, must consider whether such securities are those of a conservative and well-established corporation[FN4] of sound financial status.[FN5]

[FN1] In re Eigenmann's Guardianship, 214 Ind. 92, 14 N.E.2d 585, 116 A.L.R. 432 (1938); Creed v. McAleer, 275 Mass. 353, 175 N.E. 761, 80 A.L.R. 1117 (1931); Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 (1909).

- A corporate trustee's brief delay in reinvesting trust funds that were liquidated due to a corporate merger was no more than a failure to exercise a degree of judgment required in the circumstances, and did not amount to an act or omission that would give rise to liability under the trust instrument. Texas Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240 (Tex. 2002), reh'g of cause overruled, (Feb. 27, 2003).

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[FN2] § 483.

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[FN3] In re Buhl's Estate, 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569 (1920); In re Heyl's Estate, 331 Pa. 202, 200 A. 617, 117 A.L.R. 867 (1938)

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[FN4] New England Trust Co. v. Paine, 317 Mass. 542, 59 N.E.2d 263, 158 A.L.R. 262 (1945); In re Buhl's Estate, 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569 (1920).

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[FN5] New England Trust Co. v. Paine, 317 Mass. 542, 59 N.E.2d 263, 158 A.L.R. 262 (1945).

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E. Sale, Conveyance, Transfer, Gift, or Exchange of Trust Property

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E. Sale, Conveyance, Transfer, Gift, or Exchange of Trust Property
1. In General

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§ 500. Operation and effect, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [188.1](#), [204](#)

Generally, a sale, conveyance, or transfer of trust property by a trustee, acting with authority, has the same operation and effect as though he or she were the full legal and equitable owner of the property, and operates to pass the legal and equitable title to the purchaser.[\[FN1\]](#) Even where the trustee lacks such authority, his or her conveyance of trust property operates to vest legal title in the grantee, in the absence of any statute modifying the rule,[\[FN2\]](#) subject, where the grantee is not a purchaser for value, or has notice, actual or implied, of the breach of the trust, to the equities of the beneficiary.[\[FN3\]](#) It is ordinarily incumbent upon the purchaser to see that all conditions precedent to the trustee's power to sell are complied with; without this, he cannot assert any right to protection as a bona fide purchaser.[\[FN4\]](#) When, however, the sale is to a purchaser for value in good faith who has no actual or implied notice of the breach of trust, these equities are cut off and the beneficiary must then seek his or her remedy against the trustee.[\[FN5\]](#)

A purchaser takes the equitable as well as the legal title where the conveyance is made with the written consent of the beneficiary, although a statute requires the transfer or surrender of an interest in land to be in writing signed by the grantor or his authority.[\[FN6\]](#) A trustee who purchases the trust property for him- or herself has legal title thereto—subject to avoidance of the transaction by the beneficiary[\[FN7\]](#)—which title he or she can convey to a purchaser,[\[FN8\]](#) and the purchaser will be protected in his title if he or she is a bona fide purchaser for value, or if he or she is a purchaser from such a bona fide purchaser for value,[\[FN9\]](#) or if the beneficiary does not disaffirm the transaction within due time.[\[FN10\]](#)

[\[FN1\]](#) [Williams v. Jackson](#), 107 U.S. 478, 2 S. Ct. 814, 27 L. Ed. 529 (1883); [Robinson v. Pierce](#), 118 Ala. 273, 24 So. 984 (1898); [Hall v. Solomon](#), 61 Conn. 476, 23 A. 876 (1892).

[\[FN2\]](#) [Wyse v. Dandridge](#), 35 Miss. 672, 1858 WL 3096 (1858); [Gale v. Mensing](#), 20 Mo. 461, 1855 WL 5125 (1855); [Crocker v. Crocker](#), 31 N.Y. 507, 1865 WL 3936 (1865).

[\[FN3\]](#) [§ 532](#).

[\[FN4\]](#) [Cassell v. Ross](#), 33 Ill. 244, 1864 WL 2914 (1864).

[\[FN5\]](#) §§ [274](#) to [277](#), [290](#) to [299](#).

[\[FN6\]](#) [Matthews v. Thompson](#), 186 Mass. 14, 71 N.E. 93 (1904).

[\[FN7\]](#) §§ [274](#) to [277](#).

[\[FN8\] Hoyt v. Latham, 143 U.S. 553, 12 S. Ct. 568, 36 L. Ed. 259 \(1892\); In re Sprain's Estate, 199 Minn. 511, 272 N.W. 779, 111 A.L.R. 1357 \(1937\).](#)

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[\[FN9\] § § 290, 299.](#)

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[\[FN10\] Hoyt v. Latham, 143 U.S. 553, 12 S. Ct. 568, 36 L. Ed. 259 \(1892\).](#)

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§ 501. Application of proceeds

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When real property held in trust is sold, the sale results in a mere substitution of assets, with the proceeds being held by the trustee, with the income payable to the beneficiaries in the same manner as the income from the land, in accordance with the distribution set forth in the trust instrument.[\[FN1\]](#)

The owner of the beneficial interest in an Illinois land trust is empowered to receive the proceeds from the sale of trust property and to transfer the beneficial interest through an assignment.[\[FN2\]](#)

[\[FN1\] Carnahan v. Johnson, 127 Ohio App. 3d 195, 711 N.E.2d 1093 \(12th Dist. Madison County 1998\).](#)

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[\[FN2\] Espevik v. Kaye, 277 Ill. App. 3d 689, 214 Ill. Dec. 360, 660 N.E.2d 1309 \(2d Dist. 1996\).](#)

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2. Powers and Duties of Trustee
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§ 502. Generally

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[Power of sale given trustee by will or trust instrument as surviving termination of trust, 43 A.L.R.2d 1102](#)

Forms

Sales—At trustor's direction. [Am. Jur. Legal Forms 2d, Trusts § 251:466](#)

Definition: A fiduciary's "power to sell" means the authority given by statute, or by the instrument creating the trust, or the capacity inherent in the functioning of his or her office, as distinguished from his or her "right to sell," which is used in the sense of doing that which is proper or correct, in adherence to duty and necessity.[\[FN1\]](#)

The terms of a trust instrument or declaration may, either expressly or impliedly, invest the trustee with power to sell the trust property,[FN2] or he or she may be given such power by statute,[FN3] by a court having jurisdiction in the premises,[FN4] or by the consent of beneficiaries.[FN5] In the absence, however, of any such authorization, a trustee has no power or duty to sell trust property, and an unauthorized sale by him or her is void, or at least voidable.[FN6] The rule applies to a sale of stocks, bonds, or other securities that are proper trust investments and are received by the trustee as part of the trust estate.[FN7] The presumption of law, at least historically, is that an ordinary trustee is without a power of sale;[FN8] but it has been held that a trustee of a testamentary trust having real property as its sole asset may sell the real property in order to pay necessary sums to the beneficiary, even in the absence of express language in the instrument authorizing such sales.[FN9] Furthermore, it has been held that where trust property is unproductive, in that it produced an annual net income of less than one percent of its value, the trustee has a duty to sell such underproductive property.[FN10] In some jurisdictions, a trustee enjoys the discretion to make decisions regarding the disposition of the trust corpus, provided that he or she acts prudently.[FN11]

[FN1] [Virginia Trust Co. v. Evans](#), 193 Va. 425, 69 S.E.2d 409, 32 A.L.R.2d 769 (1952).

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[FN2] [§ 511](#).

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[FN3] [§ 514](#).

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[FN4] [§§ 529 to 532](#).

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[FN5] [§§ 515, 516](#).

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[FN6] [Colorado & S. Ry. Co. v. Blair](#), 214 N.Y. 497, 108 N.E. 840 (1915); [Munsey v. Russell Bros.](#), 31 Tenn. App. 187, 213 S.W.2d 286 (1948).

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[FN7] [Washington County Hospital Ass'n v. Hagerstown Trust Co.](#), 124 Md. 1, 91 A. 787 (1914); [In re Leitsch's Will](#), 185 Wis. 257, 201 N.W. 284, 37 A.L.R. 547 (1924).

- As to the duty of retention or conversion of the existing trust instruments, see [§ § 436, 485 to 487, 489](#).

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[FN8] [Geyser-Marion Gold-Min. Co. v. Stark](#), 106 F. 558 (C.C.A. 8th Cir. 1901); [Carter v. Manufacturers' Nat. Bank](#), 71 Me. 448, 1880 WL 4179 (1880); [Marbury v. Ehlen](#), 72 Md. 206, 19 A. 648 (1890).

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[FN9] [Estate of Wells v. Sanford](#), 281 Ark. 242, 663 S.W.2d 174 (1984).

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[FN10] [Perfect Union Lodge No. 10, A.F. and A.M., of San Antonio v. Interfirst Bank of San Antonio, N.A.](#), 748 S.W.2d 218 (Tex. 1988).

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[FN11] [Aloha Lumber Corp. v. University of Alaska](#), 994 P.2d 991, 142 Ed. Law Rep. 527 (Alaska 1999).

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§ 503. Power of gift, exchange, or other disposition

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[Power of trustee of noncharitable trust to make gift of trust property, 21 A.L.R.3d 801](#)

A power of sale conferred upon a trustee does not in general authorize an alienation of any character other than a sale.[\[FN1\]](#) Granting of the power to sell usually does not authorize a gift of the trust property.[\[FN2\]](#)

A trustee lacks the power to convey the trust corpus in his or her individual capacity.

[\[FN1\] Myrick v. Williamson, 190 Ala. 485, 67 So. 273 \(1914\); Lindsey v. Robinson, 180 Ga. 648, 180 S.E. 106 \(1935\); Clune v. Norton, 306 Mass. 324, 28 N.E.2d 229 \(1940\).](#)

- As to the trustee's power to exchange trust property for a share of a corporation organized to hold the property, see [§ 505](#).

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[\[FN2\] Page v. Natural Gas & Fuel Co., 35 F.2d 462 \(C.C.A. 8th Cir. 1929\); Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516, 79 A.L.R. 1339 \(1931\).](#)

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§ 504. Power of gift, exchange, or other disposition—Power to grant an option

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[Power of executor or trustee with power to sell or to lease real property, or to do both, to give an option to purchase, 83 A.L.R.2d 1310](#)

In some jurisdictions, a trustee has no authority to enter into a contract granting an option to purchase land belonging to the trust estate absent an express grant of such power,^[FN1] though in other jurisdictions, such power can be implied.^[FN2] A trustee with power to sell does not necessarily have the authority to give a long-term option to another to buy and so bind the trust estate that it cannot be sold in the meantime.^[FN3] However, there is some authority to the effect that it may be proper for a fiduciary with a general power of sale to grant an option to purchase in special circumstances where a sale cannot otherwise be advantageously made, at least if the option is to be effective for a short period of time only.^[FN4]

A right of first refusal as to the sale of a settlor's home, granted by the trustee, ripens into an option when the trustee manifests a willingness to accept a good-faith offer.^[FN5]

^[FN1] [Phillips v. Sexton, 243 Ga. 501, 255 S.E.2d 15 \(1979\).](#)

- A guardian may not ordinarily grant an option to sell his or her wards' real estate. [Thompson Funeral Home,](#)

[Inc. v. Thompson, 249 Miss. 472, 162 So. 2d 874 \(1964\).](#)

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[\[FN2\] Ward v. NationsBank of Virginia, N.A., 256 Va. 427, 507 S.E.2d 616 \(1998\).](#)

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[\[FN3\] Loud v. St. Louis Union Trust Co., 313 Mo. 552, 281 S.W. 744 \(1925\).](#)

- As to the authority of the trustee with a power to lease to give a lessee an option to purchase, see [§ 538](#).

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[\[FN4\] Nelson v. American Trust Co., 104 N.J. Eq. 594, 146 A. 460 \(Ch. 1929\), aff'd, 106 N.J. Eq. 282, 150 A. 919 \(Ct. Err. & App. 1930\).](#)

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[\[FN5\] Taylor v. Cesery, 717 So. 2d 1112 \(Fla. Dist. Ct. App. 1st Dist. 1998\).](#)

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§ 505. Power of gift, exchange, or other disposition—Power to exchange trust property for share of corporation organized to hold the property

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West's Key Number Digest, [Trusts](#) [188.1](#)

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[Trustee's power to exchange trust property for share of corporation organized to hold the property, 20 A.L.R.3d 841](#)

A trustee specifically empowered by the trust instrument to exchange trust property has the power to exchange such property for shares in a corporation organized to hold the trust property.^[FN1] A trustee may exchange the trust property for shares in a corporation specifically created to hold the trust assets, where he or she obtains the prior consent of the beneficiaries to effectuate the exchange,^[FN2] or where the trust instrument^[FN3] or a statute^[FN4] gives him or her the power to sell the trust property.

^[FN1] [Wilson Bldg., Inc. v. Baer, 11 Misc. 2d 467, 175 N.Y.S.2d 495 \(Sup 1958\).](#)

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^[FN2] [Reynolds v. Remick, 333 Mass. 1, 127 N.E.2d 653 \(1955\).](#)

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^[FN3] [McCollum v. William McCollum Corp., 435 So. 2d 4 \(Ala. 1983\); Ash v. Ash, 126 N.J. Eq. 531, 10 A.2d 150 \(Ch. 1940\); In re Sprague, 22 R.I. 413, 48 A. 383 \(1901\).](#)

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^[FN4] [In re Sprague, 22 R.I. 413, 48 A. 383 \(1901\).](#)

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§ 506. Duty of good faith

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In selling or disposing of the trust property, it is the trustee's duty to act in good faith in the interests of the beneficiary.^[FN1] While a provision in a trust instrument empowering trustees to exchange or transfer trust property upon such terms as the trustees "in their sole discretion" might deem advisable are broad and could be viewed as "absolute," such a provision in legal contemplation does not mean unlimited or arbitrary discretion but means only that the judgment of the trustees exercised in good faith should control.^[FN2]

The trustee's duty to act in good faith is violated if he or she attempts to secure an advantage for him- or herself from the transaction,^[FN3] and it is an unauthorized, unlawful, and wrongful act for a trustee to transfer trust property to pay his or her own private indebtedness.^[FN4]

Violation by a trustee of his duty of good faith to the beneficiary generally renders a sale or other alienation of trust property voidable against all persons^[FN5] not protected as bona fide purchasers for value,^[FN6] or subjects the trustee, at the election of the beneficiary, to the payment of the full value of the property sold or otherwise aliened.^[FN7]

A trustee's duty of impartiality as among beneficiaries of the same trust^[FN8] pertains, of course, to an exercise by the trustee of a power of sale.^[FN9]

^[FN1] [Wormley v. Wormley](#), 21 U.S. 421, 5 L. Ed. 651 (1823); [Clay v. Thomas](#), 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 (1917); [Schmidt v. Perkins](#), 74 N.J.L. 785, 67 A. 77 (N.J. Ct. Err. & App. 1907); [Finley v. Exchange Trust Co.](#), 1938 OK 178, 183 Okla. 167, 80 P.2d 296, 117 A.L.R. 162 (1938).

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^[FN2] [Copley v. Copley](#), 126 Cal. App. 3d 248, 178 Cal. Rptr. 842 (4th Dist. 1981).

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^[FN3] [Schmidt v. Perkins](#), 74 N.J.L. 785, 67 A. 77 (N.J. Ct. Err. & App. 1907).

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^[FN4] [Manhattan Bank v. Walker](#), 130 U.S. 267, 9 S. Ct. 519, 32 L. Ed. 959 (1889); [Smith v. Ayer](#), 101 U.S. 320, 25 L. Ed. 955 (1879); [Duncan v. Jaudon](#), 82 U.S. 165, 21 L. Ed. 142 (1872); [Newell v. Hadley](#), 206 Mass. 335, 92 N.E. 507 (1910).

- As to the private debt of a trustee as value for a transfer to a bona fide purchaser cutting off equity to follow trust property, see [§ 298](#).

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^[FN5] [Schmidt v. Perkins](#), 74 N.J.L. 785, 67 A. 77 (N.J. Ct. Err. & App. 1907).

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^[FN6] [§§ 290 to 299](#).

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^[FN7] [§ 276](#).

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^[FN8] [§ 359](#).

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^[FN9] [Johnson v. Johnson](#), 242 Iowa 27, 45 N.W.2d 573 (1951); [Gaver v. Gaver](#), 176 Md. 171, 4 A.2d 132 (1939).

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§ 507. Duty of care, diligence, and skill

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The duty of a trustee to exercise due care, diligence, and skill in the administration of a trust^[FN1] is applicable to a sale of trust property.^[FN2] Where real estate owned by a trust has an unreasonably low annual return, the trustee breaches its duty to the beneficiaries and remaindermen when it sells the trust property where the land has strong potential for drastic short-term appreciation and the trustee's own trust policies prohibit selling trust real estate when the potential for appreciation is high.^[FN3] However, whether a sale is proper depends on the circumstances existing at the time the trust is made, rather than upon subsequent events.^[FN4] Trustees' failure to sell an ownership interest in undeveloped property before an unexpected decline in real estate values does not violate the prudent-investor rule, so as to constitute a breach of their fiduciary duty to the primary beneficiary and remaindermen.^[FN5]

A sale of trust property, under the requirement of diligence, must be made within a reasonable time^[FN6] and for the best price and on the best terms that are reasonably attainable.^[FN7]

^[FN1] §§ [360](#) to [365](#).

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^[FN2] [Winder v. Nock](#), 104 Va. 759, 52 S.E. 561 (1906); [Long Lake Lumber Co. v. Stewart](#), 198 Wash. 348, 88 P.2d 414 (1939).

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^[FN3] [Thomas v. Turner](#), 736 S.W.2d 343 (Ky. Ct. App. 1987).

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[\[FN4\] Estate of Pitzer, 155 Cal. App. 3d 979, 202 Cal. Rptr. 855 \(2d Dist. 1984\).](#)

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[\[FN5\] In re Estate of Cavin, 728 A.2d 92 \(D.C. 1999\).](#)

- As to the prudent-investor rule, generally, see [§ 477](#).

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[\[FN6\] § 533.](#)

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[\[FN7\] § 535.](#)

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§ 508. Cotrustees or surviving trustees

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In accordance with the general rule that cotrustees must act jointly in the execution of trust powers,[\[FN1\]](#) they must join in the sale and conveyance of trust property[\[FN2\]](#) in order to pass a legal title.[\[FN3\]](#) Ordinarily, a separate conveyance by a cotrustee fails to pass even his or her share in the legal title,[\[FN4\]](#) and this is true although other cotrustees have disclaimed or released to him or her.[\[FN5\]](#)

A conveyance by the only qualifying trustee or trustees of several named,[\[FN6\]](#) or by a surviving trustee,[\[FN7\]](#) is, however, effective, at least where the power is one coupled with an interest.[\[FN8\]](#)

[\[FN1\] § 320.](#)

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[\[FN2\] Wilbur v. Almy, 53 U.S. 180, 12 How. 180, 13 L. Ed. 944 \(1851\); Smilie v. Biffle, 2 Pa. 52 \(1845\).](#)

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[\[FN3\] Learned v. Welton, 40 Cal. 349, 1870 WL 952 \(1870\); Ham v. Ham, 58 N.H. 70, 1877 WL 10006 \(1877\).](#)

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[\[FN4\] First Nat. Bank v. Cash, 220 Ala. 319, 125 So. 28 \(1929\).](#)

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[\[FN5\] Milne v. Cummings, 4 Yeates 577, 1808 WL 1485 \(Pa. 1808\).](#)

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[\[FN6\] Gray v. McCurdy, 114 Tex. 217, 266 S.W. 396, 36 A.L.R. 820 \(1924\).](#)

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[\[FN7\] Barr v. Gratz's Heirs, 17 U.S. 213, 4 L. Ed. 553 \(1819\).](#)

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[\[FN8\] Wallace v. Foxwell, 250 Ill. 616, 95 N.E. 985 \(1911\); Atzinger v. Berger, 151 Ky. 800, 152 S.W. 971 \(1913\).](#)

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§ 509. Substitute and successor trustees

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[Right of an administrator with the will annexed, or trustee other than the person named in the will as such, to execute power of sale conferred by will, 9 A.L.R.2d 1324](#)

A substitute trustee can, in general, exercise a power of sale conferred by the terms of the trust,[[FN1](#)] unless the power is personal to the trustee named in the trust instrument by reason of the trustor's expression of trust and confidence in him or her.[[FN2](#)] The authority of the substitute trustee to execute the power is predicated, where it exists, on its appurtenancy to the office of trustee,[[FN3](#)] which is to be presumed, in the absence of clear expression by the trustor to the contrary.[[FN4](#)] The authority of the substitute trustee to exercise the power may be clearly expressed, of course, by the trust instrument.[[FN5](#)]

Where an initial trustee lacks the authority to enter into a contract with a purchaser for the sale of trust land, the successor trustee is entitled to judgment as a matter of law in the purchaser's breach of contract action, where an amendment extinguishes the trustee's power to dispose of trust assets without constituting revocation of the trust.[[FN6](#)]

[[FN1](#)] [Dodge v. Dodge](#), 109 Md. 164, 71 A. 519 (1908); [In re Devincenzi's Estate](#), 65 Nev. 158, 190 P.2d 842 (1948); [In re Morris' Will](#), 197 Misc. 322, 97 N.Y.S.2d 740 (Sup 1949).

- As to the powers of a substitute or successor trustee, see [§ 324](#).

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[[FN2](#)] [Pippin v. Barker](#), 233 N.C. 549, 64 S.E.2d 830 (1951).

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[[FN3](#)] [Haggin v. Straus](#), 148 Ky. 140, 146 S.W. 391 (1912); [Maryland Casualty Co. v. Safe Deposit & Trust Co. of Baltimore](#), 115 Md. 339, 80 A. 903 (1911).

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[[FN4](#)] [Dodge v. Dodge](#), 109 Md. 164, 71 A. 519 (1908).

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[[FN5](#)] [Haggin v. Straus](#), 148 Ky. 140, 146 S.W. 391 (1912).

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[[FN6](#)] [Pierpont v. Tenedine](#), 2002 WL 959971 (Conn. Super. Ct. 2002).

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§ 510. Delegation; employment of agent

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[Trustee's power to employ broker or agent to sell or lease estate property, 47 A.L.R.2d 1379](#)

A trustee having the power to sell the trust property may utilize the services of real-estate brokers or agents to sell or lease estate property,[\[FN1\]](#) or at least may employ agents to a limited extent to carry out what he or she has already decided upon in respect of the sale,[\[FN2\]](#) or to find a purchaser for the property;[\[FN3\]](#) but unless such authority is expressly granted to him or her, a trustee cannot delegate to an agent or any other third person his or her power to sell the trust property. Therefore, a sale of land by an agent of a trustee passes no title to the purchaser where there is nothing on the face of the trust instrument authorizing the trustee to appoint an agent to make the sale for him or her.[\[FN4\]](#) A trustee must exercise his or her own judgment, and not delegate responsibility, in determining the time, place, and mode of sale.[\[FN5\]](#)

Under some circumstances, trustees can properly ratify the acts of agents in selling trust property and thus validate the transactions.[\[FN6\]](#)

[\[FN1\]](#) [Corpus Christi Bank and Trust v. Roberts, 597 S.W.2d 752 \(Tex. 1980\).](#)

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[\[FN2\]](#) [Ball v. Consolidated Realty Co., 246 Ky. 458, 55 S.W.2d 60 \(1932\).](#)

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[\[FN3\]](#) [Coleman v. Connolly, 242 Ill. 574, 90 N.E. 278 \(1909\); Appeal of Burke, 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 \(1954\).](#)

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[\[FN4\] Coleman v. Connolly, 242 Ill. 574, 90 N.E. 278 \(1909\); Fuller v. O'Neal, 69 Tex. 349, 6 S.W. 181 \(1887\).](#)

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[\[FN5\] § 533.](#)

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[\[FN6\] Hill v. Peoples, 80 Ark. 15, 95 S.W. 990 \(1906\).](#)

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§ 511. Generally

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West's Key Number Digest, [Trusts](#) [188.1](#), [189](#), [191\(1\)](#), (2), (3)

The terms of a trust may determine the existence and scope of the power and duty of the trustee to sell property of the trust estate.[\[FN1\]](#) The trust instrument, including a will, may either expressly or by implication endow the trustee with a power of sale,[\[FN2\]](#) without any requirement that the power be exercised only upon petition to and order by a court, after an appraisal, or upon the giving of a bond.[\[FN3\]](#) It may vest broad discretion in the trustee as to the amount of property to be sold,[\[FN4\]](#) and as to the time[\[FN5\]](#) and the terms of the sale.[\[FN6\]](#)

Under the Restatement of Trusts, Third, the trustee can properly sell trust property unless the terms of the trust expressly prohibit or condition the sale of some or all of the trust assets, or it appears from the terms of the trust and the circumstances that assets of the trust are to be retained in specie in the trust estate.[\[FN7\]](#)

[FN1] [First Nat. Bank v. Sheehan, 220 Ala. 524, 126 So. 409 \(1930\)](#); [Von Schrader v. Cornet, 3 S.W.2d 706 \(Mo. 1927\)](#); [Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\)](#).

[FN2] [Shoemaker v. Newman, 65 F.2d 208, 89 A.L.R. 1034 \(App. D.C. 1933\)](#); [McCollum v. McCollum, 328 Ark. 607, 946 S.W.2d 181 \(1997\)](#); [Ackerman v. Fichter, 179 Ind. 392, 101 N.E. 493 \(1913\)](#); [Robinson v. Robinson, 105 Me. 68, 72 A. 883 \(1908\)](#); [Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\)](#).

- An inter vivos trust, which gave the settlors the power to revoke the trust without the consent of the beneficiaries, and which provided that the sale or other disposition by the settlors of any part of the property held under the trust would constitute a revocation of the trust, authorized the settlors to sell or otherwise dispose of the sole trust asset. [Matter of Estate of West, 948 P.2d 351 \(Utah 1997\)](#).

- The execution of an earnest money agreement was not a sale or disposition of real property under the terms of an inter vivos trust which provided for the distribution of such property to the settlor's grandson unless sold or otherwise disposed of at the settlor's death; therefore, legal title remained in the settlor as trustee until his death, and such property was properly distributed to his grandson. [Ciet v. Kaufman, 902 P.2d 153 \(Utah Ct. App. 1995\)](#).

[FN3] [Ackerman v. Fichter, 179 Ind. 392, 101 N.E. 493 \(1913\)](#).

[FN4] [Shoemaker v. Newman, 65 F.2d 208, 89 A.L.R. 1034 \(App. D.C. 1933\)](#).

[FN5] [§ 533](#).

[FN6] [§ § 533, 534, 537](#).

[FN7] [Restatement Third, Trusts: Prudent Investor Rule § 190](#).

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§ 512. Power of sale as surviving termination of trust

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West's Key Number Digest, [Trusts](#) [191\(2\)](#)

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[Power of sale given trustee by will or trust instrument as surviving termination of trust, 43 A.L.R.2d 1102](#)

In determining whether, and if so when, a trustee may exercise a power of sale vested in him or her, notwithstanding the trust term has ended, or has reached the point of ending, so that at most nothing remains but a winding-up process, involving perhaps a distribution or conveyance of money or property, the basic inquiry is the intent of the trustor in conferring the power.[\[FN1\]](#)

The situation which exists where one or some of two or more trusts embracing interests in common property come to an end while the others continue may be compared to that of a single trust as to which remainder interests of one or some of the beneficiaries have vested in them and cannot be further managed by the trustee, notwithstanding his or her duties fully continue as to the other interests.[\[FN2\]](#)

[\[FN1\] Breen v. Breen, 411 Ill. 206, 103 N.E.2d 625 \(1952\).](#)

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[\[FN2\] Forman v. Young, 166 A.D. 815, 152 N.Y.S. 417 \(1st Dep't 1915\), aff'd, 222 N.Y. 516, 118 N.E. 1058 \(1917\).](#)

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§ 513. Implication of powers and duties

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West's Key Number Digest, [Trusts](#) [189](#), [191\(2\)](#)

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[Implied power of executor or testamentary trustee to sell real estate, 23 A.L.R.2d 1000](#)

A trustee's power of sale of the trust property may arise by implication from the terms of the trust instrument,^[FN1] construed as an entirety.^[FN2] Such an implication does not depend on any particular form of words,^[FN3] and may result from language in the trust instrument necessarily requiring the exercise of the power,^[FN4] from the statement of purposes or the conferring of other powers or duties to which the power of sale is essential,^[FN5] or from manifestation of the intent of the trustor as disclosed by an examination of the entire instrument.^[FN6] The implied power to sell property or securities in which trust funds are invested exists where necessary for the proper discharge of the trust.^[FN7]

The implication of a power to sell does not arise, however, merely from the desirability of a sale.^[FN8] Even in an emergency, while a trustee may sell trust property although he or she has not been authorized so to do by the terms of the trust, such a sale without authorization of a court having jurisdiction in the matter has been said to be at his risk.^[FN10]

[FN1] [Beeler v. Fidelity & Columbia Trust Co.](#), 293 Ky. 361, 169 S.W.2d 16 (1943); [Revoc Co. v. Thomas](#), 179 Md. 101, 16 A.2d 847, 134 A.L.R. 373 (1940); [First Union Nat. Bank of N. C. v. Broyhill](#), 263 N.C. 189, 139 S.E.2d 214 (1964).

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[FN2] [Beeler v. Fidelity & Columbia Trust Co.](#), 293 Ky. 361, 169 S.W.2d 16 (1943).

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[FN3] [Preston v. Safe Deposit & Trust Co.](#), 116 Md. 211, 81 A. 523 (1911).

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[FN4] [Preston v. Safe Deposit & Trust Co.](#), 116 Md. 211, 81 A. 523 (1911).

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[FN5] [Robinson v. Robinson](#), 105 Me. 68, 72 A. 883 (1908); [First Nat. Bank of Portland v. Bell](#), 125 Or. 598, 268 P. 63 (1928).

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[\[FN6\] Preston v. Safe Deposit & Trust Co., 116 Md. 211, 81 A. 523 \(1911\).](#)

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[\[FN7\] First Nat. Bank v. Lee, 23 Ky. L. Rptr. 1897, 66 S.W. 413 \(Ky. 1902\).](#)

- The trustee's plan to sell trust property, an apartment building where a beneficiary lived, was a reasonable exercise of the trustee's discretionary authority where the trustee planned to use the proceeds for the beneficiary's maintenance as well as the educational needs of the beneficiary's children, and where the beneficiary and his wife prevented repairs to the building and lead paint removal was necessary. [Gershaw v. Gershfield, 52 Mass. App. Ct. 81, 751 N.E.2d 424 \(2001\).](#)

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[\[FN8\] First Baptist Church of Jacksonville v. American Bd. of Com'rs for Foreign Missions, 66 Fla. 441, 63 So. 826 \(1913\); Dunn v. Haley's Trustees, 302 Ky. 323, 194 S.W.2d 635 \(1946\).](#)

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[\[FN10\] Vickers v. Vickers, 189 Ky. 323, 225 S.W. 44 \(1920\).](#)

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The alienation of trust estates may be governed by statute.[FN1] The purpose of a statute governing conveyances of real property to trusts is to give credence to the actions of trustees in selling, pledging as collateral, or otherwise dealing with trust property.[FN2]

[FN1] [In re Estate of Kiser, 72 P.3d 425 \(Colo. Ct. App. 2003\)](#); [Douglas v. Cruger, 80 N.Y. 15, 1880 WL 12365 \(1880\)](#).

[FN2] [In re Estate of Kiser, 72 P.3d 425 \(Colo. Ct. App. 2003\)](#).

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West's Key Number Digest

West's Key Number Digest, [Trusts](#) [189](#), [192](#)

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[Propriety of sale of trust assets without consent despite trust provision requiring consent, 39 A.L.R.4th 158](#)

[Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 A.L.R.3d 1249](#)

A trust instrument may require that before selling trust property, the trustee must obtain the consent or advice of beneficiaries or of some or a certain portion of them,[FN1] or that he or she obtain the consent or advice of disinterested advisers;[FN2] or it may require or direct the trustee to sell upon the request of beneficiaries.[FN3] While a trustee may sua sponte seek the beneficiaries' agreement before disposing of trust property, unless the trust agreement so provides, their consent is not required.[FN4]

Although, where a trust agreement gives the trustee full power to manage, sell, or lease all or any part of the assets of the trust estate, the trustee is not required to secure the consent of the beneficiaries before selling trust assets, the trustee must inform the beneficiaries of all material facts in connection with nonroutine transactions which significantly affect the trust estate and the interests of the beneficiaries prior to the transaction taking place.[FN5]

[FN1] [Gindrat v. Montgomery Gas-Light Co.](#), 82 Ala. 596, 2 So. 327 (1887).

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[FN2] [Gathright's Trustee v. Gaut](#), 276 Ky. 562, 124 S.W.2d 782, 120 A.L.R. 1403 (1939).

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[FN3] [Fredrick v. Fredrick](#), 219 Ill. 568, 76 N.E. 856 (1906).

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[FN4] [Rock Springs Land and Timber, Inc. v. Lore](#), 2003 WY 100, 75 P.3d 614 (Wyo. 2003).

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[FN5] [Allard v. Pacific Nat. Bank](#), 99 Wash. 2d 394, 663 P.2d 104 (1983).

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§ 516. Estoppel or waiver

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West's Key Number Digest, [Trusts](#) [192](#)

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[Estoppel of or waiver by parties or participants regarding irregularities or defects in execution or judicial sale, 2 A.L.R.2d 6](#)

The general rule that consent, affirmation, or even silent approval of an act of a trustee by a beneficiary raises an estoppel or waiver precluding such beneficiary from raising any objection or asserting any liability in respect of any breach of trust by a trustee,[\[FN1\]](#) is applicable in respect of sales of trust property.[\[FN2\]](#) Where the written consent of beneficiaries is required, a beneficiary is not estopped from objecting to the sale of a trust asset by the fact that he or she was present at a meeting of beneficiaries concerning the prospective sale, where the beneficiary makes it clear that his or her consent is contingent on the occurrence of other events agreed to at a meeting of the beneficiaries.[\[FN3\]](#)

[\[FN1\]](#) §§ [326](#) to [330](#).

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[\[FN2\]](#) [Word v. Sparks, 191 Ark. 893, 82 S.W.2d 5 \(1935\); Marcum v. Wallace, 246 Ky. 726, 56 S.W.2d 5 \(1932\).](#)

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[\[FN3\]](#) [Matter of Scheib Trust, 457 N.W.2d 4 \(Iowa Ct. App. 1990\).](#)

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a. In General

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§ 517. Generally

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West's Key Number Digest, [Trusts](#) [188.1](#)

The general rule is that any person other than the trustee or those acting in his or her interest^[FN1] or having a direct interest in defeating the trust^[FN2] may validly bid and purchase at a trustee's sale of trust property.^[FN3] Generally, such bid and purchase may validly be made by a beneficiary of the trust,^[FN4] or for his or her benefit.^[FN5]

^[FN1] As to trustees as purchasers, generally, see [§§ 519 et seq.](#)

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^[FN2] [In re Stack's Will](#), 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

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^[FN3] [Johnson v. Johnson](#), 242 Iowa 27, 45 N.W.2d 573 (1951).

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^[FN4] [Searles v. Kelley, Simmons & Co.](#), 88 Miss. 228, 40 So. 484 (1906).

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^[FN5] [Matter of McManus' Estate](#), 62 A.D.2d 758, 407 N.Y.S.2d 180 (2d Dep't 1978), judgment aff'd, [47 N.Y.2d 717](#), 417 N.Y.S.2d 55, 390 N.E.2d 773 (1979).

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§ 518. Agents

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Agents for the management and operation of trust properties are not disqualified by reason of their employment from purchasing the properties when they are sold by the trustee, since a mere agency for one purpose does not disqualify the agent from dealing with his principal outside the scope of the agency.[FN1] A sale to such agents will not be set aside by reason of the fact that their position gives them an advantage over other bidders at the sale.[FN2] Where, however, management and operation agents are called upon by trustees for information, and they conceal property or mislead the trustees as to its value, and thereafter purchase the property, they are guilty of fraud.[FN3]

[FN1] [Am. Jur. 2d, Agency § 231.](#)

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[FN2] [§ 535.](#)

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[FN3] [Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 \(1928\).](#)

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The trustee's duty to serve the interest of the beneficiary with complete loyalty, excluding all self-interest, prohibits him or her from dealing with a trust property for his or her individual benefit; the purchase of trust property by a trustee for his or her own account is a breach of this duty.^[FN1] Likewise, a trustee holding property for a group has no right to assign the property as his or her own.^[FN2] Accordingly, in the absence of special circumstances,^[FN3] the purchase of trust property by the trustee, without the knowledge or consent of the beneficiary,^[FN4] or without authorization by a court having jurisdiction in the matter,^[FN5] is improper and, although not void, is voidable at the instances of beneficiaries of the trust^[FN6] irrespective of the good faith of the trustee, profit or advantage to him or her from the transaction, or loss or prejudice to the trust estate.^[FN8]

^[FN1] [Home Federal Sav. and Loan Ass'n of Chicago v. Zarkin](#), 89 Ill. 2d 232, 59 Ill. Dec. 897, 432 N.E.2d 841, 30 A.L.R.4th 721 (1982); [Clay v. Thomas](#), 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 (1917).

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^[FN2] [Waxler v. Dalsted](#), 529 N.W.2d 176 (N.D. 1995).

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^[FN3] § 522.

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^[FN4] § 526.

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^[FN5] § 523.

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^[FN6] [Magruder v. Drury](#), 235 U.S. 106, 35 S. Ct. 77, 59 L. Ed. 151 (1914); [Cunningham v. Macon & B.R. Co.](#), 156 U.S. 400, 15 S. Ct. 361, 39 L. Ed. 471 (1895); [Hoyt v. Latham](#), 143 U.S. 553, 12 S. Ct. 568, 36 L. Ed. 259 (1892); [Ford City Bank & Trust Co. v. Ford City Bank & Trust Co.](#), 110 Ill. App. 3d 123, 65 Ill. Dec. 678, 441 N.E.2d 1192 (1st Dist. 1982); [Appeal of Burke](#), 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 (1954).

- While trustees have exclusive control of the trust property and the power to dispose of it at a public or private sale, a trustee's transfer of trust property to him- or herself may constitute a breach of the trustee's fiduciary duty and a voidable sale affected by a substantial conflict of interest. [Matter of Estate of West](#), 948 P.2d 351 (Utah 1997).

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^[FN8] § § 521, 522.

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§ 520. Authorization by trust provision

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[Validity and construction of trust provision authorizing trustee to purchase trust property, 39 A.L.R.3d 836](#)

While, as a general rule, a trustee cannot deal for him- or herself in regard to the trust property,[\[FN1\]](#) it has been recognized that the terms of a trust may validly confer authority upon a trustee to purchase in his or her individual capacity property owned or held by the trust estate.[\[FN2\]](#) In the absence of contrary public policy or prohibitory legislation, expressed or implied, the expressed intention of a grantor will override whenever possible objections to the sale to a trustee of trust property, where the trust instrument expressly allows such transfer.[\[FN3\]](#)

[\[FN1\]](#) § 519.

[\[FN2\]](#) [Fladung v. Fladung, 162 Colo. 381, 426 P.2d 543 \(1967\); Losner v. First Nat. Bank of Homestead, 308 So. 2d 605 \(Fla. Dist. Ct. App. 3d Dist. 1975\); Robertson v. Hert's Adm'rs, 312 Ky. 405, 227 S.W.2d 899 \(1950\); In re Krause's Estate, 19 Mich. App. 155, 172 N.W.2d 468, 39 A.L.R.3d 828 \(1969\); In re Vance's](#)

[Estate, 11 Wash. App. 375, 522 P.2d 1172 \(Div. 1 1974\).](#)

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[\[FN3\] In re Frolich's Estate, 112 N.H. 320, 295 A.2d 448 \(1972\).](#)

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§ 521. Effect of good faith and giving of value

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The rule against purchase of trust property by the trustee conclusively presumes in effect unfair dealing from the self-dealing, and it is immaterial to the invalidity of the purchase by the trustee that in fact he or she acted in good faith^[FN1] or gave full consideration.^[FN2] It is likewise immaterial that the trust estate in fact sustained no loss or prejudice.^[FN3]

^[FN1] [Hoyt v. Latham, 143 U.S. 553, 12 S. Ct. 568, 36 L. Ed. 259 \(1892\); Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 \(1917\).](#)

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^[FN2] [Hoyt v. Latham, 143 U.S. 553, 12 S. Ct. 568, 36 L. Ed. 259 \(1892\).](#)

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[\[FN3\] Mosser v. Darrow, 341 U.S. 267, 71 S. Ct. 680, 95 L. Ed. 927 \(1951\); Hoyt v. Latham, 143 U.S. 553, 12 S. Ct. 568, 36 L. Ed. 259 \(1892\).](#)

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[Enforceability of contractual right, in which fiduciary has interest, to purchase property of estate or trust, 6 A.L.R.4th 786](#)

The rule against the purchase of trust property by the trustee will not apply where, under the particular circumstances of the case, the reason for the rule does not exist,[\[FN1\]](#) as, for example, where there is no possibility of advantage to the trustee or prejudice to the trust estate from the transaction in question.[\[FN2\]](#) Thus, the rule prohibiting a trustee of a testamentary trust from dealing with trust property for his own benefit and to the detriment of the trust property has been held inapplicable to the exercise of an option to purchase trust property under a lease between the decedent and a partnership, despite the fact that one of the cotrustees of

the testamentary trust was a partner in the partnership where the discretion of the cotrustee was limited by the fixed terms of the lease.[FN3]

[FN1] [Appeal of Burke, 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 \(1954\); Honeywell v. Dominick, 223 S.C. 365, 76 S.E.2d 59 \(1953\).](#)

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[FN2] [Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 \(1967\).](#)

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[FN3] [In re Thomas, 311 A.2d 112 \(Del. 1973\).](#)

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§ 523. Judicial, public, or foreclosure sale, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [198](#)

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[Right of trustee of land having interest therein to purchase on his own behalf in association with foreclosure by third-party lienor, in absence of express trust provision, 30 A.L.R.4th 732](#)

The rule in some jurisdictions is that a trustee cannot purchase trust property on his or her own account, even at a public sale,^[FN1] irrespective of his or her good faith and the fairness of the transaction.^[FN2] Such rule has been followed not only where the sale was brought about by the trustee,^[FN3] but also where it was brought about by another.^[FN4] The broad view has been taken that even in the case of a judicial sale which is public and conducted by an official and not by the trustee, the trustee cannot purchase trust property on his or her own account, at least in a proceeding begun by him or her.^[FN5]

^[FN1] [Marr v. Marr, 73 N.J. Eq. 643, 70 A. 375 \(Ct. Err. & App. 1908\).](#)

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^[FN2] [Harrison v. McHenry, 9 Ga. 164, 1850 WL 1585 \(1850\); Bank of Old Dominion v. Dubuque & Pac. Railroad Co., 8 Iowa 277, 8 Clarke 277, 1859 WL 214 \(1859\).](#)

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^[FN3] [Marr v. Marr, 73 N.J. Eq. 643, 70 A. 375 \(Ct. Err. & App. 1908\).](#)

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^[FN4] [§ 524.](#)

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^[FN5] [Linsley v. Strang, 149 Iowa 690, 126 N.W. 941 \(1910\).](#)

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§ 524. Sale by, or brought about by, another; purchase of outstanding claim

West's Key Number Digest

It is a broad rule followed in many jurisdictions that any purchase by a trustee for his or her own benefit of an outstanding title, claim to, or interest in, the trust property, whether at a judicial, execution, foreclosure, private, or other sale by, or brought about by, another, is presumed to be for, and inures to, the benefit of the trust estate and the beneficiaries,[[FN1](#)] at their election,[[FN2](#)] irrespective of actual good faith or fraud on the part of the trustee;[[FN3](#)] but where the trust estate takes the benefit of the purchase, the trustee is entitled to reimbursement for his or her expenditures, at least where he or she acted in good faith to protect the trust estate in the purchase.[[FN4](#)]

[[FN1](#)] [Union Pac. R. Co. v. Durant](#), 95 U.S. 576, 24 L. Ed. 391 (1877); [Vulcan Detinning Co. v. American Can Co.](#), 72 N.J. Eq. 387, 67 A. 339 (Ct. Err. & App. 1907); [Butler v. Butler](#), 144 S.W.2d 956 (Tex. Civ. App. Texarkana 1940), writ dismissed, judgment correct, (Jan. 8, 1941).

- A cotrustee cannot purchase property on behalf of herself and another at a foreclosure sale, even though the sale is conducted by another trustee and the trustee making the purchase was not an active participant in conducting the sale. [Smith v. Credico Indus. Loan Co.](#), 234 Va. 514, 362 S.E.2d 735 (1987).

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[[FN2](#)] [Wilson v. Brookshire](#), 126 Ind. 497, 25 N.E. 131 (1890).

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[[FN3](#)] [Fulton v. Whitney](#), 66 N.Y. 548, 1876 WL 12264 (1876).

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[[FN4](#)] [§ 571](#).

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§ 525. Purchase for another

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [198](#)

Generally, a trustee selling trust property cannot purchase it as agent for another.[\[FN1\]](#) Such a purchase, if it does not violate self-dealing, violates the duty of a trustee to give undivided loyalty to the trust.[\[FN2\]](#)

[\[FN1\]](#) [In re Carlson's Guardianship, 162 Wash. 20, 297 P. 764 \(1931\).](#)

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[\[FN2\]](#) [In re Carlson's Guardianship, 162 Wash. 20, 297 P. 764 \(1931\).](#)

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§ 526. Effect of approval or consent of beneficiary

West's Key Number Digest

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A purchase by a trustee of trust property from or with the approval of the beneficiary, if the latter is competent to give such approval,[FN1] is valid as against such beneficiary, where the transaction is made in good faith on the part of the trustee, on an adequate consideration, with full knowledge of the facts by the beneficiary, and as a result of independent thought on his or her part.[FN2]

[FN1] [Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 \(1917\).](#)

[FN2] [Michoud v. Girod, 45 U.S. 503, 45 U.S. 506, 4 How. 503, 11 L. Ed. 1076 \(1846\); Herpolsheimer v. Michigan Trust Co., 261 Mich. 209, 246 N.W. 81 \(1933\), aff'd, 248 N.W. 610 \(Mich. 1933\).](#)

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§ 527. By spouse or relative

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [189](#), [198](#)

It is generally recognized that a purchase of trust property by a spouse or close relative of a trustee is improper and voidable by the beneficiary where and to the extent that such a purchase by the trustee him- or herself would be improper and voidable by the cestui que trust,[FN1] even though the transaction is free from actual fraud and supported by fair consideration.[FN2] One reason for this rule is to prevent any conflict of interest in the mind of the trustee in a sale of the trust property, and to prevent any opportunity or temptation to him or her to take a profit or benefit from such a transaction.[FN3] A trustee breaches his or her fiduciary duties

when he or she engages in improper familial conflict of interest by selling the trust corpus to the trustee's child.[FN4]

Such a purchase has been condemned despite the fact that the spouse or relative was also a beneficiary.[FN5]

In accordance with the rule that a trust instrument should be strictly construed in favor of the beneficiaries, where a will does not specifically permit the sale of trust property to a "relative," the state trust act, which prohibits the sale of the trust property to the trustee's brother, applies.[FN6]

[FN1] [Frazier v. Jeakins, 64 Kan. 615, 68 P. 24 \(1902\)](#); [Brandau v. Greer, 95 Miss. 100, 48 So. 519 \(1909\)](#); [Maddox v. Maddox, 151 Neb. 626, 38 N.W.2d 547 \(1949\)](#); [In re Fulton's Will, 253 A.D. 494, 2 N.Y.S.2d 917 \(3d Dep't 1938\)](#); [Scottish-American Mortg. Co. v. Clowney, 70 S.C. 229, 49 S.E. 569 \(1904\)](#); [Matter of Estate of West, 948 P.2d 351 \(Utah 1997\)](#).

[FN2] [Frazier v. Jeakins, 64 Kan. 615, 68 P. 24 \(1902\)](#); [In re Fulton's Will, 253 A.D. 494, 2 N.Y.S.2d 917 \(3d Dep't 1938\)](#).

[FN3] §§ [349](#), [350](#), [353](#), [355](#), [357](#), [359](#).

[FN4] [Giagnorio v. Emmett C. Torkelson Trust, 292 Ill. App. 3d 318, 226 Ill. Dec. 693, 686 N.E.2d 42 \(2d Dist. 1997\)](#).

[FN5] [Pierce v. Dahlgren, 300 F. 268, 2 Ohio L. Abs. 741 \(C.C.A. 6th Cir. 1924\)](#).

[FN6] [Price v. Johnston, 638 S.W.2d 1 \(Tex. App. Corpus Christi 1982\)](#).

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§ 528. By others in close relationship to trustee

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A sale of trust property by a trustee to a corporation of which he or she is an officer or stockholder has generally been held to be voidable or to render the trustee accountable for his or her act,[\[FN1\]](#) and this is particularly true of a sale of trust property to a corporation organized by the trustee in his or her individual capacity to take over the business of the trust estate.[\[FN2\]](#) The view has been taken, however, that such a transaction, where the trustee is a stockholder of the purchasing corporation, is not necessarily voidable, although it is to be scrutinized carefully by a court.[\[FN3\]](#)

A bank trustee's sale of trust property to a substantial customer of the bank constituted a conflict of interest where the bank as trustee gave special consideration to the customer that it would not give to other potential purchasers if the land had been offered at public auction, the trustee made no efforts to market the land through its real-estate division or through any real-estate broker, the trustee never informed the remainderman of its contemplated sale and, upon receipt of the customer's purchase offered to the trustee, the trustee did not make a counteroffer.[\[FN4\]](#)

[\[FN1\]](#) [Otter v. Neiman, 96 Misc. 481, 160 N.Y.S. 610 \(Sup 1916\).](#)

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[\[FN2\]](#) [Ball v. Hopkins, 268 Mass. 260, 167 N.E. 338 \(1929\).](#)

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[\[FN3\]](#) [Van Heusen v. Van Heusen Charles Co., 74 Misc. 292, 131 N.Y.S. 401 \(Sup 1911\).](#)

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[\[FN4\]](#) [Thomas v. Turner, 736 S.W.2d 343 \(Ky. Ct. App. 1987\).](#)

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§ 529. Generally; interference with trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [193.5](#), [194](#)

Judicial authorization of a sale of trust property generally is necessary where the trustee is one appointed by the court to administer a trust under its supervision and control,[\[FN1\]](#) but not where the trustee is one who is named as such by the terms of the trust which authorizes him or her to sell trust property.[\[FN2\]](#)

The general rule is that in the absence of fraud, mismanagement, or incapacity, a court will not interfere with the power given to a trustee to sell the trust property.[\[FN3\]](#) In a proper case, however, a court of equity will, upon the application of a beneficiary, compel a sale where the trustee is at fault in not selling trust property, as where he or she has unduly delayed in selling the property and further delay will not be of advantage to all concerned.[\[FN4\]](#)

[\[FN1\]](#) [§ 544](#).

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[\[FN2\]](#) [Barr v. Gratz's Heirs](#), 17 U.S. 213, 4 L. Ed. 553 (1819).

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[\[FN3\]](#) [Dickey v. Volker](#), 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928).

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[\[FN4\]](#) [Shoemaker v. Newman](#), 65 F.2d 208, 89 A.L.R. 1034 (App. D.C. 1933).

- As to the removal of a trustee, see [§ 224](#).

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§ 530. Approval or confirmation of sale

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [193.5](#), [194](#), [196](#)

In trusteeships under the active supervision and control of a court, all sales of the trust property are necessarily subject to previous order or subsequent confirmation or rejection by the court.^[FN1] The standard governing the trial court's consideration of the trustee's request to confirm the sale of trust property should be whether the trustee was acting in a reasonable and prudent manner at the time the agreement was executed, not whether it had obtained the highest price possible at the time the court acted.^[FN2] Where a sale is subject to confirmation by the court, the role of the court is limited to determining whether the sale was fairly conducted and made and whether a reasonable price had been offered;^[FN3] the trial court does not have the power to solicit additional bids, its sole function being to determine whether the agreed upon price represents reasonable value.^[FN4]

In case of sales not authorized by the terms of the trust, court approval should be sought.^[FN5] A proceeding for such an approval or confirmation by the court ordinarily requires that beneficiaries be made parties or be notified, although in a proper case virtual representation of unborn beneficiaries suffices.^[FN6]

^[FN1] [Kenaday v. Edwards, 134 U.S. 117, 10 S. Ct. 523, 33 L. Ed. 853 \(1890\).](#)

- As to the effect of a second and higher offer on a final approval of a trustee's sale, see [§ 536](#).

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^[FN2] [Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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^[FN3] [Stanton v. Sayre, 10 Ohio App. 3d 174, 461 N.E.2d 3 \(10th Dist. Franklin County 1983\).](#)

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^[FN4] [Stanton v. Sayre, 10 Ohio App. 3d 174, 461 N.E.2d 3 \(10th Dist. Franklin County 1983\).](#)

- Mere inadequacy of price will not justify a court in refusing to confirm a sale of trust property, thus depriving the purchaser of the benefit of the bargain, unless the inadequacy amounts to fraud. [Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

- As to the effect of second and higher offers, see [§ 536](#).

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^[FN5] [§ 531](#).

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[\[FN6\] § 617.](#)

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§ 531. Authorization of sale not authorized by terms of trust

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[Propriety of sale of trust assets without consent despite trust provision requiring consent, 39 A.L.R.4th 158](#)

[Fiduciary's power to sell property at price less than that specified in will or trust instrument creating power of sale, 100 A.L.R.2d 1049](#)

In the absence of special circumstances, a court of equity cannot properly authorize or approve a sale by a trustee which is not authorized by,[\[FN1\]](#) or which is in contravention of, the terms of the trust.[\[FN2\]](#) The power to authorize a sale, regardless of the terms of the trust, may, however, exist when necessary to carry out an ultimate purpose of the trust in light of a change in conditions and circumstances not contemplated by the creator of the trust.[\[FN3\]](#) An order to sell the trust's main asset, and to distribute the proceeds to the beneficiaries, is permitted if it does not substantially amend the terms of the trust.[\[FN4\]](#)

In the application of its more general power to authorize a deviation from the terms of the trust,[\[FN5\]](#) a court may authorize or approve a sale of trust property not authorized by the terms of the trust,[\[FN6\]](#) even

though it is in contravention of such terms.[FN7] Such authorization is proper where the sale is desirable for the preservation or salvage of the trust estate,[FN8] or the protection of the interests of beneficiaries,[FN9] as where there is imminent danger of the trust corpus wasting or being destroyed or effectively eliminated,[FN10] or where it will effect the accomplishment of the probable ultimate object or purpose of the trustor,[FN11] or prevent the defeat or impairment of the trust as the settlor intended it,[FN12] as where conditions and circumstances that the trustor did not foresee have developed,[FN13] and where the trustor would have made such authorization had he or she possessed such foresight.[FN14]

[FN1] [Seigle v. First Nat. Co.](#), 338 Mo. 417, 90 S.W.2d 776, 105 A.L.R. 181 (1936).

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[FN2] [In re Stack's Will](#), 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

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[FN3] [American State Bank v. Kupfer](#), 114 Ill. App. 3d 760, 70 Ill. Dec. 677, 449 N.E.2d 1024, 39 A.L.R.4th 147 (4th Dist. 1983); [Carroll v. Carroll](#), 464 S.W.2d 440 (Tex. Civ. App. Amarillo 1971), writ dismissed, (July 7, 1971).

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[FN4] [Dewitt v. Dewitt](#), 2002 WL 31661303 (Cal.App. 1 Dist.,2002.) (settlor's express intention was that the co-beneficiaries share equally in her estate, and this intent was best served by liquidating the trust's main asset).

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[FN5] §§ [312](#) to [314](#).

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[FN6] [American State Bank v. Kupfer](#), 114 Ill. App. 3d 760, 70 Ill. Dec. 677, 449 N.E.2d 1024, 39 A.L.R.4th 147 (4th Dist. 1983); [Seigle v. First Nat. Co.](#), 338 Mo. 417, 90 S.W.2d 776, 105 A.L.R. 181 (1936); [Carroll v. Carroll](#), 464 S.W.2d 440 (Tex. Civ. App. Amarillo 1971), writ dismissed, (July 7, 1971).

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[FN7] [Carroll v. Carroll](#), 464 S.W.2d 440 (Tex. Civ. App. Amarillo 1971), writ dismissed, (July 7, 1971); [In re Stack's Will](#), 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

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[FN8] [Vickers v. Vickers](#), 189 Ky. 323, 225 S.W. 44 (1920); [Cutter v. American Trust Co.](#), 213 N.C. 686, 197 S.E. 542 (1938); [Carroll v. Carroll](#), 464 S.W.2d 440 (Tex. Civ. App. Amarillo 1971), writ dismissed, (July 7, 1971); [In re Stack's Will](#), 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).

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[FN9] [American State Bank v. Kupfer](#), 114 Ill. App. 3d 760, 70 Ill. Dec. 677, 449 N.E.2d 1024, 39 A.L.R.4th 147 (4th Dist. 1983); [Ball v. Safe-Deposit & Trust Co. of Baltimore City](#), 92 Md. 503, 48 A. 155 (1901); [Young v. Young](#), 255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 (1931).

- Judicial sales of the beneficial interests in land trusts may be ordered when the business owners are in deadlock over the business' management. [Barry v. Carr](#), 277 Ill. App. 3d 232, 213 Ill. Dec. 772, 660 N.E.2d 29 (1st Dist. 1995).

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[FN10] [American State Bank v. Kupfer](#), 114 Ill. App. 3d 760, 70 Ill. Dec. 677, 449 N.E.2d 1024, 39 A.L.R.4th 147 (4th Dist. 1983); [Carroll v. Carroll](#), 464 S.W.2d 440 (Tex. Civ. App. Amarillo 1971), writ dismissed, (July 7, 1971).

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[\[FN11\] Bibb v. Bibb, 204 Ala. 541, 86 So. 376 \(1920\); Vickers v. Vickers, 189 Ky. 323, 225 S.W. 44 \(1920\); Low v. First Nat. Bank & Trust Co. of Vicksburg, 162 Miss. 53, 138 So. 586, 80 A.L.R. 112 \(1932\).](#)

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[\[FN12\] In re Keet's Estate, 91 P.2d 944 \(Cal. App. 2d Dist. 1939\), opinion superseded on other grounds, 15 Cal. 2d 328, 100 P.2d 1045 \(1940\).](#)

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[\[FN13\] American State Bank v. Kupfer, 114 Ill. App. 3d 760, 70 Ill. Dec. 677, 449 N.E.2d 1024, 39 A.L.R.4th 147 \(4th Dist. 1983\).](#)

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[\[FN14\] Young v. Young, 255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 \(1931\); In re Stack's Will, 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 \(1935\).](#)

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§ 532. Relief from unauthorized sale or failure to sell

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [193.5](#)

Where a trustee wrongfully sells and transfers trust property, the beneficiary of the trust may elect to hold the trustee personally liable and accountable, as for conversion of the property,[\[FN1\]](#) or the beneficiary may follow the property or its proceeds, so far as it can be traced, into the hands of the purchaser, assuming, of course, that the purchaser does not have the status of a bona fide purchaser for value.[\[FN2\]](#)

Practice Guide: If an illegal sale is threatened, the beneficiary may enjoin the trustee from taking such a step.[\[FN3\]](#)

Damages are recoverable for breach of trust in a sale of trust property, either as against the trustee or against a purchaser not protected as a bona fide purchaser for value.[\[FN4\]](#)

A beneficiary may sue in equity to compel the trustee to use his or her power of sale, where the trustee refuses to act.[\[FN5\]](#)

[\[FN1\]](#) § § [274](#), [276](#).

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[\[FN2\]](#) § [275](#).

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[\[FN3\]](#) [In re Stone's Estate](#), 358 Pa. 335, 56 A.2d 664 (1948).

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[\[FN4\]](#) § § [276](#), [277](#), [290](#) to [299](#).

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[\[FN5\]](#) [Citizens Fidelity Bank & Trust Co. v. McNeal](#), 279 S.W.2d 751 (Ky. 1955).

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West's Key Number Digest

West's Key Number Digest, [Trusts](#) [189](#), [195](#), [200\(1\)](#), [203](#)

The essentials and requirements of conveyances, transfers, and sales generally pertain to sales by a trustee.[\[FN1\]](#) Although it is desirable for the trustee in the transfer instrument to recite that he or she is acting as a trustee in the matter, or at least affix his or her signature as trustee,[\[FN2\]](#) this is not essential to the effectiveness of the transaction; if he or she has authority to make the conveyance, transfer, or other alienation, it will be referred to his or her authority,[\[FN3\]](#) and if he or she lacks authority, the rights of the purchaser depend upon his or her character as a bona fide purchaser for value.[\[FN4\]](#)

The single warranty or representation that a trustee of a land trust makes upon execution of documents is that it has the power and authority to appropriately execute the instruments.[\[FN5\]](#)

[\[FN1\] Judge v. Booge, 47 Mo. 544, 1871 WL 7679 \(1871\).](#)

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[\[FN2\] Porter v. Schofield, 55 Mo. 303, 1874 WL 8372 \(1874\).](#)

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[\[FN3\] Gindrat v. Montgomery Gas-Light Co., 82 Ala. 596, 2 So. 327 \(1887\).](#)

- Trustees' signatures as individuals on a title deed was sufficient to convey good title from the trust, where the trust was a revocable inter vivos trust, the individuals were the sole trustees, and, as beneficiaries, they had the power during their lifetimes to direct the sale of the real property owned by the trust. [Galdjie v. Darwish, 113 Cal. App. 4th 1331, 7 Cal. Rptr. 3d 178 \(2d Dist. 2003\)](#), as modified on denial of reh'g, (Dec. 23, 2003).

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[\[FN4\] § 290.](#)

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[\[FN5\] In re Marriage of Gross, 324 Ill. App. 3d 872, 258 Ill. Dec. 330, 756 N.E.2d 312 \(1st Dist. 2001\).](#)

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§ 534. Price; obtaining fair market value

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 195, 196

A trustee who undertakes to sell trust property has a duty to secure the fair market value of the property and to employ that degree of care, skill, and judgment which a reasonably prudent person would exercise in the conduct of a similar sale^[FN1] or lease.^[FN2] A trustee's duty of loyalty and reasonable care dictate that he or she must seek to obtain the best price for the trust property he or she is selling.^[FN3] Factors that the court will consider in determining whether the trustee exercised the requisite degree of diligence and care in selling the trust property include its efforts to determine the value of the property sold,^[FN4] its method of offering the property, and whether it closed the sale without endeavoring to obtain better bids.^[FN5]

Practice Guide: Beneficiaries seeking damages for the alleged sale of family trust property below fair market value are required to prove that the trustee sold the property for less than its fair market value.^[FN6] Absent bad faith, unfair dealings, or conflict of interest, adequacy of the price obtained by a trustee for a piece of trust property should be reviewed for abuse of discretion.^[FN7]

A trustee who is empowered to sell trust property is under a duty to sell it for the best price and on the best terms possible.^[FN8] Where he or she does act with such good faith and care, mere inadequacy of price is no ground in itself to charge him or her with a higher price or to set aside the sale.^[FN9] But where insufficient efforts have been made to ascertain the adequacy of the sale price, a trustee's good faith in carrying out the transaction may not be sufficient to sustain its validity.^[FN10] A trustee is not obligated to accept the highest offer in disposing of trust property, if there are advantages to accepting the offer of another bidder; however, the trustee cannot direct benefits to non-beneficiaries at the expense of the beneficiaries.^[FN11]

^[FN1] [Cosden v. Mercantile-Safe Deposit and Trust Co.](#), 41 Md. App. 519, 398 A.2d 460 (1979).

- Trustees' selection of independent appraisers from two nationally known companies to value the stock of a family corporation precluded the claim that the trustees breached their duty to make reasonable efforts to sell the trust assets at the best price obtainable, even though the beneficiary's expert reached a different conclusion and a higher value. [Huntington Natl. Bank v. Wolfe](#), 99 Ohio App. 3d 585, 651 N.E.2d 458 (10th Dist. Franklin County 1994).

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^[FN2] [Forest Guardians v. Wells](#), 201 Ariz. 255, 34 P.3d 364 (2001).

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^[FN3] [In re Trusteeship Created by City of Sheridan](#), 593 N.W.2d 702 (Minn. Ct. App. 1999) (applying Colorado law).

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^[FN4] [Cosden v. Mercantile-Safe Deposit and Trust Co.](#), 41 Md. App. 519, 398 A.2d 460 (1979); [Hatcher v. U. S. Nat. Bank of Oregon](#), 56 Or. App. 643, 643 P.2d 359 (1982).

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^[FN5] [Cosden v. Mercantile-Safe Deposit and Trust Co.](#), 41 Md. App. 519, 398 A.2d 460 (1979).

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^[FN6] [White v. White](#), 2002 WL 32341854 (Tex. App. Eastland 2002).

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[\[FN7\] In re Harold S. Ansell Family Trust, 224 Mich. App. 745, 569 N.W.2d 914 \(1997\).](#)

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[\[FN8\] Marshall v. Grauberger, 796 P.2d 34 \(Colo. Ct. App. 1990\); Murphy v. Central Bank and Trust Co., 699 P.2d 13 \(Colo. Ct. App. 1985\); Thomas v. Turner, 736 S.W.2d 343 \(Ky. Ct. App. 1987\); Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 \(1928\); Long Lake Lumber Co. v. Stewart, 198 Wash. 348, 88 P.2d 414 \(1939\).](#)

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[\[FN9\] West Coast Life Ins. Co. v. Glenn-Colusa Irr. Dist., 50 Cal. App. 2d 204, 122 P.2d 595 \(3d Dist. 1942\); Long Lake Lumber Co. v. Stewart, 198 Wash. 348, 88 P.2d 414 \(1939\).](#)

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[\[FN10\] Cosden v. Mercantile-Safe Deposit and Trust Co., 41 Md. App. 519, 398 A.2d 460 \(1979\).](#)

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[\[FN11\] Aloha Lumber Corp. v. University of Alaska, 994 P.2d 991, 142 Ed. Law Rep. 527 \(Alaska 1999\); Rock Springs Land and Timber, Inc. v. Lore, 2003 WY 100, 75 P.3d 614 \(Wyo. 2003\).](#)

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§ 535. Bidding

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [195](#)

A trustee's duty of loyalty and reasonable care requires him or her to seek to obtain the best price obtainable for trust property which he or she is selling.[\[FNI\]](#) Consequently, the trustee should secure competitive bidding

and surround the sale with such other factors as will tend to cause the property to sell to the greatest advantage.[FN2]

A trustee's conduct of bidding at a sale of trust property is governed by the cardinal principle of his or her duty of good faith and loyalty to the trust.[FN3] He or she should fully consider all competent bids, and disregard bids which he or she is without authority to accept, as, for example, a bid offering to purchase an option covering a long period rather than to purchase the property outright, when the authority of the trustee is limited to sale of the property.[FN4]

The duty of a trustee in respect of bidding at a sale of trust property is to the trust and not to bidders at the sale.[FN5] Unsuccessful bidders cannot complain of the refusal of the trustee to furnish a statement of the earnings of the trust property sold, where such information might discourage bidding and tend to reduce the amounts of bids.[FN6]

[FN1] § 534.

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[FN2] Murphy v. Central Bank and Trust Co., 699 P.2d 13 (Colo. Ct. App. 1985).

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[FN3] Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928).

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[FN4] Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928).

- As to the authority of the trustee to grant an option, generally, see § 504.

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[FN5] Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928).

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[FN6] Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928).

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§ 536. Bidding—Effect of second and higher bids

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West's Key Number Digest, [Trusts](#) [195](#)

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[Second and higher offer as affecting final approval of trustee's sale, 1 A.L.R.3d 629](#)

As a general rule, a trustee may not disavow his or her acceptance of an initial bid or offer upon receipt of a later higher bid.^[FN1] Once a bid for property is accepted, the fact that someone makes a later higher bid does not necessarily make the accepted bid inadequate.^[FN2]

^[FN1] [Samuel v. Mallory, 553 So. 2d 119 \(Ala. 1989\); Evans v. Hunold, 393 Ill. 195, 65 N.E.2d 373 \(1946\); Standish Corp. v. Keane, 220 Md. 1, 150 A.2d 728 \(1959\).](#)

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^[FN2] [Samuel v. Mallory, 553 So. 2d 119 \(Ala. 1989\).](#)

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§ 537. Terms of payment; security

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [195](#), [196](#)

Regardless of whether a sale must be for cash or may be on credit or partly on credit depends on the terms of the trust and the circumstances of the particular case.[\[FN1\]](#)

Trustees must pass, in their discretion, on the adequacy of the security given.[\[FN2\]](#) A breach of fiduciary duty may occur where, in view of the inadequacy of the security, the trustee did not restrict the indebtedness that the corporation could incur or require a higher rate of interest.[\[FN3\]](#)

[\[FN1\]](#) [Gray v. McCurdy](#), 114 Tex. 217, 266 S.W. 396, 36 A.L.R. 820 (1924).

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[\[FN2\]](#) [Dickey v. Volker](#), 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928).

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[\[FN3\]](#) [Hatcher v. U. S. Nat. Bank of Oregon](#), 56 Or. App. 643, 643 P.2d 359 (1982).

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§ 538. Generally

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[Power of executor or trustee with power to sell or to lease real property, or to do both, to give an option to purchase, 83 A.L.R.2d 1310](#)

[Power of trustee and court as regards term of lease of trust property, 67 A.L.R.2d 978](#)

Forms

Leases, [Am. Jur. Legal Forms 2d, Trusts § 251:470](#)

Objection—To lease of trust real property—Allegation—Trustee has no power to lease under terms of trust instrument. [Am. Jur. Pleading and Practice Forms \(Rev\), Trusts § 23](#)

The authority of a trustee to lease trust property is sometimes found to exist either by virtue of express provisions of the trust instrument[[FN1](#)] or by implication from other powers conferred or duties imposed on the trustee.[[FN2](#)] The cases are not in agreement as to whether the power to sell implies the power to lease, with some courts holding that the power to lease may not be inferred from the authority to sell[[FN3](#)] and others holding that such power to lease can be implied from the power to sell.[[FN4](#)] An implication of such a power arises where it is necessary to the exercise of other powers and duties conferred upon the trustee,[[FN5](#)] where a trustee is directed to hold, manage, care for, and collect income from trust property[[FN6](#)] or where a trustee is given full control of real estate to produce revenue therefrom without being given a power of sale.[[FN7](#)] A trustee has the authority to terminate a lease where the trust instrument gives trustees the power to make decisions on real estate, including its lease.[[FN8](#)] Implication of the power of a trustee to make leases for a period longer than the duration or the probable duration of the trust may exist.[[FN9](#)]

The implication and exercise of the power of a trustee to lease must be reasonable with regard to the rights of beneficiaries, the nature of the property, the uses to which it advantageously may be put, and the usual and customary methods of dealing with such property in the locality where it is situated.[[FN10](#)] This rule is applicable to the determination of the rent,[[FN11](#)] the period of the lease,[[FN12](#)] and rights granted under the lease.[[FN13](#)] The trust instrument may require or at least contemplate the trustee's consultation with or advice by others before leasing trust property.[[FN14](#)]

The rule against self-dealing by a trustee[[FN15](#)] generally prohibits a lease by a trustee to himself or herself or the trustee's spouse.[[FN16](#)]

A trustee's waiver of a breach of covenant by a lessee against subletting binds his or her successor in office.[[FN17](#)]

Trustees with power to lease but without general or absolute power to sell have no authority to give to their lessee an option to purchase during the term.[[FN18](#)]

[[FN1](#)] [Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\).](#)

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[[FN2](#)] [Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\); Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[[FN3](#)] [In re Bruner's Will, 363 Pa. 552, 70 A.2d 222, 18 A.L.R.2d 92 \(1950\).](#)

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[[FN4](#)] [Ilari v. Ewing, 314 Ky. 182, 234 S.W.2d 293 \(1950\).](#)

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[\[FN5\] Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[\[FN6\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\).](#)

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[\[FN7\] Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[\[FN8\] Geren v. Geren, 29 Kan. App. 2d 565, 29 P.3d 448 \(2001\).](#)

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[\[FN9\] § 541.](#)

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[\[FN10\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\); Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

- A trustee who rents corpus property to a remainderman under the trust, in contravention of a beneficiary's life estate, is liable to the life beneficiary for the fair market rental value of the property. [Miller v. Miller, 2003-Ohio-1342, 2003 WL 1356804](#) (Ohio Ct. App. 8th Dist. Cuyahoga County 2003).

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[\[FN11\] In re Hubbell Trust, 135 Iowa 637, 113 N.W. 512 \(1907\).](#)

- A trustee has no authority to lease real property held in trust for substantially less than the fair value thereof. [Hill v. Thompson, 564 So. 2d 1, 61 Ed. Law Rep. 1458 \(Miss. 1989\).](#)

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[\[FN12\] §§ 540 to 542.](#)

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[\[FN13\] Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N.E. 818 \(1909\)](#) (the authority to grant farming leases does not imply the power to grant mining or oil and gas leases where no mines or wells are open on the property at the time of the creation of the trust).

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[\[FN14\] Gathright's Trustee v. Gaut, 276 Ky. 562, 124 S.W.2d 782, 120 A.L.R. 1403 \(1939\).](#)

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[\[FN15\] § 351.](#)

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[\[FN16\] Wilmington Trust Co. v. Carrow, 14 Del. Ch. 290, 125 A. 350 \(1924\).](#)

- As to purchases by spouses and relatives, see [§ 527.](#)

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[\[FN17\] Katz v. Miller, 148 Wis. 63, 133 N.W. 1091 \(1912\).](#)

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[\[FN18\] Winslow v. Baltimore & O.R. Co., 188 U.S. 646, 23 S. Ct. 443, 47 L. Ed. 635 \(1903\).](#)

- As to trustee's authority to enter into a contract granting an option to purchase land belonging to the trust estate, see [§ 504.](#)

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§ 539. Cotrustees

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[Power of trustee and court as regards term of lease of trust property, 67 A.L.R.2d 978](#)

Where there are several cotrustees, all should join in the execution of a lease of the trust property.[[FN1](#)] The burden is on the lessee to prove the death of cotrustees not joining in the execution of the lease.[[FN2](#)] Recognition or ratification by cotrustees who have not joined in a lease cannot be assumed unless it was shown to have been founded on full knowledge of all the facts.[[FN3](#)]

[[FN1](#)] [Winslow v. Baltimore & O.R. Co., 188 U.S. 646, 23 S. Ct. 443, 47 L. Ed. 635 \(1903\).](#)

- As to the execution of powers by cotrustees, generally, see §§ [320](#), [322](#), [323](#).

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[[FN2](#)] [Winslow v. Baltimore & O.R. Co., 188 U.S. 646, 23 S. Ct. 443, 47 L. Ed. 635 \(1903\).](#)

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[[FN3](#)] [Winslow v. Baltimore & O.R. Co., 188 U.S. 646, 23 S. Ct. 443, 47 L. Ed. 635 \(1903\).](#)

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§ 540. Period of lease

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[Power of trustee and court as regards term of lease of trust property, 67 A.L.R.2d 978](#)

The period for which a trustee may lease trust property may be limited by the express terms of the trust.[\[FN1\]](#) The governing statutes also may restrict or limit the term for which the property may be leased.[\[FN2\]](#) When the length of the term of the lease is not fixed by the terms of the trust, statute, or order of court, the trustee in fixing the term of a lease which he or she gives should be governed by the reasonableness thereof,[\[FN3\]](#) determined in view of the rights of beneficiaries,[\[FN4\]](#) the nature and character of the property,[\[FN5\]](#) the purposes of the trust,[\[FN6\]](#) the uses to which the trust property may reasonably be put,[\[FN7\]](#) the usual and customary periods of leases of such property in the locality,[\[FN8\]](#) and circumstances and conditions existing at the time of the lease's execution.[\[FN9\]](#) However, a trustee has no authority to enter a long-term lease at a nominal one-time rental, so that the lease is tantamount to a gift.[\[FN10\]](#)

[\[FN1\]](#) [First Nat. Bank of Atlanta v. Robinson, 209 Ga. 582, 74 S.E.2d 875 \(1953\).](#)

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[\[FN2\]](#) [§ 542.](#)

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[\[FN3\]](#) [Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\); Wilmington Trust Co. v. Carrow, 14 Del. Ch. 290, 125 A. 350 \(1924\); Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[\[FN4\]](#) [Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\).](#)

- As to a lease by a trustee for an equitable life beneficiary where there is a remainder over, see [Am. Jur. 2d,](#)

[Life Tenants and Remaindermen § 113.](#)

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[FN5] [In re Hubbell Trust, 135 Iowa 637, 113 N.W. 512 \(1907\); Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[FN6] [In re Hubbell Trust, 135 Iowa 637, 113 N.W. 512 \(1907\).](#)

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[FN7] [In re Hubbell Trust, 135 Iowa 637, 113 N.W. 512 \(1907\); Grandy v. Robinson, 180 Or. 315, 175 P.2d 463 \(1946\).](#)

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[FN8] [Marshall's Trustee v. Marshall, 225 Ky. 168, 7 S.W.2d 1062, 61 A.L.R. 1365 \(1928\); Sweeney v. Hagerstown Trust Co., 144 Md. 612, 125 A. 522 \(1924\); In re Caswell's Will, 197 Wis. 327, 222 N.W. 235, 61 A.L.R. 1359 \(1928\).](#)

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[FN9] [Jeanes v. Burke, 226 S.W.2d 908 \(Tex. Civ. App. Eastland 1950\); Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[FN10] [Hill v. Thompson, 564 So. 2d 1, 61 Ed. Law Rep. 1458 \(Miss. 1989\).](#)

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Leases—Limitation to term of trust. [Am. Jur. Legal Forms 2d, Trusts § 251:472](#)

Petition or application—For authority to lease trust real property—Necessity that property be leased for period longer than allowed by will—Changed conditions of property and surrounding area. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 232

Petition or application—For authority to lease trust real property—Mineral lease which may extend beyond duration of trust. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 233

Objection—To lease of trust real property—Allegation—Proposed lease term extends beyond probable duration of trust. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 237

A trustee ordinarily is without power to lease trust property for a period beyond the duration of the trust,[FN1] or in case of indefiniteness of the period of the trust, beyond its probable duration.[FN2] Under the rule, a lease for a definite term by a trustee confers no estate upon a tenant which will continue after the expiration of the trust,[FN3] or at least, the excess of the lease beyond the term of the trust is void.[FN4] However, the terms or purposes of a trust instrument may authorize a trustee to make a lease of trust property to run beyond the duration or probable duration of the trust.[FN5] The legal effect of such authorization is to couple to the trust a power and to limit the estate of those entitled at the end of the trust to the extent of any leases so validly executed under the power.[FN6] Such a power to lease trust property beyond the duration or the probable duration of the trust estate need not be expressly conferred but may be implied from the necessity of such power to the administration of the trust[FN7] or from its necessity to the execution of other powers and duties of the trustee,[FN8] such as a power and duty to produce a reasonable income from the property[FN9] or the power and duty to preserve and protect the trust estate.[FN10]

[FN1] [Patterson v. Polk, 229 Ark. 272, 317 S.W.2d 286, 67 A.L.R.2d 970 \(1958\)](#); [In re Hubbell Trust, 135 Iowa 637, 113 N.W. 512 \(1907\)](#); [Wingert v. T. W. Phillips Gas & Oil Co., 398 Pa. 100, 157 A.2d 92 \(1959\)](#); [In re Caswell's Will, 197 Wis. 327, 222 N.W. 235, 61 A.L.R. 1359 \(1928\)](#).

- Absent an enabling statute or provision in the trust instrument, the trustee does not have the power to lease the trust property for a term extending beyond the life of the life beneficiary, where such life marks the extent of the duration of the trust. [Englehart v. Larson, 2000 SD 41, 608 N.W.2d 673 \(S.D. 2000\)](#).

- As to a lease by a trustee for an equitable life beneficiary where there is a remainder over, see [Am. Jur. 2d, Life Tenants and Remaindermen § 113](#).

[FN2] [Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\)](#).

[\[FN3\] City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 93 A.L.R. 598 \(1934\), aff'd, 264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\).](#)

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[\[FN4\] Hallin v. Hallin, 2 Ill. App. 2d 118, 118 N.E.2d 612 \(2d Dist. 1954\); St. Louis Union Trust Co. v. Van Raalte, 214 Mo. App. 172, 259 S.W. 1067 \(1924\).](#)

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[\[FN5\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\); Montgomery Ward & Co. v. Norton's Trustee, 255 Ky. 244, 73 S.W.2d 41 \(1934\).](#)

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[\[FN6\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\).](#)

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[\[FN7\] Montgomery Ward & Co. v. Norton's Trustee, 255 Ky. 244, 73 S.W.2d 41 \(1934\); Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

- It was reasonable to assume that by granting the trustee the authority to enter into a lease, the sole beneficiary intended to extend the life of the trust so that the lease entered into between the trustees and lessees was not invalid, even though the trust had expired pursuant to its terms prior to the time the lease was entered into. [La Salle Nat. Bank v. Khan, 191 Ill. App. 3d 41, 138 Ill. Dec. 305, 547 N.E.2d 472 \(1st Dist. 1989\).](#)

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[\[FN8\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\); Montgomery Ward & Co. v. Norton's Trustee, 255 Ky. 244, 73 S.W.2d 41 \(1934\).](#)

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[\[FN9\] In re Caswell's Will, 197 Wis. 327, 222 N.W. 235, 61 A.L.R. 1359 \(1928\).](#)

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[\[FN10\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\); In re Caswell's Will, 197 Wis. 327, 222 N.W. 235, 61 A.L.R. 1359 \(1928\).](#)

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F. Leases of Trust Property

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§ 542. Period of lease—Under statute or court authorization

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [205](#)

A.L.R. Library

[Power of trustee and court as regards term of lease of trust property, 67 A.L.R.2d 978](#)

Forms

Order—Authorizing lease of trust real property. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 240

Statutes may regulate or limit the period of a lease of trust property;[FN1] the length of the term of the lease sometimes depends upon whether the trustee acts with or without judicial authorization.[FN2] Legislation of this character has been deemed extensive rather than restrictive of the power of a trustee to lease, and hence, not to invalidate a lease for a period longer than that authorized by statute without approval of a court, where the lease is for a period not exceeding the period of the trust.[FN3] Provision may be made for a summary method of obtaining judicial approval of a lease beyond a certain period.[FN4]

In accordance with its general jurisdiction to permit certain steps or proceedings in the administration of the trust, where such steps or proceedings are not authorized by the terms of the trust or are in deviation therefrom and certain circumstances are present,[FN5] a court of equity may in a proper case authorize a lease of trust property for a period longer than that allowed by the terms of the trust or beyond the duration or probable duration of the trust,[FN6] such as where it appears probable, under all the circumstances, that the trustor would have authorized the lease for such a period had he or she regarded the matter in the light of such circumstances when the trust was created[FN7] or where the lease is necessary for the accomplishment of the purposes of the trust.[FN8] However, such a proper case exists only where the long-term lease is essential for the preservation of the trust property or is reasonably necessary to carry out the purposes of the trust and is not likely to extend beyond the termination of the trust.[FN9] Any such power of a court is not to violate the terms of the trust, but rather to execute the ultimate purpose of the trustor.[FN10]

[FN1] [Williams v. Nylund, 268 F.2d 91 \(10th Cir. 1959\)](#); [Frankford Trust Co. v. D. A. Schulte, Inc., 302 Pa. 421, 153 A. 747 \(1931\)](#).

[FN2] [City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 93 A.L.R. 598 \(1934\)](#), *aff'd*, [264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\)](#).

- As to the judicial authorization of a period of lease, see [§ 541](#).

[\[FN3\] Hastings v. Black, 24 N.Y.S.2d 190 \(Sup 1940\).](#)

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[\[FN4\] City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 93 A.L.R. 598 \(1934\), aff'd, 264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\).](#)

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[\[FN5\] §§ 312 to 314.](#)

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[\[FN6\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\); Denegre v. Walker, 214 Ill. 113, 73 N.E. 409 \(1905\); Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[\[FN7\] Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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[\[FN8\] Russell v. Russell, 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 \(1929\).](#)

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[\[FN9\] In re Hubbell Trust, 135 Iowa 637, 113 N.W. 512 \(1907\).](#)

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[\[FN10\] Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 \(1913\).](#)

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§ 543. Modification

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [205](#)

A.L.R. Library

[Power of trustee and court as regards term of lease of trust property, 67 A.L.R.2d 978](#)

The power of a trustee to modify, or agree to the modification of, a lease of trust property depends upon the terms of the trust, the facts and circumstances of the particular case, and in some jurisdictions, upon statutory provisions.[\[FN1\]](#) The power of a trustee to make a lease includes the power to modify the terms of the lease,[\[FN2\]](#) although where the period of the lease is for such a period as to require judicial authorization under statute,[\[FN3\]](#) modification of the lease also requires such authorization.[\[FN4\]](#) Modification of terms, such as rental, which the court has approved, and which probably influenced the court in its decision authorizing the lease, cannot be made without approval of the court.[\[FN5\]](#)

[\[FN1\]](#) [City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 93 A.L.R. 598 \(1934\)](#), aff'd, [264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\)](#).

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[\[FN2\]](#) [City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 93 A.L.R. 598 \(1934\)](#), aff'd, [264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\)](#).

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[\[FN3\]](#) [§ 542](#).

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[\[FN4\]](#) [City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 93 A.L.R. 598 \(1934\)](#), aff'd, [264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\)](#).

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[\[FN5\]](#) [City Bank Farmers' Trust Co. v. Smith, 263 N.Y. 292, 189 N.E. 222, 93 A.L.R. 598 \(1934\)](#), aff'd, [264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 601 \(1934\)](#).

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West's Key Number Digest, [Trusts](#) [206\(.5\)](#), (1), (2), (7)

A.L.R. Library

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Forms

[Am. Jur. Legal Forms 2d, Trusts § 251:477](#)

[Am. Jur. Pleading and Practice Forms, Trusts §§ 242, 244](#)

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§ 544. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [206\(.5\)](#), (7)

Forms

Creation of encumbrances—Mortgages. [Am. Jur. Legal Forms 2d, Trusts § 251:477](#)

The powers and duties of a trustee in respect to a pledge or other encumbrance of trust property are determined largely by reference to the rules applicable to the sale and conveyance of the trust estate;[\[FN1\]](#) requirements as to form and substance of mortgages, pledges, or other encumbrances executed by a trustee generally are the same as those governing mortgages, pledges, or encumbrances executed by the legal owners of property in other cases.[\[FN2\]](#)

While a trustee generally must not abandon to cotrustees the execution of mortgages of trust property,[\[FN3\]](#) a trustee who, in good faith, executes a quitclaim deed to his or her cotrustee in order that the property may be more readily mortgaged to raise money for its improvement is not, for that reason, personally liable to beneficiaries to the extent of property taken in exchange for it.[\[FN4\]](#)

A mortgage that a trustee has authority to make is valid regardless of whether the trustee misapplies the sum borrowed.[\[FN5\]](#) Even where a trustee lacks authority under the terms of a trust to mortgage or otherwise encumber trust property, the mortgagee or other encumbrancer is protected even as against the equitable demands of the beneficiaries if he or she is a bona fide purchaser for value.[\[FN6\]](#) However, the beneficiaries of a trust will not be bound by a mortgage agreement entered into between a mortgagee and a trustee acting as an individual, where the beneficiaries have no knowledge of the transaction until months after it occurred, and the beneficiaries do not ratify the trustee's act.[\[FN7\]](#)

A trustee which holds the mortgage to a remainderman's property in a trust has no fiduciary duty to forbear foreclosing on the mortgage due to default, as the trustee has a duty to protect the assets of the trust for the benefit of all the beneficiaries, not just one.[\[FN8\]](#)

[\[FN1\]](#) §§ [500](#), [502](#) to [537](#).

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[\[FN2\]](#) [Am. Jur. 2d, Mortgages §§ 12 to 96](#).

- As to the perfection of a security interest, generally, see [Am. Jur. 2d, Secured Transactions §§ 259 to 474](#).

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[\[FN3\]](#) § [348](#).

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[\[FN4\]](#) [Killmer Paint & Glass Co. v. Davenport-Bethell Co., 1929 OK 200, 136 Okla. 252, 277 P. 653, 63 A.L.R. 997 \(1929\)](#).

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[\[FN5\]](#) [Smith v. McKenzie, 119 N.H. 296, 401 A.2d 1069 \(1979\)](#).

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[\[FN6\]](#) §§ [290](#) to [299](#).

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[\[FN7\]](#) [Norwest Bank Minnesota, N.A. v. Ode, 615 N.W.2d 91 \(Minn. Ct. App. 2000\)](#).

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[\[FN8\]](#) [New Haven Sav. Bank v. LaPlace, 66 Conn. App. 1, 783 A.2d 1174 \(2001\)](#).

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G. Mortgage, Pledge, and Other Encumbrance of Trust Property

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 545. Power of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [206\(.5\)](#)

Generally, a power to sell trust property does not include the power to mortgage unless the terms of the trust expressly grant mortgaging power[\[FN1\]](#) or it can be implied from the terms of the trust,[\[FN2\]](#) or it is conferred by statutory provision.[\[FN3\]](#) However, in a proper case a court of equity may authorize a mortgage, pledge, or other encumbrance of trust property in deviation from the terms of the trust instrument.[\[FN4\]](#)

Statutes sometimes provide for the mortgaging of trust property for certain purposes, such as erecting, altering, completing, repairing, or improving trust property, where it appears to the court to be for the interest of the trust estate or of the beneficiaries.[\[FN5\]](#)

A trustee as an individual is not in privity with him- or herself as trustee, and thus a mortgage signed by the trustee as an individual is not binding on the trustee in his or her role as trustee, and any reformation of the mortgage to show that the trustee executed it in his or her capacity as trustee violates the trust provisions.[\[FN6\]](#)

Where the instrument creating the trust expressly provides that the property shall not be encumbered, the trustee, on buying the property at a sheriff's sale, has no power to mortgage it, for the reason that he or she holds it as trustee for the same purpose and with the same limitations as before the sale.[FN7]

[FN1] [Snyder v. Collier](#), 85 Neb. 552, 123 N.W. 1023 (1909); [Boon v. Hall](#), 76 A.D. 520, 78 N.Y.S. 557 (4th Dep't 1902); [Lawler v. Lomas & Nettleton Financial Corp.](#), 583 S.W.2d 810 (Tex. Civ. App. Dallas 1979); [State v. Underwood](#), 54 Wyo. 1, 86 P.2d 707 (1939).

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[FN2] [§ 546](#).

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[FN3] [Callava v. Feinberg](#), 864 So. 2d 429 (Fla. Dist. Ct. App. 3d Dist. 2003), review denied, 879 So. 2d 621 (Fla. 2004) (the purpose of the statute giving a grantee of real property who takes as a trustee for an unnamed beneficiary the full authority to encumber or alienate the property is to prevent a fraud being perpetrated upon persons who might subsequently rely upon the record when dealing with the grantee).

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[FN4] [§ 548](#).

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[FN5] [Russell v. Russell](#), 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 (1929).

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[FN6] [Norwest Bank Minnesota, N.A. v. Ode](#), 615 N.W.2d 91 (Minn. Ct. App. 2000).

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[FN7] [Kenworthy v. Equitable Trust Co.](#), 218 Pa. 286, 67 A. 469 (1907).

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§ 546. Power of trustee—By implication

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [206\(.5\)](#)

The authority of a trustee to mortgage, pledge, or otherwise encumber trust property may arise by implication[[FN1](#)] from the express terms of the trust in light of the circumstances attending its execution.[[FN2](#)] Authority to mortgage or otherwise encumber the trust property ordinarily is implied where it is necessary:

(1) to the execution of the trust;[[FN3](#)]

(2) to the contracting of debts in a business which the trustee is carrying on under the terms of the trust;[[FN4](#)]

(3) to preserve, maintain, repair, or improve the trust estate in accordance with the terms of the trust;[[FN5](#)]

(4) to effect an income necessary to carry out a direction for the maintenance of a beneficiary;[[FN6](#)] and

(5) to secure a purchase of property that the trustee is authorized to make.[[FN7](#)]

A power of a trustee to execute a mortgage has been inferred from a power to protect the interests of beneficiaries, in connection with other provisions of the trust instrument and surrounding facts and circumstances.[[FN8](#)]

In some jurisdictions, the power of a trustee to encumber trust property cannot be inferred; unless that power is granted by the trust instrument, the trustee cannot exercise the power except under court order.[[FN9](#)]

A power of a trustee to execute a mortgage has been inferred, in some instances, from a power to repair or improve the trust property,[[FN10](#)] particularly where the improvements will make the property more productive and of greater value to the beneficiary,[[FN11](#)] or where the repair or improvement is directed to the carrying out of the trust, as where the repair or improvement is necessary to provide maintenance of or a home for a beneficiary as directed by the trust.[[FN12](#)]

On the one hand, it has been ruled that a power of a trustee to mortgage is not to be implied from a power to invest and reinvest,[[FN13](#)] though it has also been held that a trustee with the power to sell and reinvest may, on reinvesting, give a purchase money mortgage, although the trust instrument confers no express power to execute a mortgage.[[FN14](#)]

A mere power of sale expressly conferred in a trust instrument does not, by implication, confer the authority to mortgage, in the absence of anything in the instrument read in the light of the surrounding circumstances to indicate a contrary intent.[[FN15](#)]

[[FN1](#)] [Smith v. Massachusetts Mut. Life Ins. Co.](#), 116 Fla. 390, 156 So. 498, 95 A.L.R. 508 (1934); [Lawler v. Lomas & Nettleton Financial Corp.](#), 583 S.W.2d 810 (Tex. Civ. App. Dallas 1979); [State v. Underwood](#), 54 Wyo. 1, 86 P.2d 707 (1939).

[[FN2](#)] [Lawler v. Lomas & Nettleton Financial Corp.](#), 583 S.W.2d 810 (Tex. Civ. App. Dallas 1979); [State v. Underwood](#), 54 Wyo. 1, 86 P.2d 707 (1939).

[[FN3](#)] [In re Lueft](#), 129 Wis. 534, 109 N.W. 652 (1906); [State v. Underwood](#), 54 Wyo. 1, 86 P.2d 707 (1939).

[\[FN4\] Roberts v. Hale, 124 Iowa 296, 99 N.W. 1075 \(1904\).](#)

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[\[FN5\] Shirkey v. Kirby, 110 Va. 455, 66 S.E. 40 \(1909\).](#)

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[\[FN6\] In re Lueft, 129 Wis. 534, 109 N.W. 652 \(1906\).](#)

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[\[FN7\] Stump v. Warfield, 104 Md. 530, 65 A. 346 \(1906\).](#)

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[\[FN8\] Smith v. Massachusetts Mut. Life Ins. Co., 116 Fla. 390, 156 So. 498, 95 A.L.R. 508 \(1934\).](#)

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[\[FN9\] Ivey v. Ivey, 266 Ga. 143, 465 S.E.2d 434 \(1996\).](#)

- As to judicial authorization for a trustee to encumber trust property, see [§ 548](#).

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[\[FN10\] In re Windsor Trust Co., 142 A.D. 772, 127 N.Y.S. 586 \(1st Dep't 1911\).](#)

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[\[FN11\] In re Lueft, 129 Wis. 534, 109 N.W. 652 \(1906\).](#)

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[\[FN12\] Shirkey v. Kirby, 110 Va. 455, 66 S.E. 40 \(1909\).](#)

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[\[FN13\] Tuttle v. First Nat. Bank, 187 Mass. 533, 73 N.E. 560 \(1905\); Cowan v. Hamilton Nat. Bank, 177 Tenn. 94, 146 S.W.2d 359 \(1941\).](#)

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[\[FN14\] Stump v. Warfield, 104 Md. 530, 65 A. 346 \(1906\).](#)

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[\[FN15\] Stump v. Warfield, 104 Md. 530, 65 A. 346 \(1906\); Jackson v. Templin, 66 S.W.2d 666, 92 A.L.R. 873 \(Tex. Comm'n App. 1933\); In re Lueft, 129 Wis. 534, 109 N.W. 652 \(1906\).](#)

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§ 547. Power of trustee—Extent of power

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [206\(.5\)](#), [206\(1\)](#)

The scope or extent of a power to mortgage or encumber trust property given in a trust instrument is to be determined from the language granting such authority, considered in light of the circumstances, the purposes of the trust, and other such factors.[FN1] The language of a trust agreement, authorizing a trustee to mortgage the property of the trust to the same extent and with the same powers which any individual would have with respect to his or her own property and funds, authorizes the trustee to mortgage the principal of the trust.[FN2] An express power to mortgage includes a power to mortgage to raise funds to construct an improvement in order to carry out a trust direction for the maintenance of a beneficiary.[FN3] On the other hand, a power to mortgage realty coming to the trustee with the trust estate does not authorize a mortgage of real estate acquired by a trustee with trust funds.[FN4] A mortgage placed upon trust property to raise funds for the construction of a building on a portion thereof should be limited to such portion, where it appears that the best interests of the estate will be served if, when the time for distribution comes, upon the determination of the trust, different pieces of the property may be dealt with as separate units.[FN5]

Power in a deed of trust to sell or mortgage the premises for the benefit of the trust authorizes the insertion in a mortgage of a power of sale in case of default, where mortgages so drawn are in common use and repeatedly recognized and regulated by statute.[FN6]

The power of a trustee to mortgage or pledge the trust property does not include a power to make beneficiaries personally liable for the mortgage or pledge indebtedness.[FN7]

[FN1] [Patterson v. Polk](#), 229 Ark. 272, 317 S.W.2d 286, 67 A.L.R.2d 970 (1958).

- Where the terms of the trust gave the trustee extremely broad authority over the management of the trust, including the encumbrance of assets for the benefit of the beneficiaries, the trustee had authority to pledge the assets of the trust as collateral for loans by the trustee to a beneficiary. [Saba v. Fifth Third Bank of NW Ohio, N.A.](#), 2002 WL 31002781 (Ohio App. 6 Dist.).

[FN2] [Delaware Valley Factors, Inc. v. Ronca](#), 442 Pa. Super. 609, 660 A.2d 623 (1995).

[FN3] [Mulford v. Mulford](#), 42 N.J. Eq. 68, 6 A. 609 (Ch. 1886).

[FN4] [Marx v. Clisby](#), 126 Ala. 107, 28 So. 388 (1900), opinion modified, [130 Ala. 502](#), 30 So. 517 (1901).

[FN5] [Russell v. Russell](#), 109 Conn. 187, 145 A. 648, 63 A.L.R. 783 (1929).

[FN6] [Am. Jur. 2d, Mortgages § 537](#).

[\[FN7\] Hall v. Jameson, 151 Cal. 606, 91 P. 518 \(1907\); Crane v. Disabled American Veterans of the World War, 66 Ohio App. 259, 20 Ohio Op. 71, 32 Ohio L. Abs. 678, 31 N.E.2d 116 \(1st Dist. Hamilton County 1940\).](#)

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§ 548. Judicial authorization; in absence of authorization by terms of trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [206\(.5\)](#), [206\(1\)](#), [206\(2\)](#)

Forms

Petition or application—For authorization to mortgage trust real property. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 242

Order—Authorizing mortgage of trust real property. Am. Jur. Pleading and Practice Forms (Rev), Trusts § 244

While ordinarily a court cannot undertake to authorize a mortgage, pledge, or other encumbrance of trust property in contravention of the terms of the trust,[\[FN1\]](#) where circumstances or emergencies unforeseen by the trustor arise which will defeat the ultimate object of the trustor unless an encumbrance of the property is authorized, a court may permit deviation from the terms of the trust by permitting or authorizing the trustee to mortgage, pledge, or otherwise encumber the trust property in contravention of the terms of the trust.[\[FN2\]](#) In some instances such a judicial authorization of a mortgage or the encumbering of the trust estate has been permitted in order to enhance the value of the res and increase its income.[\[FN3\]](#)

[\[FN1\] Seigle v. First Nat. Co., 338 Mo. 417, 90 S.W.2d 776, 105 A.L.R. 181 \(1936\); Colorado & S. Ry. Co. v. Blair, 214 N.Y. 497, 108 N.E. 840 \(1915\).](#)

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[\[FN2\] Scott v. Mussafer, 223 Ala. 153, 134 So. 857 \(1931\); Seigle v. First Nat. Co., 338 Mo. 417, 90 S.W.2d 776, 105 A.L.R. 181 \(1936\); State v. Underwood, 54 Wyo. 1, 86 P.2d 707 \(1939\).](#)

- As to the necessity that all interested persons be made parties or be notified, see §§ [617](#), [627](#).
- As to when equity will permit deviation from the terms of a trust, generally, see §§ [312](#) to [314](#).

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[\[FN3\] Scott v. Mussafer, 223 Ala. 153, 134 So. 857 \(1931\); State v. Underwood, 54 Wyo. 1, 86 P.2d 707 \(1939\).](#)

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17A Am. Jur. Legal Forms 2d, Trusts §§ [251:275](#), [251:282](#), [251:286](#)

24 Am. Jur. Pleading and Practice Forms (Rev), Trusts §§ 247, 252

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[Restatement Second, Trusts §§ 168, 182, 226, 226A](#)

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§ 549. Generally

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[Trustee's liability for payments of trust funds to one whose interest has terminated, 48 A.L.R.2d 1252](#)

[Beneficiary's consent to, acquiescence in, or ratification of, trustee's improper allocation or distribution of assets, 29 A.L.R.2d 1034](#)

Forms

Payment and application of income—General form. [Am. Jur. Legal Forms 2d, Trusts §§ 251:282](#)

Complaint, petition, or declaration—By beneficiary To compel payment of money or delivery of property by trustee. [Am. Jur. Pleading and Practice Forms \(Rev\), Trusts § 247](#)

Since it is the ultimate duty of a trustee to surrender all the trust property to the beneficiaries entitled to it, and to make a full and correct accounting of the trusteeship,[FN1] a trustee is personally liable for trust property that he or she fails to surrender to the beneficiaries unless he or she accounts for, and justifies, such failure on his or her part,[FN2] as by showing proper expenditures in the administration of the trust.[FN3] However, a trustee is under no duty to turn over to beneficiaries property or funds that have not come into the estate,[FN4] in the absence of fault or breach of duty on the part of the trustee in collecting or bringing them into the estate.[FN5] A trustee is not under a duty to turn over income or other benefits received by the estate where the expenses chargeable against the income or benefit exceed it.[FN6] Where a trustee brings an action for restitution of funds mistakenly paid to an estate, a showing that the estate no longer has the specific funds because it has paid them out is not sufficient to raise a fact issue of a prejudicial change in the estate's position after receiving the funds.[FN7]

A trustee is under a duty to the extent that he or she has or should have trust funds in his or her hands to make such payments and distribution to the beneficiaries of the trust as is directed by the trust instrument or declaration.[FN8] A trustee has an obligation to make allocations between income beneficiaries and remaindermen.[FN9] Where a trust is created to pay the income to a beneficiary for a designated period, the trustee is under a duty to the beneficiary to pay to him or her at reasonable intervals the net income of the trust property.[FN10] Any misapplication of trust property or funds among beneficiaries is at the peril of the trustee.[FN11] If by the terms of the trust it is the duty of the trustee to pay or convey the trust property or any part thereof to a beneficiary, the trustee is liable if he or she pays or conveys to a person who is neither the beneficiary nor one to whom the beneficiary or the court has authorized him or her to make such payment or conveyance.[FN12] A beneficiary who consents that money or property be paid or distributed to another beneficiary known not to be entitled thereto cannot deny credit to the trustee for the assets thus disposed of.[FN13]

[FN1] §§ 371, 373, 374, 376 to 378, 380 to 384, 386 to 391, 393 to 396.

[FN2] [May v. Henderson, 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870 \(1925\).](#)

[\[FN3\]](#) §§ [416](#) to [423](#).

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[\[FN4\]](#) [Magruder v. Drury](#), 235 U.S. 106, 35 S. Ct. 77, 59 L. Ed. 151 (1914); [Cromwell v. Converse](#), 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 (1928); [Miller v. Pender](#), 93 N.H. 1, 34 A.2d 663, 150 A.L.R. 798 (1943).

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[\[FN5\]](#) § [403](#).

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[\[FN6\]](#) [Cromwell v. Converse](#), 108 Conn. 412, 143 A. 416, 61 A.L.R. 663 (1928); [Butler v. Builders Trust Co.](#), 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 (1938).

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[\[FN7\]](#) [Pickett v. Republic Nat. Bank of Dallas](#), 619 S.W.2d 399 (Tex. 1981).

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[\[FN8\]](#) [Butler v. Builders Trust Co.](#), 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 (1938); [Brahmey v. Rollins](#), 87 N.H. 290, 179 A. 186, 119 A.L.R. 8 (1935); [In re Kline's Estate](#), 280 Pa. 41, 124 A. 280, 32 A.L.R. 926 (1924).

- As to payments and distribution under spendthrift, support, and discretionary trusts, see §§ [119](#) to [123](#).

- As to the distribution of funds where the funds of more than one trust have been commingled by the trustee and the balance is insufficient to satisfy all trust claims, see [§ 287](#).

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[\[FN9\]](#) [Jacob v. Davis](#), 128 Md. App. 433, 738 A.2d 904 (1999).

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[\[FN10\]](#) [Restatement Second, Trusts § 182](#).

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[\[FN11\]](#) [Darlington v. Turner](#), 202 U.S. 195, 26 S. Ct. 630, 50 L. Ed. 992 (1906).

- In respect to a trustee's liability resulting from payment to the wrong person after termination of the right of the original beneficiary, application of the rule of absolute liability depends largely upon the circumstances of the case and particularly upon the nature of the event which terminates the right of the original beneficiary, the rule of absolute liability being generally applied where the right of the original beneficiary has been terminated by his death. [Rodgers v. Herron](#), 226 S.C. 317, 85 S.E.2d 104, 48 A.L.R.2d 1241 (1954).

- As to the misapplication of trust property or funds, see [§ 345](#).

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[\[FN12\]](#) [Restatement Second, Trusts § 226](#).

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[\[FN13\]](#) [Clark v. Clark](#), 123 Kan. 646, 256 P. 1012 (1927).

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§ 550. Discretionary trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [280](#)

A discretionary trust involves the trustee's discretion to pay over income or principal, or to withhold it;[FN1] it is not an abuse of discretion, if there is no improper motivation, for the trustee to pay nothing,[FN2] and a beneficiary cannot compel a trustee to pay him or her, or apply for his or her use any part of the trust property.[FN3] In such a trust, the trustee shall pay to the beneficiary only so much of the income or capital of the trust as the trustee sees fit to use for that purpose.[FN4] A beneficiary of a discretionary trust has only a mere expectancy in the nondistributed income and principal until the trustee elects to make a distribution of the trust assets.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Trusts that give the trustee the "sole and absolute" discretion to make income and principal distributions for a beneficiary's medical care, care, comfort, maintenance, health, welfare, and general well-being are discretionary trusts, but the trustee must base his or her decisions on the needs of the beneficiary, and his or her discretion can be judged by that standard. [Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 \(2008\)](#).

A trustee of a discretionary trust subject to a support standard may be compelled to make distributions consistent with the trust's support terms for the benefit of the beneficiary. [Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 \(2008\)](#).

A trust that allows the trustee the uncontrolled discretion to distribute income and principal as the trustee determines, without a support standard, is a pure discretionary trust. [Pack v. Osborn, 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 \(2008\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Ventura County Dept. of Child Support Services v. Brown, 117 Cal. App. 4th 144, 11 Cal. Rptr. 3d 489 \(2d Dist. 2004\)](#), as modified on denial of reh'g, (Apr. 28, 2004); [Strojek ex rel. Mills v. Hardin County Bd. of Supervisors, 602 N.W.2d 566 \(Iowa Ct. App. 1999\)](#); [Simpson v. State, Dept. of Social and Rehabilitation Services, 21 Kan. App. 2d 680, 906 P.2d 174 \(1995\)](#); [Eckes v. Richland County Social Services, 2001 ND 16, 621 N.W.2d 851 \(N.D. 2001\)](#).

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[\[FN2\] Ventura County Dept. of Child Support Services v. Brown, 117 Cal. App. 4th 144, 11 Cal. Rptr. 3d 489 \(2d Dist. 2004\)](#), as modified on denial of reh'g, (Apr. 28, 2004).

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[\[FN3\] Ridgell v. Ridgell, 960 S.W.2d 144 \(Tex. App. Corpus Christi 1997\)](#).

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[\[FN4\] Jordan v. Caswell, 264 Ga. 638, 450 S.E.2d 818 \(1994\)](#).

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[\[FN5\] In re Horton, 668 N.W.2d 208 \(Minn. Ct. App. 2003\)](#).

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§ 551. Where trust or instructions are invalid

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [280](#)

A.L.R. Library

[Liability of trustee for payments or conveyances under a trust subsequently held to be invalid, 77 A.L.R.4th 1177](#)

[Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196](#)

If the terms of the trust require the trustee to pay trust property to a beneficiary, the trustee is liable if he or she pays to a person who is not a beneficiary.^[FN1] However, if a trustee pays to a person who by the terms of the trust is entitled to it and the trust is later held invalid, the trustee is liable to the person entitled to the property only if when the trustee made the payment he or she knew or should have known that the trust was invalid.^[FN2]

The trustee's mere knowledge that the settlor is suing to invalidate the trust, in the absence of other factors, does not cause the trustee to have reasonable doubts as to the trust and thus the trustee will not be held liable for a payment even though the trust might subsequently be found invalid.^[FN3] A trustee has been held not liable for payments made under a trust subsequently found to be invalid, despite a claim that the trustee's actions breached the duty of loyalty to the settlor,^[FN4] nor can liability be based on claims that the trustee should not have followed the settlor's instructions without question, due to unforeseen circumstances.^[FN5]

Observation: In view of the circumstances surrounding the execution of the document, the settlor's advanced age and general physical deterioration, and the fact that the trustee was unable to communicate with her, a question of the settlor's competence should have arisen in the trustee's mind; hence, the court pointed out, the trustee, in accepting and acting on the invalid instruction, indicated an absence of the skill and care of a prudent person handling his or her own property, and such action constituted a violation of the trustee's duty.^[FN6]

^[FN1] [Restatement Second, Trusts § 226.](#)

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^[FN2] [Restatement Second, Trusts § 226A.](#)

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^[FN3] [Wilcox v. Waldman, 154 Ariz. 532, 744 P.2d 444, 77 A.L.R.4th 1163 \(Ct. App. Div. 1 1987\); Cloud v. U. S. Nat. Bank of Oregon, 280 Or. 83, 570 P.2d 350, 6 A.L.R.4th 1185 \(1977\).](#)

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^[FN4] [Wilcox v. Waldman, 154 Ariz. 532, 744 P.2d 444, 77 A.L.R.4th 1163 \(Ct. App. Div. 1 1987\).](#)

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^[FN5] [Wilcox v. Waldman, 154 Ariz. 532, 744 P.2d 444, 77 A.L.R.4th 1163 \(Ct. App. Div. 1 1987\).](#)

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^[FN6] [Cloud v. U. S. Nat. Bank of Oregon, 280 Or. 83, 570 P.2d 350, 6 A.L.R.4th 1185 \(1977\).](#)

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§ 552. Amount or share

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 280

A.L.R. Library

[Beneficiary's consent to, acquiescence in, or ratification of, trustee's improper allocation or distribution of assets, 29 A.L.R.2d 1034](#)

The amount of payments or other benefits to be turned over to particular beneficiaries is governed by,[FN1] and must be determined by the trustee in accordance with, the terms of the trust.[FN2] Trustees' proposal for the equal division of a trust created by a testator for the benefit of his or her family is permissible, even in view of economic inequalities among branches of the family, where the division is within the power granted to the trustees, fulfills the grantor's desires, enables the trustees to adapt investment policies more precisely, and will not deprive beneficiaries of protection from the trustees.[FN3]

Notwithstanding changes in economic conditions, the imposition of heavier taxes, or other matters not contemplated by the settlor, a court will not authorize modification of the terms of a trust in respect to benefits payable under it, where a proper construction of the trust instrument leads to the conclusion that the trustor intended primarily the annuity or other benefits in question, in the amount that he or she defined them, to be paid to the beneficiary, rather than to secure and protect the subsistence, maintenance, or education of the beneficiary.[FN4] Where, however, the intention of the trustor primarily is to secure the maintenance and education of the beneficiary, and the trustor thus frames the trust instrument in such a way as to create a spendthrift, support, or other form of protective trust, a court will in a proper case permit a deviation from the terms of the trust in respect to amounts of payments to the beneficiary.[FN5]

A beneficiary who is under no incapacity and who fully consents to, acquiesces, or concurs in, or who ratifies with full knowledge, an act of the trustee in wrongly allocating or distributing trust assets, cannot hold the trustee accountable therefor or deny to him or her credit for funds thus disposed of.[FN6] Beneficiaries cannot effectually object to a method or scheme of distribution to which they agree or in which they acquiesce, and which has been fully executed.[FN7]

Amounts loaned and advanced by a trustee to beneficiaries out of the trust estate are to be deducted from their shares on distribution of the estate.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Trustees of irrevocable family trust did not abuse their discretion in withholding from one beneficiary's per stirpes distribution for one year the costs, amounting to \$157,000, of defending against a suit by beneficiary; the apparent demise of that suit, taken together with the unsuccessful result of a successor suit, provided sufficient evidence of initial suit's lack of merit to justify decision to pass defense costs on to that beneficiary alone.

[McPherson v. McPherson, 307 Ga. App. 548, 705 S.E.2d 314 \(2011\).](#)

[END OF SUPPLEMENT]

[FN1] [Rogers v. English, 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812 \(1943\).](#)

- The beneficiary of a testamentary trust which vests in the trustee the discretion to determine the amount necessary for the beneficiary's support is entitled to a reasonable amount, although he or she has a separate estate. [In re Swinson's Estate, 167 Pa. Super. 293, 74 A.2d 485, 18 A.L.R.2d 1231 \(1950\).](#)

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[FN2] [Brahmey v. Rollins, 87 N.H. 290, 179 A. 186, 119 A.L.R. 8 \(1935\).](#)

- Where the settlor's clearly stated purpose was to pay to the guardians of a handicapped child only a stipulated annual amount as long as the child resided in the guardians' home, the guardians' request for an increase in the support and for real-estate taxes and insurance attributable to an addition to their residence would be denied. [Matter of Estate of Steward, 134 Ill. App. 3d 412, 89 Ill. Dec. 315, 480 N.E.2d 201 \(2d Dist. 1985\).](#)

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[FN3] [McNeil v. Bennett, 792 A.2d 190 \(Del. Ch. 2001\)](#), aff'd in part, rev'd in part on other grounds, [798 A.2d 503 \(Del. 2002\)](#).

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[FN4] [Rogers v. English, 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812 \(1943\).](#)

- As to deviations from trust terms to accomplish the ultimate purpose of the trust, see §§ [312](#) to [314](#).

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[FN5] [§ 123.](#)

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[FN6] [Scullin v. Clark, 242 S.W.2d 542, 29 A.L.R.2d 1024 \(Mo. 1951\)](#); [In re Leupp, 108 N.J. Eq. 49, 153 A. 842 \(Ch. 1931\).](#)

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[FN7] [Lipsitt v. Sweeney, 317 Mass. 706, 59 N.E.2d 465 \(1945\).](#)

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[FN8] [In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\).](#)

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§ 553. Time

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [280](#)

A.L.R. Library

[Beneficiary's consent to, acquiescence in, or ratification of, trustee's improper allocation or distribution of assets, 29 A.L.R.2d 1034](#)

It is within the power of a trust settlor to provide for the time and manner of distribution of the trust estate and its income,[FN1] and payments and distributions to beneficiaries of a trust are to be made during the course of administration of the trust in accordance therewith. Except with the approval of the court,[FN2] the trustee cannot properly make payment and distribution to beneficiaries in contravention of the trust before the time specified,[FN3] or before occurrence of conditions precedent which may be imposed, such as need by the beneficiary,[FN4] passage of a period of certain conduct by the beneficiary,[FN5] or attainment by him or her of a certain competency.[FN6] On the final settlement of the trust the beneficiaries are entitled to have the entire trust property and funds turned over to them.[FN7]

Payments and distributions are to be made with reasonable diligence by trustees,[FN8] but in determining whether such diligence has been exercised, consideration is to be given to difficulties encountered in the administration of the trust,[FN9] including such matters as liquidation of charges and expenses, payment of taxes, market conditions encountered in investments, and litigation.[FN10] Ordinarily, however, a trustee should not be required to pay out to beneficiaries trust funds to which conflicting claims are pending and undetermined.[FN11]

Generally, income is to be paid to beneficiaries as it accrues, or periodically; it is not to be accumulated by a trustee unless a provision in the trust instrument authorizes the accumulation of income.[FN12]

Ordinarily, the proper time to determine the persons to whom distribution of a trust estate shall be made is when the time for distribution arrives.[FN13]

In the case of trusts to secure payments, creditors are the beneficiaries, and payments may be made to them where, under the terms of the trust, they become entitled thereto.[FN14]

A beneficiary who, not being under any incapacity, obtains or joins in a premature termination of the trust and receives distribution accordingly, cannot require the trustee to restore the funds or further account for them.[FN15]

[FN1] [Lent v. Title & Trust Co. of Portland, 137 Or. 511, 3 P.2d 755 \(1931\).](#)

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[FN2] [§ 558.](#)

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[FN3] [In re Chapin, 148 Mass. 588, 20 N.E. 195 \(1889\); Hester v. Wilkinson, 25 Tenn. 215, 6 Hum. 215, 1845 WL 1898 \(1845\).](#)

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[FN4] [Kerens v. St. Louis Union Trust Co., 283 Mo. 601, 223 S.W. 645, 11 A.L.R. 288 \(1920\).](#)

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[FN5] [Kerens v. St. Louis Union Trust Co., 283 Mo. 601, 223 S.W. 645, 11 A.L.R. 288 \(1920\).](#)

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[FN6] [Viall v. Rhode Island Hospital Trust Co., 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 \(1924\).](#)

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[FN7] [May v. Henderson, 268 U.S. 111, 45 S. Ct. 456, 69 L. Ed. 870 \(1925\); State v. Northrop, 93 Conn. 558, 106 A. 504, 7 A.L.R. 1014 \(1919\); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

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[FN8] [North Adams Nat. Bank v. Curtiss, 278 Mass. 471, 180 N.E. 217, 83 A.L.R. 607 \(1932\).](#)

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[FN9] [North Adams Nat. Bank v. Curtiss, 278 Mass. 471, 180 N.E. 217, 83 A.L.R. 607 \(1932\).](#)

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[FN10] [North Adams Nat. Bank v. Curtiss, 278 Mass. 471, 180 N.E. 217, 83 A.L.R. 607 \(1932\).](#)

- A trustee properly refused to disburse funds pending litigation of claims by residuary beneficiaries of the testamentary trust against the trustee and others; the trustee had an obligation to retain all funds until the matter was judicially resolved. [Wilbanks v. Gray, 795 So. 2d 541 \(Miss. Ct. App. 2001\).](#)

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[FN11] [Feldmeier v. Superior Court of Santa Barbara County, 12 Cal. 2d 302, 83 P.2d 929, 119 A.L.R. 927 \(1938\).](#)

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[FN12] [Gasquet v. Pollock, 1 A.D. 512, 37 N.Y.S. 357 \(1st Dep't 1896\), aff'd, 158 N.Y. 734, 53 N.E. 1125 \(1899\); Miller v. Miller, 203 Tenn. 590, 315 S.W.2d 101 \(1958\).](#)

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[FN13] [Bowlin v. Rhode Island Hospital Trust Co., 31 R.I. 289, 76 A. 348 \(1910\), modified, 76 A. 770 \(R.I. 1910\).](#)

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[FN14] [Hamlen v. Rednalloh Co., 291 Mass. 119, 197 N.E. 149, 99 A.L.R. 1230 \(1935\).](#)

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[\[FN15\] Shelton v. King, 229 U.S. 90, 33 S. Ct. 686, 57 L. Ed. 1086 \(1913\); Rowley v. American Trust Co., 144 Va. 375, 132 S.E. 347, 45 A.L.R. 738 \(1926\).](#)

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§ 554. Time—Discretion of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [280](#)

Sometimes the trust instrument or declarations vest discretion in the trustee, whether a natural person or a corporation,[\[FN1\]](#) to determine when payments or distributions are to be made to beneficiaries,[\[FN2\]](#) as, for example, to determine when a condition precedent to payment or distribution to a beneficiary has been met by the beneficiary.[\[FN3\]](#) The trustee may be given discretion to determine that a beneficiary has followed a certain course of conduct for a certain period,[\[FN4\]](#) or that he or she has attained a certain competency.[\[FN5\]](#)

Trustees who are given discretionary power to distribute funds from the trust for the support of an incompetent do not abuse their discretion in determining not to make a distribution from the trust where they annually examine the guardian's report on the cost of the incompetent's care, consider the size of the guardianship account and the income therefrom, and conclude that the guardianship account is still sufficient to provide for the incompetent's support.[\[FN6\]](#) On the other hand, where a will provides that the net income from a trust is to be paid to the testator's daughter and also gives the trustees discretion to apply the income or principal for the use of any beneficiary in the event of serious illness, but the trustee refuses to pay income to the daughter's committee after she becomes incompetent, even though the testator knew of his daughter's incompetence and took care of her during his lifetime, the trustees have no authority to accumulate income that is obviously needed for the daughter's care.[\[FN7\]](#)

[\[FN1\] Kerens v. St. Louis Union Trust Co., 283 Mo. 601, 223 S.W. 645, 11 A.L.R. 288 \(1920\).](#)

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[\[FN2\] Damon v. Damon, 312 Mass. 268, 44 N.E.2d 657, 143 A.L.R. 463 \(1942\); Viall v. Rhode Island Hospital Trust Co., 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 \(1924\).](#)

- As to whether the trustee's discretion merely governs the time or manner of payment, or actually conditions the gift itself, see [§ 555](#).

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[\[FN3\] Viall v. Rhode Island Hospital Trust Co., 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 \(1924\).](#)

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[\[FN4\] Kerens v. St. Louis Union Trust Co., 283 Mo. 601, 223 S.W. 645, 11 A.L.R. 288 \(1920\)](#) (sobriety for a certain period).

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[\[FN5\] Viall v. Rhode Island Hospital Trust Co., 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 \(1924\).](#)

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[\[FN6\] First Nat. Bank of Catawba County v. Edens, 55 N.C. App. 697, 286 S.E.2d 818 \(1982\).](#)

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[\[FN7\] Grabois v. Grosner, 363 F.2d 979 \(D.C. Cir. 1966\).](#)

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H. Payment and Distribution
1. In General

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§ 555. Trustee's discretion as conditioning gift or as merely governing time or method of payment

West's Key Number Digest

Forms

Payment and application of income—Trustee's discretion. [Am. Jur. Legal Forms 2d, Trusts § 251:286](#)

In determining the nature and extent of the discretion given trustees in reference to the payment, application, or distribution of the income or corpus, the point of doubt is frequently whether the discretion intended is merely administrative in scope, designed for management and protection, or, on the contrary, is initiative, conferring power to give, withhold, or defeat shares and to control directly the channels of devolution.[\[FN1\]](#) Ordinarily, the ultimate question is whether the beneficiary has equitable title notwithstanding the trustee's discretion, for a case is usually one of two kinds: either one in which equitable title is in the beneficiary subject merely to the trustee's control and withholding of enjoyment, or one in which the beneficiaries, or some of them, can acquire title through only the trustee's exercise of his or her discretion. But it should be observed that the precise question of the determination as to whether the discretion given the trustee conditions the gift itself, or governs merely the time or method of permitting enjoyment, is not one of present or future equitable title but of scope of discretion. The beneficiary may in fact have title but the trustee has power to defeat it, or the beneficiary may have no title and it may be intended that he or she never shall get title to any specific property, money, or thing under the trustee's control, and yet the trustee's discretion be limited to matters of time or mode.[\[FN2\]](#)

Where there is an initial disposition expressly in trust for a designated person, and no specific gift over of anything not paid, applied, or distributed by the trustee under the discretion given him or her, the correct conclusion ordinarily is that the discretion is limited to the time or method of payment, application, or distribution.[\[FN3\]](#)

In a mere directional trust, the absence of a specific gift over of any income or corpus not distributed often serves to confirm that the discretion given the trustee was not intended to reach beyond matters of time or method.[\[FN4\]](#) The vital point of inquiry may be whether there is in fact a gift over of income or corpus not disposed of by the trustee under the discretion.[\[FN5\]](#)

The absence of a gift expressly in trust for a designated person, where the trust authorizes the trustee to make discretionary support payments to that person during his or her lifetime, coupled with the presence of a gift over of anything not disposed of by the trustee under his or her discretion, is generally sufficient to indicate that the discretion is not limited to time or method of payment or distribution; trust instruments embracing those two elements are likely to contain plain language conferring broad powers of appointment on the trustees.[\[FN6\]](#) Under a trust disposition intended to serve the purposes of a spendthrift trust by lodging in the trustee complete discretion to give or to withhold such part or all of the income or corpus as he or she thinks fit, the cestui has no claim on anything withheld in good faith.[\[FN7\]](#)

[\[FN1\]](#) §§ [119](#) to [123](#).

[\[FN2\]](#) [In re Nicholson's Estate](#), 355 Pa. 426, 50 A.2d 283, 172 A.L.R. 450 (1947).

- As to the trustee's discretion as to the time of payments under a trust, generally, see [§ 554](#).

[\[FN3\]](#) [Sheridan v. Krause](#), 161 Va. 873, 172 S.E. 508, 91 A.L.R. 1067 (1934).

[\[FN4\] Clyde v. Lake, 78 N.H. 322, 100 A. 552 \(1917\).](#)

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[\[FN5\] Lembeck v. Lembeck, 73 N.J. Eq. 427, 68 A. 337 \(Ch. 1907\).](#)

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[\[FN6\] Rackemann v. Wood, 203 Mass. 501, 89 N.E. 1037 \(1909\).](#)

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[\[FN7\] Mason v. Rhode Island Hospital Trust Co., 78 Conn. 81, 61 A. 57 \(1905\).](#)

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2. Payment and Distribution on Judicial Order or Decree

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§ 556. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [280](#), [287](#)

Forms

Order—Directing payment of money or delivery of property to beneficiary. Am. Jur. Pleading and Practice Forms (Rev), Trusts §§ 252

Upon the failure of a trustee to make distribution of the income or corpus of a trust fund as directed by the trust declaration, the beneficiaries entitled may resort to judicial proceedings for an order or decree of distribution,[\[FN1\]](#) which, when granted, is an effectual protection to a trustee against all claims for property or

money distributed in accordance with the order or decree.[\[FN2\]](#) A decree for distribution by a trustee may be rendered on a bill to construe a will.[\[FN3\]](#)

A court has the authority to provide guidance to a trustee when questions arise as to the distribution of income between beneficiaries and remaindermen.[\[FN4\]](#)

Where a court renders its order or decree for a distribution of a trust estate, the trustee has the single, peremptory obligation to make such a distribution at once, unless the terms of the decree provide otherwise.[\[FN5\]](#)

A decree for the payment by the trustee to the beneficiary of a sum of money is absolute, not limited to trust property or funds in the hands of the trustee, and instead, binds the trustee personally, and is enforceable against his or her property.[\[FN6\]](#)

A decree for the distribution of a trust estate may be vacated for fraud, such as, for example, the concealment of the existence of a beneficiary and failure to make him or her a party to the proceeding in which the decree for distribution is obtained.[\[FN7\]](#)

[\[FN1\] Chapman v. Northern Trust Co., 296 Ill. 353, 129 N.E. 836, 13 A.L.R. 568 \(1921\).](#)

- As to orders and decrees in suits and proceedings relating to trusts and trustees, see §§ [664](#) to [670](#).

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[\[FN2\] Chapman v. Northern Trust Co., 296 Ill. 353, 129 N.E. 836, 13 A.L.R. 568 \(1921\).](#)

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[\[FN3\] Chapman v. Northern Trust Co., 296 Ill. 353, 129 N.E. 836, 13 A.L.R. 568 \(1921\).](#)

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[\[FN4\] Kane v. Hutchinson, 718 So. 2d 938 \(Fla. Dist. Ct. App. 3d Dist. 1998\).](#)

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[\[FN5\] Brent v. State of Maryland, 85 U.S. 430, 21 L. Ed. 777 \(1873\).](#)

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[\[FN6\] Jastram v. McAuslan, 29 R.I. 390, 71 A. 454 \(1909\).](#)

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[\[FN7\] Quinn v. Hall, 37 R.I. 56, 91 A. 71 \(1914\).](#)

- As to fraud in obtaining a decree as a defense to an action against the surety of the trustee, see [§ 401](#).

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§ 557. Disobedience as contempt

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A trustee's refusal to distribute, pay, or turn over trust property or funds which he or she has in his or her possession at the time or which are concealed by him or her, and which he or she has been ordered by a court having jurisdiction in the premises to pay over, constitutes contempt of court and may be punished accordingly.[FN1] Inability of the trustee to comply with the decree or order which results from his or her misappropriation or other fault occurring after the decree or order is no defense.[FN2] A trustee's failure of compliance with an order to pay over trust funds cannot be treated as contempt in respect to property or funds that a trustee has never collected, although such failure of collection is the consequence of fault or neglect on his or her part.[FN3] Nor can the trustee's failure of compliance with such an order be treated as contempt in respect to funds that he or she has previously spent or dissipated.[FN4]

Where a decree is not to pay funds into court or to an officer of the court, but is simply an adjudication successfully obtained by a plaintiff which can be enforced by execution, contempt proceedings will not lie to enforce the decree.[FN5] Conversely, contempt proceedings are available where execution at law is not possible.[FN6]

[FN1] [Princess Lida of Thurn and Taxis v. Thompson](#), 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 (1939); [Cox v. Rice](#), 375 Ill. 357, 31 N.E.2d 786, 134 A.L.R. 923 (1940).

- The trustee of a constructive trust may be punished as for contempt upon his refusal to pay over the trust fund as directed by the court. [Caswell v. Bathrick](#), 54 R.I. 30, 169 A. 321 (1933).

[FN2] [Rudd v. Rudd](#), 184 Ky. 400, 214 S.W. 791 (1919).

[FN3] [Tudor v. Firebaugh](#), 364 Ill. 283, 4 N.E.2d 393 (1936).

[FN4] [Klimek v. Borkowski](#), 259 Mich. 383, 243 N.W. 313 (1932).

[FN5] [Hennig v. Abrahams](#), 246 A.D. 621, 282 N.Y.S. 970 (2d Dep't 1935), aff'd, 270 N.Y. 626, 1 N.E.2d 362 (1936).

[FN6] [Smith v. Boomhower](#), 251 Mich. 126, 230 N.W. 905 (1930).

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§ 558. Advance payments

West's Key Number Digest

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A court may permit or authorize a departure or deviation from the terms of the trust, at least from the express or literal terms thereof, in order to accomplish what the settlor of a trust would have intended had he or she anticipated exigencies or conditions which subsequently arose.[FN1] A court may authorize payments and distributions to beneficiaries in advance of the time set by a settlor, or in advance of the time when they ordinarily would be made, to the end of effecting the ultimate intention of the settlor, but not to the end of serving the convenience or even the benefit of the beneficiaries.[FN2] The court may permit or direct the trustee to apply income and principal from the trust estate for the necessary support of a beneficiary of the trust before the time when by the terms of the trust he or she is entitled to the enjoyment of such income or principal, if the interest of no other beneficiary of the trust is impaired thereby.[FN3] However, such advance payments to beneficiaries in deviation from or in contravention of the terms of the trust are authorized only rarely,[FN4] and then only in accordance with necessities and justice.[FN5] The rule does not permit the court to substitute its judgment for that of the settlor of the trust.[FN6]

The court may authorize such a payment or distribution in an exigency not anticipated by the settlor where, in case the settlor had anticipated such an exigency, he or she probably would have authorized the payment,[FN7] but a court has no power to authorize such a payment or distribution in an exigency anticipated by the settlor and in contravention of the intention of the settlor,[FN8] except, perhaps, where a postponement directed by a settlor offends some principle of positive law or settled rule of public policy.[FN9]

Payments or distributions of trust funds in deviation from the exact terms of the trust are most frequently authorized in the case of minor beneficiaries who do not have sufficient means for their maintenance or proper education,[FN10] and courts are inclined to be liberal in affording them such relief.[FN11]

Advance payments to beneficiaries of a trust may be authorized by a court to be made out of income,[\[FN12\]](#) although there is a direction for accumulation of income.[\[FN13\]](#)

[\[FN1\] § 312.](#)

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[\[FN2\] Shelton v. King, 229 U.S. 90, 33 S. Ct. 686, 57 L. Ed. 1086 \(1913\); Hallinan v. Hearst, 133 Cal. 645, 66 P. 17 \(1901\); Lent v. Title & Trust Co. of Portland, 137 Or. 511, 3 P.2d 755 \(1931\).](#)

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[\[FN3\] Restatement Second, Trusts § 168.](#)

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[\[FN4\] National Bank of Tacoma v. Roberts, 172 Wash. 355, 20 P.2d 25 \(1933\).](#)

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[\[FN5\] Frazer v. First Nat. Bank, 235 Ala. 252, 178 So. 441, 126 A.L.R. 1 \(1938\).](#)

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[\[FN6\] Lent v. Title & Trust Co. of Portland, 137 Or. 511, 3 P.2d 755 \(1931\).](#)

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[\[FN7\] Zinsmeister's Trustee v. Long, 250 Ky. 50, 61 S.W.2d 887 \(1933\); Bennett v. Nashville Trust Co., 127 Tenn. 126, 153 S.W. 840 \(1913\).](#)

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[\[FN8\] Bennett v. Nashville Trust Co., 127 Tenn. 126, 153 S.W. 840 \(1913\).](#)

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[\[FN9\] Shelton v. King, 229 U.S. 90, 33 S. Ct. 686, 57 L. Ed. 1086 \(1913\).](#)

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[\[FN10\] Pitts v. Rhode Island Hospital Trust Co., 21 R.I. 544, 45 A. 553 \(1900\); Bennett v. Nashville Trust Co., 127 Tenn. 126, 153 S.W. 840 \(1913\).](#)

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[\[FN11\] National Val. Bank v. Hancock, 100 Va. 101, 40 S.E. 611 \(1902\).](#)

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[\[FN12\] Pitts v. Rhode Island Hospital Trust Co., 21 R.I. 544, 45 A. 553 \(1900\).](#)

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[\[FN13\] § 526.](#)

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§ 559. Advance payments—Necessity of absolute interest or consent of all beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [285](#), [287](#)

A court may authorize an advance payment or distribution to a beneficiary only where he or she has an absolute right or interest in the trust property or funds or in the portion thereof out of which such payment or distribution is to be made, or where the consent of all other persons having any present or future interest, although contingent, in such property or funds or portion thereof is obtained,[\[FN1\]](#) or at least where such persons are made parties to the proceedings.[\[FN2\]](#) Their consent may be evidenced by their joining in the application to the court for the advance payment to a beneficiary.[\[FN3\]](#)

A court cannot authorize such an advance payment or distribution to a beneficiary where there is possibility of the vesting of an interest in a child not in existence.[\[FN4\]](#)

[\[FN1\]](#) [New York Life Ins. Co. v. Conrad](#), 269 Ky. 359, 107 S.W.2d 248 (1937); [Pitts v. Rhode Island Hospital Trust Co.](#), 21 R.I. 544, 45 A. 553 (1900); [Bennett v. Nashville Trust Co.](#), 127 Tenn. 126, 153 S.W. 840 (1913).

- As to the power of a life tenant or the life tenant's trustee to consume or encroach upon the principal or corpus, see [Am. Jur. 2d, Life Tenants and Remaindermen § 49](#) to [83](#).

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[\[FN2\]](#) [§ 617](#).

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[\[FN3\]](#) [Pitts v. Rhode Island Hospital Trust Co.](#), 21 R.I. 544, 45 A. 553 (1900); [Stewart v. Hamilton](#), 151 Tenn. 396, 270 S.W. 79, 39 A.L.R. 37 (1925).

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[\[FN4\]](#) [Stewart v. Hamilton](#), 151 Tenn. 396, 270 S.W. 79, 39 A.L.R. 37 (1925).

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§ 560. Advance payments—Effect of direction for accumulation of income

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [280](#), [285](#), [287](#)

Where an authorization by a court of an advance payment to a beneficiary out of income is proper, it may be made although the trust instrument or declaration directs the accumulation of income,^[FN1] but courts generally have refused to order the immediate payment to the beneficiary of a legacy or a trust fund which is to be turned over to such beneficiary at the end of a certain number of years, or upon the attainment of a certain age beyond minority, in advance of the time set by the trustor.^[FN2]

^[FN1] [Reed v. Patterson](#), 44 N.J. Eq. 211, 14 A. 490 (Ct. Err. & App. 1888); [Pitts v. Rhode Island Hospital Trust Co.](#), 21 R.I. 544, 45 A. 553 (1900).

- A court of equity may direct the present payment to the beneficiary of the income of a fund placed in trust to accumulate until she reaches a specified age, if intellectual promise, the need of education, and necessitous circumstances, unforeseen by the testator, have wrought such a change in the beneficiary's condition that the creator of the trust would have so directed had he foreseen the situation. [Bennett v. Nashville Trust Co.](#), 127 Tenn. 126, 153 S.W. 840 (1913).

^[FN2] [Stier v. Nashville Trust Co.](#), 158 F. 601 (C.C.A. 6th Cir. 1908); [De Ladson v. Crawford](#), 93 Conn. 402, 106 A. 326 (1919).

- As to the discretion of the trustee as to when to turn over principal to the beneficiaries, see [§ 554](#).

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3. Exercise of Power of Trustee to Appoint Beneficiaries

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§ 561. Generally; where trustee fails to act

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [280](#)

While a private trust generally is regarded as invalid for uncertainty where a trustee is given an unrestrained discretion to appoint or select beneficiaries,^[FN1] according to some authorities the trustee may be given power to appoint or select beneficiaries from a designated class.^[FN2] Closely related to the power of a trustee to elect or appoint among beneficiaries or a class of beneficiaries is the power of a trustee, under a discretionary trust, to exercise his or her discretion as to payment or distribution to the beneficiary of the trust.^[FN3]

A power of a trustee to elect among beneficiaries or a class of beneficiaries, or to determine whether and when a particular beneficiary is to take a benefit, or the extent of the benefit, can be exercised by only the trustee and not by the court or a successor trustee, where it is purely personal in character in the sense that it pertains to the person of the trustee rather than to the office of trustee.^[FN4] Where, however, such a power of a trustee is not personal and confidential in such sense and the designated trustee fails to exercise it, the court will appoint a trustee to exercise it, or the court will exercise the power itself. In the latter case, the court will be governed by any guide which under the terms of the trust was intended to guide the designated trustee in the exercise of such a power,^[FN5] but in the absence of such a guide, the court will decree an equal distribution among all members of the class from whom the trustee was to appoint or elect a beneficiary or beneficiaries.^[FN6]

Where a trustee is a member of a particular class from among whom he or she is to elect beneficiaries, he or she cannot elect him- or herself to share in the distribution unless the terms of the trust expressly and clearly permit him or her to do so. If the trustee is included within that class, he or she cannot draw to him- or herself more than his or her pro rata share of the estate.^[FN7]

^[FN1] § 240.

[\[FN2\] § 241.](#)

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[\[FN3\] § § 108.](#)

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[\[FN4\] Sheridan v. Krause, 161 Va. 873, 172 S.E. 508, 91 A.L.R. 1067 \(1934\).](#)

- As to the personal and confidential or impersonal and official character of the powers of a trustee, see [§ 319](#).
- As to rule that a court cannot appoint or substitute a trustee for a designated trustee or execute the trust itself, where the trust is purely personal or confidential, see [§ 217](#).

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[\[FN5\] Wetmore v. Henry, 259 Ill. 80, 102 N.E. 189 \(1913\).](#)

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[\[FN6\] Wetmore v. Henry, 259 Ill. 80, 102 N.E. 189 \(1913\); In re Dewey's Estate, 45 Utah 98, 143 P. 124 \(1914\).](#)

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[\[FN7\] In re Dewey's Estate, 45 Utah 98, 143 P. 124 \(1914\).](#)

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§ 562. Generally

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Effect of beneficiary's death. [Am. Jur. Legal Forms 2d, Trusts § 251:275](#)

While legal title in a beneficiary under the execution of either a dry or an accomplished trust is perfect, the beneficiary of such a trust generally is entitled to a conveyance or transfer of legal title in order to perfect his or her record title to the property, and he or she is entitled to such a conveyance or transfer at once and before the time fixed in the trust instrument for the termination of the trust.^[FN1] The beneficiary of a dry trust in personalty which has been executed under statute or rule of law into a legal title^[FN2] may at any time call upon the trustee to surrender such possession.^[FN3] A fortiori, where on the termination of a trust, legal title is regarded as continuing in the trustee, the beneficiary is entitled to have a conveyance or transfer of the legal title, with all essential contents and formalities, executed to him or her.^[FN4]

In the case of a trust by operation of law—constructive or resulting—the beneficiary is entitled to have the trust at once terminated and the legal title perfected in him or her by a conveyance or transfer from the trustee to him or her.^[FN5]

A transferee of the interest of a beneficiary in a trust, where the transfer is valid,^[FN6] is entitled to a conveyance or transfer of legal title, where the beneficiary would be entitled thereto except for his or her conveyance.^[FN7]

Although a trust instrument directs termination of the trust and the distribution of the principal to the beneficiaries upon the settlor's death, the trustee cannot make a complete distribution until provision has been made for all the expenses, claims, and taxes the trust may be obligated to pay, and certainly not before these amounts have been fully ascertained.^[FN8]

^[FN1] [Singhi v. Dean, 119 Me. 287, 110 A. 865 \(1920\).](#)

- As to the termination of a trust on the accomplishment of its purpose thereof, see [§ 85](#).

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^[FN2] [§ 11](#).

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^[FN3] [Security Nat. Bank v. Sternberger, 207 N.C. 811, 178 S.E. 595, 97 A.L.R. 720 \(1935\).](#)

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^[FN4] [Lincoln v. French, 105 U.S. 614, 26 L. Ed. 1189 \(1881\); French v. Edwards, 88 U.S. 147, 22 L. Ed. 534 \(1874\).](#)

- Until there is a conveyance, testamentary trustees have legal title and a duty to manage the property, and in order to clear the title upon termination of purposes of the trust, proceedings to terminate the trust and transfer title to the beneficiary should be had. [In re Schick's Estate, 169 Pa. Super. 226, 82 A.2d 262, 30 A.L.R.2d 119 \(1951\).](#)

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^[FN5] [Prosser v. Finn, 208 U.S. 67, 28 S. Ct. 225, 52 L. Ed. 392 \(1908\); Clews v. Jamieson, 182 U.S. 461, 21 S. Ct. 845, 45 L. Ed. 1183 \(1901\).](#)

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^[FN6] [§§ 241 to 245](#).

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^[FN7] [Nelson v. Wood, 199 Ark. 1019, 137 S.W.2d 929 \(1940\).](#)

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[\[FN8\] First Union National Bank v. Jones, 768 So. 2d 1213 \(Fla. Dist. Ct. App. 4th Dist. 2000\).](#)

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§ 563. Multiple beneficiaries

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When determining the proper mode of distribution during the termination of a trust involving multiple beneficiaries, the court must consider:

- (1) whether the trust instrument makes provision expressly or by implication as to the mode of distribution;
- (2) whether all beneficiaries agree upon the mode of distribution;
- (3) whether the trust consists of fungible or nonfungible property;
- (4) and whether distribution in-kind is practicable under the circumstances.[\[FN1\]](#)

[\[FN1\] Matter of Estate of Winston, 167 Misc. 2d 295, 631 NYS2D 999 \(Sur. Ct. 1995\), order aff'd, 222 A.D.2d 596, 636 NYS2D 635 \(2d Dep't 1995\).](#)

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Not all payments from a trust to trustees are inappropriate, in that trustees may receive fees [FN1] and in appropriate circumstances be reimbursed for expenses.[FN2] A trustee is entitled to reimbursement for expenses incurred within the meaning of a trust provision requiring reimbursement for such expenses,[FN3] and a trustee is generally entitled to indemnity out of the trust estate for expenses properly incurred by the trustee in the administration of the trust.[FN4] Thus, if the trustee advances the trustee's own money or uses the trustee's own property in discharging such properly incurred obligations, the trustee is entitled to reimbursement out of the trust estate; or, if the trustee has not in fact advanced the trustee's own money or used the trustee's own property to satisfy such obligations, the trustee is entitled to exoneration, that is, to use or apply the trust funds or property in the discharge of the liability.[FN5]

Comment: As between the trustee and the trust estate, a trustee is entitled to reimbursement or exoneration not only where the trustee enters into a contract which is proper in the administration of the trust and is binding on the trustee personally,[FN6] but also in cases where, without personal fault on the trustee's part, the trustee is subjected to tort liability in the administration of the estate.[FN7]

Unfaithfulness in the administration does not necessarily result in the loss of the trustee's right to be reimbursed for advances by the trustee to the trust estate,[FN8] although it does result in forfeiture of the right to compensation for the trustee's service.[FN9] An award to the trustee under a statute for costs incurred in the execution of a trust is mandatory, conditioned on the good faith of the trustee.[FN10]

The right of a trustee to reimbursement or exoneration does not depend on knowledge or consent of the beneficiary to the expense incurred, except to the extent that such consent or knowledge may be asserted as a ground of waiver of, or estoppel to object to, an improper act.[FN11] A trustee is not entitled to indemnity out of the trust estate for expenses not properly incurred in the administration of the estate unless it is either equitable to allow such indemnity to the extent a benefit has been conferred on the estate, or the expense is of a character that the beneficiary may reject or accept the benefit and has accepted it.[FN12] Thus, where an improper expense confers a benefit upon the trust estate and was incurred in good faith, the modern trend of authority is to permit the trustee to reimburse or exonerate himself or herself to the extent of the benefit conferred.[FN13]

[FN1] [In re Baylis, 313 F.3d 9 \(1st Cir. 2002\)](#).

- As to trustee's expenditures from trust, generally, see §§ [409](#) to [423](#).

- As to trustee's entitlement to compensation for services, see §§ [574](#) to [583](#).

[FN2] [In re Baylis, 313 F.3d 9 \(1st Cir. 2002\)](#); [Whittlesey v. Aiello, 104 Cal. App. 4th 1221, 128 Cal. Rptr. 2d 742 \(3d Dist. 2002\)](#), review denied, (Apr. 9, 2003); [Kuhn v. State, 924 P.2d 1053 \(Colo. 1996\)](#).

[FN3] [Thinn v. Parks, 79 Ark. App. 20, 83 S.W.3d 430 \(2002\)](#); [Lampe v. Pawlarczyk, 314 Ill. App. 3d 455, 247 Ill. Dec. 94, 731 N.E.2d 867 \(1st Dist. 2000\)](#) (did not authorize reimbursement for personal services to grantor).

[FN4] [Restatement Second, Trusts § 244](#).

[FN5] [Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 \(1933\)](#).

[FN6] [Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 \(1933\)](#).

[FN7] § 568.

[\[FN8\] Lewis v. Ingram, 57 F.2d 463 \(C.C.A. 10th Cir. 1932\).](#)

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[\[FN9\] § 619.](#)

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[\[FN10\] Morrison v. Watkins, 20 Kan. App. 2d 411, 889 P.2d 140 \(1995\).](#)

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[\[FN11\] Petroleum Royalties Co. of Okl. v. Hartford Acc. & Indem. Co., 106 F.2d 440, 124 A.L.R. 1403 \(C.C.A. 10th Cir. 1939\).](#)

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[\[FN12\] In re Fisher's Estate, 461 Pa. 696, 337 A.2d 834 \(1975\).](#)

- As to charging the estate indirectly through the right to exoneration or indemnity, see [§ 454](#).

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[\[FN13\] In re Estate of Rainone, 33 A.D.2d 1048, 309 N.Y.S.2d 529 \(2d Dep't 1970\).](#)

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X. Reimbursement and Exoneration of Trustee
A. In General

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§ 565. Constructive or resulting trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [236](#)

Reimbursement may be allowed to a trustee of a trust by operation of law, that is, to the trustee of a constructive or resulting trust, but only for those expenditures and advances which ordinarily are considered

proper in the administration of a trust.[FN1] Since the rights of the parties in case of a constructive trust are matters of equitable cognizance governed by the maxim that a person who seeks equity must do equity, the court, in impressing a constructive trust on property and ordering an accounting by the constructive trustee, may, without discussion of the trustee's right thereto, direct that the trustee be credited with expenses incurred for the benefit of the trust property or taxes paid on such property.[FN2]

[FN1] [Petroleum Royalties Co. of Okl. v. Hartford Acc. & Indem. Co., 106 F.2d 440, 124 A.L.R. 1403 \(C.C.A. 10th Cir. 1939\).](#)

- As to particular proper expenditures in administration of a trust, see §§ [416](#) to [423](#).

[FN2] [Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 \(1917\).](#)

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§ 566. Lien or charge on trust estate

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [236](#)

A trustee entitled to reimbursement or exoneration out of the trust estate for liabilities properly incurred in the administration of the trust is generally regarded as having a security interest in or lien upon the trust estate.[FN1] Such a charge or lien upon the trust property for reimbursement does not affect the question of the actual and beneficial ownership of the subject of the trust.[FN2] The charge or lien of a trustee for reimbursement for expenditures is superior to the interests of the beneficiaries of the trust.[FN3]

[FN1] [Smith v. Jones, 120 Fla. 237, 162 So. 496 \(1935\)](#); [Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 \(1933\)](#) (lien of mortgage trustee for advances to complete mortgaged building).

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[FN2] [Bacon v. Barber, 110 Vt. 280, 6 A.2d 9, 123 A.L.R. 253 \(1939\)](#).

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[FN3] [Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 \(1933\)](#); [Hoch v. Duluth Brewing & Malting Co., 173 Minn. 374, 217 N.W. 503, 56 A.L.R. 970 \(1928\)](#).

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Forms

[Am. Jur. Legal Forms 2d, Trusts §§ 251:490 to 251:493](#)

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§ 567. Generally; administrative and operating expenses

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Forms

Reimbursement and exoneration. [Am. Jur. Legal Forms 2d, Trusts §§ 251:490 to 251:493](#)

As a general rule, a trustee, whether the trust is an express one or one by operation of law, that is, a resulting or constructive trust, is entitled to reimbursement or exoneration for administrative or operating expenses incurred in the carrying out of the trust or of a business in which the trust estate is embarked; for expenditures for release of mortgages and other encumbrances, for payment of fire insurance; and for necessary repairs[FN1] and improvements, particularly where they are made in good faith.[FN2] A trustee is generally entitled to indemnity out of the trust estate for expenses properly incurred by the trustee in the administration of the trust.[FN3] The trustee of a dry trust who pays liens on the property subject to the trust, the parties going on the postulate of his possession of the legal title, is not to be regarded as a mere volunteer or interloper in so doing, but is entitled to reimbursement for such expenditures.[FN4]

A trustee is entitled to reimbursement for premiums on bonds that the trustee pays by private means, since such premiums constitute administrative expenses of the trust estate.[FN5] For proper professional services rendered, and expenses incurred in promoting legislation that has for its object and effect the rescue of substantial property interests for a class of beneficiaries under a trust of a public nature, it is equitable to impose a charge for reimbursements and compensation upon the interests of those beneficiaries who receive the benefit the same as if a like result had been reached through successful litigation in the courts.[FN6]

Where a plain provision of a trust instrument requires the trustee, prior to the distribution or accumulation of the income, to make provision for payment of administration expenses, the trustee, in order to be entitled to reimbursement for such expenses, must show substantial compliance with such provision.[FN7]

[FN1] [Lawley v. Hickenlooper, 64 Utah 543, 231 P. 821, 36 A.L.R. 1327 \(1924\).](#)

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[FN2] [Marr v. Marr, 73 N.J. Eq. 643, 70 A. 375 \(Ct. Err. & App. 1908\); Lawley v. Hickenlooper, 64 Utah 543, 231 P. 821, 36 A.L.R. 1327 \(1924\).](#)

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[FN3] [§ 564.](#)

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[FN4] [Warner v. Tullis, 206 Iowa 680, 218 N.W. 575 \(1928\).](#)

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[FN5] [Parkhurst v. Ginn, 228 Mass. 159, 117 N.E. 202 \(1917\); Butler v. Builders Trust Co., 203 Minn. 555, 282 N.W. 462, 124 A.L.R. 1178 \(1938\).](#)

- As to administrative expenses, generally, see [§ 416.](#)

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[FN6] [Winton v. Amos, 56 Ct. Cl. 472, 255 U.S. 373, 41 S. Ct. 342, 65 L. Ed. 684 \(1921\).](#)

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[FN7] [In re Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204, 172 A.L.R. 977 \(1947\).](#)

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§ 568. Tort liabilities

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [236](#)

A trustee who incurs personal liability for a tort committed in the administration of the trust, but who is without personal fault or negligence and has acted in good faith for the benefit of the estate in the line of his duties, is entitled to exoneration therefor from the trust property if the trustee has not discharged the claim, or, if the trustee has paid the claim, to be reimbursed therefor out of trust funds.^[FN1] However, a trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.^[FN2] In some jurisdictions there is no right to indemnity or exoneration where the tort was committed intentionally by the trustee in the course of the trustee's administration of the trust.^[FN3]

^[FN1] [In re Lathers' Will](#), 137 Misc. 226, 243 N.Y.S. 366 (Sur. Ct. 1930); [Ewing v. Wm. L. Foley, Inc.](#), 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 (1926).

^[FN2] [Uniform Trust Code § 1010\(b\)](#).

^[FN3] [In re Hodgson's Estate](#), 342 Pa. 250, 20 A.2d 294 (1941) (trustee committed tort of malicious prosecution).

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§ 569. Advances to beneficiaries for support or other purpose

West's Key Number Digest

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A trustee is entitled to reimbursement for support of a beneficiary out of the trustee's own means. An invalid agreement between a trustee and a beneficiary wherein the trustee purports to abandon his or her right to reimbursement for furnishing support of the beneficiary out of his or her own means does not estop the trustee, where the beneficiary elects to treat the agreement as binding, from asserting his or her right to such reimbursement, at least under circumstances where equity requires a return to the status quo.[\[FN1\]](#) Reimbursement has been limited, at least where payment is made to a beneficiary without knowledge on his or her part that there is a deficiency of trust funds, and that the payment is out of the private funds of the trustee, to income subsequently received on the identical investments which were in default.[\[FN2\]](#)

A trustee is not precluded by laches from asserting his or her right to such reimbursement, where, for many years, the beneficiary, under and in accordance with such an agreement, made no demand on the trustee for payment of the corpus and accumulated income owing to him or her under the terms of the trust, as against claimants under the will of the beneficiary.[\[FN3\]](#)

[\[FN1\] Cleveland Clinic Foundation v. Humphrys, 97 F.2d 849, 121 A.L.R. 163 \(C.C.A. 6th Cir. 1938\).](#)

[\[FN2\] In re Media-69th St. Trust Co., 329 Pa. 587, 197 A. 918, 115 A.L.R. 869 \(1938\).](#)

[\[FN3\] Cleveland Clinic Foundation v. Humphrys, 97 F.2d 849, 121 A.L.R. 163 \(C.C.A. 6th Cir. 1938\).](#)

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§ 570. Expenditures and liabilities based on legal title; taxes

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If the trustee properly holds the trust property and properly incurs the liability, the trustee is entitled to indemnity out of the trust estate for the trustee's liability.[\[FN1\]](#) Thus, a trustee is entitled, in general, to exoneration or reimbursement in respect of liabilities or expenditures consequent to the trustee's legal title to the trust res;[\[FN2\]](#) the trustee is, for example, entitled to exoneration or reimbursement in respect to taxes and special or local assessments levied against the trustee as the legal owner of the trust estate.[\[FN3\]](#)

Where one cotrustee of the trust was subject to personal jurisdiction of the court, death tax liability imposed by a state-apportionment statute on cotrustees would entitle the trustee to reimbursement from the trust or to exoneration from trust property in satisfaction of the tax liability, notwithstanding two of three trustees and the trust corpus were located in another state and the trust provided that it would be governed by that state's law.[\[FN4\]](#)

[\[FN1\] Restatement Second, Trusts § 248.](#)

- As to liabilities of trustee, generally, see §§ [331](#) to [400](#).

[\[FN2\] Lawley v. Hickenlooper, 64 Utah 543, 231 P. 821, 36 A.L.R. 1327 \(1924\).](#)

- [Restatement Second, Trusts § 248.](#)

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[\[FN3\] City of Bangor v. Peirce, 106 Me. 527, 76 A. 945 \(1910\); Suburban Home Mortg. Co. v. Hopwood, 83 Ohio App. 115, 38 Ohio Op. 206, 51 Ohio L. Abs. 490, 81 N.E.2d 387 \(2d Dist. Franklin County 1948\).](#)

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[\[FN4\] In re Thompson's Estate, 118 N.H. 361, 386 A.2d 1280 \(1978\)](#) (cotrustee was also primary beneficiary).

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§ 571. Purchase price; where estate takes property or benefit of purchase

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [236](#)

Generally, a trustee who purchases an outstanding title or claim to trust property, or an interest therein, or one who becomes a resulting or constructive trustee by purchase of property in breach of an agreement or confidence to purchase it for another, is entitled to be reimbursed for what the trustee has paid for the property, title, claim, or interest, where it inures to the benefit of the trust estate, or where the beneficiary elects to take the benefit of such purchase.[\[FN1\]](#) Property which the beneficiary has elected to claim, as owner, where trust funds have been used in part in the purchase price, generally is subject to a charge for the trustee's money also used, although in determining the amount of such charge every reasonable intentment is against the trustee.[\[FN2\]](#) The reimbursement of a constructive trustee on the acquisition of an outstanding claim antagonistic to a community of interest may be allowed.[\[FN3\]](#)

Where one purchases trust property from himself or herself as trustee and sells it to another, and the beneficiary elects to take the profits, holding the trustee liable for the price for which he resold the property, the amount of recovery by the beneficiary should be decreased by the expenses incurred by the trustee in the resale or in perfecting title, and by the amount of taxes paid by the trustee after the purchase of the property.[FN4]

[FN1] [Essex Trust Co. v. Enwright](#), 214 Mass. 507, 102 N.E. 441 (1913).

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[FN2] [Bohle v. Hasselbroch](#), 64 N.J. Eq. 334, 51 A. 508 (Ct. Err. & App. 1902).

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[FN3] [Roll v. Everitt](#), 73 N.J. Eq. 697, 71 A. 263 (Ct. Err. & App. 1908); [Stianson v. Stianson](#), 40 S.D. 322, 167 N.W. 237, 6 A.L.R. 280 (1918).

- Generally, as to a constructive trust on a purchase of an outstanding title or claim by a party to a community of interest, see § § [183](#), [192](#).

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[FN4] [Clay v. Thomas](#), 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 (1917).

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§ 572. **Costs of litigation and attorney's fees, generally**

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [236](#)

A trustee is entitled to reimbursement or exoneration in a reasonable amount for fees of counsel properly employed in the administration of the estate, for the costs of litigation in suits against the trust estate which it is the trustee's duty to defend, and for the cost of suits properly brought in behalf of the estate.[FN1] Thus, a trustee may use trust funds to pay for legal advice regarding the trust administration[FN2] and may recover attorney's fees and costs incurred in carrying out purposes of the trust, including all reasonable expenses incurred in the trust's management or protection, such as responding to an appeal,[FN;3] reasonable expenses, beyond and above their attorney's fees, that they may have incurred as result of being required to defend a suit,[FN;4] and including such expenses incurred in successfully defending against claims by the beneficiaries. [FN3]

Caution: Outlays for attorney's fees and a litigation expert's witness fees for the benefit of the trustee as opposed to the protection of the trust, are not within the scope of statutory provisions authorizing a trustee to employ attorneys reasonably necessary to the administration of the trust estate and to be reimbursed for all advances made for the benefit or protection of the trust; in such circumstances, the trustee may not be entitled to recover the trustee's litigation-related expenses.[FN4]

However, reimbursement to be allowed a trustee for attorney's fees rests largely in the discretion of the trial court.[FN5] Excessive fees are not reimbursable, [FN6] and a trustee is not entitled to reimbursement for attorney's fees in a suit not brought by the trustee in the line of the trustee's duties.[FN7] Reimbursement of a trustee for counsel fees in connection with improper trust investments may be denied.[FN8] A testamentary trustee may properly be given an allowance out of the trust estate for attorney's fees incurred in successfully resisting an application for his or her removal.[FN9] Where the trustee acts in good faith to seek direction from a court concerning its responsibilities in relation to a trust it oversees, the trustee is entitled to indemnification for any associated legal expenses.[FN10]

[FN1] Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (2000); Murphey v. Dalton, 314 S.W.2d 726, 67 A.L.R.2d 1278 (Mo. 1958); Smith v. Massachusetts Mut. Life Ins. Co., 116 Fla. 390, 156 So. 498, 95 A.L.R. 508 (1934).

- As to employment of counsel, see § 421.

- As to allowances for litigation and counsel fees, generally, see §§ 673 to 681.

[FN2] Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (2000).

[FN;3] In re Estate of Berthot, 2002 MT 277, 312 Mont. 366, 59 P.3d 1080 (2002).

[FN;4] Stepp v. Foster, 259 Va. 210, 524 S.E.2d 866 (2000).

[FN3] Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (2000).

[FN4] Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 (Div. 4 2001).

[FN5] Turner v. Ryan, 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 (1937); Murphey v. Dalton, 314 S.W.2d 726, 67 A.L.R.2d 1278 (Mo. 1958); Raszler v. Raszler, 81 N.W.2d 120 (N.D. 1957).

[FN6] West Coast Hospital Ass'n v. Florida Nat. Bank of Jacksonville, 100 So. 2d 807 (Fla. 1958).

[\[FN7\] Fulkerson v. New Gazette Co., 222 Mo. App. 230, 297 S.W. 115 \(1927\).](#)

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[\[FN8\] Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\); Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN9\] Turner v. Ryan, 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 \(1937\).](#)

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[\[FN10\] Matter of Trust of Franzen, 955 P.2d 1018 \(Colo. 1998\).](#)

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§ 573. Expenses of accounting and litigation relating thereto

West's Key Number Digest

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A trustee may be indemnified out of the trust estate for the trustee's expenses in rendering and proving the trustee's accounts, and for costs and counsel fees^[FN1] allowed the trustee on a contest of, or a proceeding to surcharge, the trustee's account.^[FN2] However, a trustee who is found guilty of malfeasance and is indebted to the trust estate is in the position of an unsuccessful litigant, and is not entitled to costs or expenses.^[FN3]

A trustee accounting in the domiciliary jurisdiction is not entitled to reimbursement for the expenses of the filing and acceptance of an inventory of trust real estate in another jurisdiction, where the view is taken that the court has no jurisdiction of the administration of the trust in respect to real estate in another jurisdiction,^[FN4]

although this limitation of jurisdiction is not applicable in other jurisdictions where the court's jurisdiction extends to rights growing out of a trust whenever the court has jurisdiction over the parties.[FN5]

Trustees may be allowed expenses not allowed as commissions for losses which they sustained, where the expenses were incurred in defending in good faith their injudicious investments.[FN6]

[FN1] [In re Howell, 215 N.Y. 466, 109 N.E. 572 \(1915\)](#).

- As to trustee being entitled to counsel fees or litigation expenses, see [§ 673](#).

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[FN2] [§ 396](#).

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[FN3] [In re Howell, 215 N.Y. 466, 109 N.E. 572 \(1915\)](#).

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[FN4] [Beardsley v. Hall, 291 Mass. 411, 197 N.E. 35, 99 A.L.R. 1129 \(1935\)](#) (disapproved of by, [Baskin v. Montedonico, 26 F. Supp. 894 \(W.D. Tenn. 1939\)](#)).

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[FN5] [Baskin v. Montedonico, 26 F. Supp. 894 \(W.D. Tenn. 1939\)](#), judgment aff'd, [115 F.2d 837 \(C.C.A. 6th Cir. 1940\)](#).

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[FN6] [In re McDowell's Will, 116 Misc. 733, 191 N.Y.S. 678 \(Sur. Ct. 1920\)](#), aff'd as modified on other grounds, [193 A.D. 914, 183 N.Y.S. 952 \(3d Dep't 1920\)](#), aff'd as modified, [230 N.Y. 601, 130 N.E. 910 \(1921\)](#).

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Trustee compensation. [Am. Jur. Pleading and Practice Forms, Trusts, §§ 157 to 164](#)

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[Restatement Second, Trusts § 242](#)

Generally, a trustee is entitled to an allowance as compensation for the trustee's services in administering the trust,[\[FN1\]](#) at least to the extent that the services for which the trustee claims compensation are in the trustee's line of duty as trustee,[\[FN2\]](#) but not for a trustee's neglect or acts in bad faith,[\[FN3\]](#) and only for services actually performed on behalf of the trust.[\[FN4\]](#) Thus, in addition to being entitled to reimbursement for expenses incurred, unless otherwise provided by the terms of the trust, a trustee is entitled to compensation for his or her services as trustee.[\[FN5\]](#)

While provision for the trustee's compensation may be prescribed by statute,[\[FN6\]](#) such compensation may be allowed even in the absence of authorization by trust or by statute.[\[FN7\]](#) The common fund doctrine is applied in fiduciary law and thus a trustee of a trust who has taken steps to preserve or acquire assets for the trust is deemed entitled to compensation from the trust fund.[\[FN8\]](#)

The trustee may, in any case, waive the right to compensation[\[FN9\]](#) or forfeit it through neglect or the violation of a duty.[\[FN10\]](#) An absence of bad faith on the part of the trustee will not preclude recovery under a statute providing for the repayment of excessive compensation paid from a trust. [\[FN11\]](#)

Although trustees generally have a right to collect their commissions annually, their commissions are governed by the law in force at the time of the settlement of their accounts, and not by the law in force at the end of each year or at the time the trust was assumed.[\[FN12\]](#)

Caution: Although a trustee who has not accepted the trust may disclaim the appointment, once the appointment is accepted, the trustee may be under a duty to administer the trust even though the specified compensation is inadequate.[\[FN13\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Where a trust specifically states that a trustee is to serve without compensation, such a provision might be enforceable. [Alexander v. McEwen, 367 Ark. 241, 239 S.W.3d 519 \(2006\)](#).

[END OF SUPPLEMENT]

[FN1] [In re Estate of Moring v. Colorado Dept. of Health Care Policy and Financing, 24 P.3d 642 \(Colo. Ct. App. 2001\)](#).

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[FN2] [Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\)](#); [In re Testamentary Trust Created Under Last Will and Testament of Ischy, 490 Pa. 71, 415 A.2d 37 \(1980\)](#).

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[FN3] [§ 590](#).

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[FN4] [In re Trusteeship Created by City of Sheridan, 593 N.W.2d 702 \(Minn. Ct. App. 1999\)](#) (compensation only for work reasonably related to furthering a trust's interests); [Shear v. Gabovitch, 43 Mass. App. Ct. 650, 685 N.E.2d 1168 \(1997\)](#).

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[FN5] [In re Estate of Moring v. Colorado Dept. of Health Care Policy and Financing, 24 P.3d 642 \(Colo. Ct. App. 2001\)](#).

- As to entitlement to reimbursement for expenses, see [§ 564](#).

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[FN6] [In re Will of Crabtree, 440 Mass. 177, 795 N.E.2d 1157 \(2003\)](#); [In re Trust Created Under Will Dated Nov. 15, 1917 of Cunha, 104 Haw. 267, 88 P.3d 202 \(2004\)](#); [Matter of OnBank & Trust Co., 90 N.Y.2d 725, 665 N.Y.S.2d 389, 688 N.E.2d 245 \(1997\)](#) (applied retroactively).

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[FN7] [In re Testamentary Trust Created Under Last Will and Testament of Ischy, 490 Pa. 71, 415 A.2d 37 \(1980\)](#) (it is presumed that fiduciaries will receive reasonable compensation for their services).

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[FN8] [Kenneth F. White, Chtd. v. St. Alphonsus Regional Medical Center, 136 Idaho 238, 31 P.3d 926 \(Ct. App. 2001\)](#).

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[FN9] [§ 590](#).

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[FN10] [§ 590](#).

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[FN11] [Marshall v. First Nat. Bank Alaska, 97 P.3d 830 \(Alaska 2004\)](#).

- As to basis and amount of compensation, see §§ [580](#) to [583](#).

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[\[FN12\] In re Potter, 106 Misc. 113, 175 N.Y.S. 598 \(Sur. Ct. 1919\).](#)

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[\[FN13\] In re Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204, 172 A.L.R. 977 \(1947\).](#)

- As to the binding effect of the trust instrument on one who accepts the office of trustee, see [§ 575](#).

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§ 575. Terms of trust

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[Limiting effect of provision in contract, will, or trust instrument fixing trustee's or executor's fees, 19 A.L.R.3d 520](#)

Forms

Petition or application to establish higher rate of compensation or, in alternative, to be permitted to resign as trustee by trustee of inter vivos trust against beneficiaries [Am. Jur. Pleading and Practice Forms, Trusts, § 160](#)

The terms of a trust may specifically instruct that trustees are to be compensated,[\[FN1\]](#) and may fix the compensation or commissions of a trustee for his or her services,[\[FN2\]](#) or provide that the trustee is entitled to reasonable compensation for services.[\[FN3\]](#) In exercising their general power of supervision over the compensation paid to a trustee, the courts generally have deferred to the terms of the contractual agreement relating to compensation.[\[FN4\]](#)

A trust provision may effectively limit the compensation of the trustee to an amount less than that fixed or allowed by statute; the trustee can accept the trust subject to the limiting provision or decline it.[\[FN5\]](#) One who accepts the office of trustee also accepts the trust instrument, [\[FN6\]](#) and is bound by the terms of the instrument,[\[FN7\]](#) including any provision designating the compensation to which the trustee is entitled,[\[FN8\]](#) and in some instances even if the provision excludes compensation.[\[FN9\]](#) Thus, if an instrument creating a trust provides what the trustee's compensation will be, such provision is binding on all parties concerned,[\[FN10\]](#) and the trustee is ordinarily not entitled to any fees in a larger amount than those provided in the trust instrument.[\[FN11\]](#)

There may, however, be exceptions to this rule, as where there are duties imposed upon the trustee outside and beyond the general duties of the trust or in the case of an exigency or emergency which threatens a proper administration of the trust.[\[FN12\]](#) Thus, where owing to circumstances not anticipated at the time of the creation of the trust, the duties of the trustee have become more onerous, greater compensation than that fixed by the terms of the trust may be awarded.[\[FN13\]](#)

Where the trust agreement provides that the trustee will receive certain commissions on the receipt and disbursement of income and principal as compensation for the trustee's services, the trustee is precluded from receiving annual principal commissions permitted by a statute enacted after the execution of the trust agreement.[\[FN14\]](#) Where a will provides that all laws referred to in the will refers to such laws as they exist at the time of death, trustees of testamentary trust established by the will are not entitled to new rates of annual commissions when enacted by statute.[\[FN15\]](#)

The trust agreement may also prescribe the manner of authorizing reasonable compensation; thus, for example, a trust instrument may permit two trustees jointly to authorize reasonable compensation but not permit one trustee to take compensation against the will of the other. [\[FN16\]](#) However, where the trust instrument explicitly instructs that cotrustees are to be compensated for their services, a trial court may not rely on protracted arguments and disputes among the cotrustees as basis for requiring the cotrustees to waive their contractual rights. [\[FN17\]](#)

[\[FN1\]](#) [Hannam v. Brown, 114 Nev. 350, 956 P.2d 794 \(1998\).](#)

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[\[FN2\]](#) [Champion v. Commonwealth, 228 Ky. 794, 15 S.W.2d 1003 \(1929\); Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\).](#)

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[\[FN3\]](#) [Todd v. Ford, 92 Colo. 392, 21 P.2d 173 \(1933\).](#)

- Reasonable compensation. [Am. Jur. Legal Forms 2d, Trusts § 251:403.](#)

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[\[FN4\]](#) [Bunn v. Kuta, 109 Md. App. 53, 674 A.2d 26 \(1996\).](#)

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[\[FN5\]](#) [Seiple v. Mitchell, 239 Ala. 533, 195 So. 865 \(1940\); Curl v. Security Trust Co., 127 W. Va. 501, 33 S.E.2d 677, 161 A.L.R. 855 \(1945\).](#)

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[\[FN6\]](#) [Lowy v. Kessler, 522 So. 2d 917 \(Fla. Dist. Ct. App. 3d Dist. 1988\); Matter of Estate of Perlberg, 694 S.W.2d 304 \(Tenn. Ct. App. 1984\).](#)

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[\[FN7\] Marks v. Marks, 51 Haw. 548, 465 P.2d 996 \(1970\).](#)

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[\[FN8\] Lowy v. Kessler, 522 So. 2d 917 \(Fla. Dist. Ct. App. 3d Dist. 1988\); Barry v. Barry, 198 Miss. 677, 21 So. 2d 922, 161 A.L.R. 864 \(1945\); Matter of Estate of Perlberg, 694 S.W.2d 304 \(Tenn. Ct. App. 1984\); Allen v. Berrey, 645 S.W.2d 550 \(Tex. App. San Antonio 1982\), writ refused n.r.e., \(Mar. 30, 1983\).](#)

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[\[FN9\] In re Cornell's Will, 63 Misc. 2d 234, 311 N.Y.S.2d 49 \(Sur. Ct. 1970\).](#)

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[\[FN10\] In re Kennedy's Trust, 364 Pa. 310, 72 A.2d 124, 18 A.L.R.2d 1374 \(1950\).](#)

- As to basis and amount of compensation, see §§ [580](#) to [583](#).

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[\[FN11\] Curl v. Security Trust Co., 127 W. Va. 501, 33 S.E.2d 677, 161 A.L.R. 855 \(1945\); Marks v. Marks, 51 Haw. 548, 465 P.2d 996 \(1970\)](#) (not entitled to higher statutory commissions).

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[\[FN12\] Smith v. Stover, 262 Ill. App. 440, 1931 WL 3091 \(2d Dist. 1931\).](#)

- As to additional compensation allowed for extraordinary services, see [§ 585](#).

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[\[FN13\] In re Bissinger's Estate, 60 Cal. 2d 756, 36 Cal. Rptr. 450, 388 P.2d 682, 19 A.L.R.3d 506 \(1964\).](#)

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[\[FN14\] Lehman v. Irving Trust Co., 55 N.Y.2d 97, 447 N.Y.S.2d 897, 432 N.E.2d 769 \(1982\).](#)

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[\[FN15\] Matter of Miller, 99 A.D.2d 780, 471 N.Y.S.2d 877 \(2d Dep't 1984\).](#)

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[\[FN16\] U.S. v. Frost, 321 F.3d 738 \(8th Cir. 2003\) \(applying Arkansas law\).](#)

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[\[FN17\] Hannam v. Brown, 114 Nev. 350, 956 P.2d 794 \(1998\).](#)

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§ 576. Terms of trust—Absence of compensation provision in instrument

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 314, 315, 315(1)

The absence of any compensation provision in a trust document is not a bar to compensation.^[FN1] Where a trust fails to fix trustee fees, but where the trustee in a letter to the settlor stated the trustee's usual fee schedule and the letter indicated that the settlor had previously agreed to such fee, and where such schedule had been followed for a number of years, the letter agreement established the fee.^[FN2]

Under a trust instrument providing that the compensation for all services to be rendered by the trustee must be such as may be agreed upon by the parties thereto in writing, the failure of the beneficiary to agree to any compensation does not bar the trustee from obtaining reasonable compensation for services upon the trustee's final accounting.^[FN3]

^[FN1] [Rutanen v. Ballard, 424 Mass. 723, 678 N.E.2d 133 \(1997\)](#) (statute authorizes probate court to award compensation); [In re Testamentary Trust Created Under Last Will and Testament of Ischy, 490 Pa. 71, 415 A.2d 37 \(1980\)](#).

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^[FN2] [Estate of Ingram v. Ashcroft, 709 S.W.2d 956 \(Mo. Ct. App. W.D. 1986\)](#).

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^[FN3] [In re Davidson's Trust Estate, 354 Pa. 333, 47 A.2d 145, 165 A.L.R. 768 \(1946\)](#).

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§ 577. Judicial approval or allowance

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 314, 315, 315(1)

Forms

Amount fixed by court. [Am. Jur. Legal Forms 2d, Trusts § 251:399](#)

Courts have the inherent power to review compensation paid to trustees from trust assets.^[FN1] In the absence of anything in the trust instrument definitely fixing the compensation of the trustee, a trustee is entitled to a reasonable fee which is wholly within the court's discretion,^[FN2] the court being empowered to determine the value of the trustee's services.^[FN3] Where neither the trust instrument nor a statute provides for any certain amount, percent, or method of determining trustees' fees or commission and there is no agreement in respect thereto, it is proper to submit the amount of commission of the trustees to a court of equity for approval and allowance.^[FN4] If the trustee has agreed to manage the property for a specific sum, and has received that sum, the trustee is not entitled to a judicial determination as to what constitutes a fair and reasonable compensation for the trustee's services.^[FN5]

The court in its discretion may ordinarily increase, diminish,^[FN6] or in cases involving a breach of the trustee's duties, deny compensation to a trustee;^[FN7] in exercising its power to review the amount of compensation awarded to a trustee, the court must consider the totality of the circumstances, though generally the court defers to the terms of the contractual agreement relating to compensation.^[FN8] In some jurisdictions, however, a court may not have discretion to deny a trustee an annual commission at the statutory rate.^[FN9]

A statute may provide that if there are special circumstances, the amount of the allowance is in the sound discretion of the equity court exercising jurisdiction.^[FN10] In jurisdictions where there is no applicable statute, the determination of whether the compensation claimed by a trustee is reasonable and just is left to the sound discretion of the trial court.^[FN11] Where the trust document does not contain an express compensation agreement and no independent agreement concerning compensation was created, the court itself may raise the issue of the reasonableness of the compensation.^[FN12] The issue of a trustee's fees may be the subject of a separate judgment, which may be certified, although the court retains jurisdiction over other trust issues.^[FN13]

^[FN1] [Bunn v. Kuta, 109 Md. App. 53, 674 A.2d 26 \(1996\).](#)

^[FN2] [Matter of Harbaugh's Estate, 231 Kan. 564, 646 P.2d 498 \(1982\); Matter of Trusts Created Under Will of Dwan, 371 N.W.2d 641 \(Minn. Ct. App. 1985\); Estate of Ingram v. Ashcroft, 709 S.W.2d 956 \(Mo. Ct. App. W.D. 1986\).](#)

[\[FN3\] In re Estate of Sonovick, 373 Pa. Super. 396, 541 A.2d 374 \(1988\).](#)

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[\[FN4\] Morrison v. Asher, 361 S.W.2d 844 \(Mo. Ct. App. 1962\).](#)

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[\[FN5\] Rutanen v. Ballard, 424 Mass. 723, 678 N.E.2d 133 \(1997\).](#)

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[\[FN6\] Turner v. Ryan, 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 \(1937\); In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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[\[FN7\] Matter of Wills of Jacobs, 91 N.C. App. 138, 370 S.E.2d 860 \(1988\); In re Drake's Will, 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 \(1935\).](#)

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[\[FN8\] Bunn v. Kuta, 109 Md. App. 53, 674 A.2d 26 \(1996\).](#)

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[\[FN9\] In re Arnold O., 279 A.D.2d 774, 719 N.Y.S.2d 174 \(3d Dep't 2001\).](#)

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[\[FN10\] Sokol v. Nattans, 26 Md. App. 65, 337 A.2d 460 \(1975\).](#)

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[\[FN11\] Bridgeport-City Trust Co. v. First Nat. Bank & Trust Co. of Bridgeport, 124 Conn. 472, 200 A. 809, 117 A.L.R. 1148 \(1938\); In re Estate of Sonovick, 373 Pa. Super. 396, 541 A.2d 374 \(1988\).](#)

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[\[FN12\] In re Estate of Sonovick, 373 Pa. Super. 396, 541 A.2d 374 \(1988\).](#)

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[\[FN13\] Boatmen's Trust Co. v. Sugden, 827 S.W.2d 249 \(Mo. Ct. App. E.D. 1992\).](#)

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§ 578. Charge on estate

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [314](#), [315](#), [315\(1\)](#)

Compensation due a trustee for the trustee's services, where its payment is not otherwise made or provided for, is chargeable to and payable out of the trust estate,[\[FN1\]](#) and payment ordinarily is effected by retention on approval of an accounting in which compensation is itemized, but sometimes payment may be taken out of money paid out without approval until final accounting.[\[FN2\]](#) The trustee has a lien against the estate for payments due to the trustee and the trustee may not be compelled to relinquish control of the trust estate until the lien for payments is satisfied.[\[FN3\]](#)

One who has mingled in one bank account moneys received by him or her as trustee of property in a state other than that of the domiciliary jurisdiction and moneys received by him or her as trustee of property in the state of the domiciliary jurisdiction may properly withdraw therefrom the compensation to which he or she is entitled as trustee of the property in the other state.[\[FN4\]](#)

[\[FN1\]](#) [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940); [McAfee v. Thomas](#), 121 Or. 351, 255 P. 333 (1927).

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[\[FN2\]](#) [Cook v. Stockwell](#), 206 N.Y. 481, 100 N.E. 131 (1912).

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[\[FN3\]](#) [First Union National Bank v. Jones](#), 768 So. 2d 1213 (Fla. Dist. Ct. App. 4th Dist. 2000).

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[\[FN4\]](#) [Beardsley v. Hall](#), 291 Mass. 411, 197 N.E. 35, 99 A.L.R. 1129 (1935) (disapproved of on other grounds by, [Baskin v. Montedonico](#), 26 F. Supp. 894 (W.D. Tenn. 1939)).

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§ 579. Time when payable

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [314](#), [315](#), [315\(1\)](#), [320](#)

The time when the compensation of a trustee becomes payable and chargeable against the trust estate is generally some time after the trust estate comes into the trustee's hands; until that time there is no service by the trustee or basis for compensation.^[FN1] However, the particular time when compensation becomes payable to the trustee and chargeable to the estate, after the trustee receives the trust estate and commences its administration, varies.^[FN2] As to certain trusts, the time is that of an annual or periodic accounting,^[FN3] but, at least in respect of certain if not all trusts, such time is that of the final accounting or termination of the trust.^[FN4] It is improper to order the payment of the trustees' commissions before the computations are made for the final judicial settlement since the trustees' commissions must be recalculated to reflect the changes in the capital value at the final judicial accounting.^[FN5]

Generally, the compensation of a trustee, when payable out of corpus, has been allowed only at the termination of the trust,^[FN6] but there may be circumstances of an unusual or extraordinary character which require or justify a departure from the general practice.^[FN7] Even if a trustee is presently entitled to compensation on those parts of the corpus which have been withdrawn from the trust, payment on the balance must await the termination of the trust.^[FN8]

In the absence of statutory provisions determining the time of payment, a testamentary trustee may pay itself compensation in advance of formal court approval. This does not, however, justify the taking of any advance fees beyond what is reasonable.^[FN9]

A trustee may be entitled to be compensated for services to the trust at the time they are rendered,^[FN10] but where there is continued difficulty about the time when the trustee is to be paid the compensation, the court may, in its discretion, fix a yearly compensation to be paid at a specific time and to be a charge against the probate estate at that time.^[FN11]

^[FN1] [In re Schliemann's Will](#), 259 N.Y. 497, 182 N.E. 153, 84 A.L.R. 662 (1932); [In re Binder's Estate](#), 137 Ohio St. 26, 17 Ohio Op. 364, 27 N.E.2d 939, 129 A.L.R. 130 (1940).

^[FN2] [Bridgeport-City Trust Co. v. First Nat. Bank & Trust Co. of Bridgeport](#), 124 Conn. 472, 200 A. 809, 117 A.L.R. 1148 (1938).

^[FN3] [Bridgeport-City Trust Co. v. First Nat. Bank & Trust Co. of Bridgeport](#), 124 Conn. 472, 200 A. 809, 117 A.L.R. 1148 (1938) (observing statutory provisions in other jurisdictions).

[\[FN4\] Bridgeport-City Trust Co. v. First Nat. Bank & Trust Co. of Bridgeport, 124 Conn. 472, 200 A. 809, 117 A.L.R. 1148 \(1938\)](#) (observing other jurisdictions); [In re Bushe, 227 N.Y. 85, 124 N.E. 154, 7 A.L.R. 1590 \(1919\)](#) (testamentary trustee).

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[\[FN5\] Matter of Maurice, 74 A.D.2d 906, 426 N.Y.S.2d 66 \(2d Dep't 1980\)](#).

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[\[FN6\] See Estate of Cahen, 483 Pa. 157, 394 A.2d 958, 96 A.L.R.3d 1091 \(1978\)](#).

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[\[FN7\] Bridgeport-City Trust Co. v. First Nat. Bank & Trust Co. of Bridgeport, 124 Conn. 472, 200 A. 809, 117 A.L.R. 1148 \(1938\)](#).

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[\[FN8\] In re Kennedy's Trust, 364 Pa. 310, 72 A.2d 124, 18 A.L.R.2d 1374 \(1950\)](#).

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[\[FN9\] Estate of Gilfillan, 79 Cal. App. 3d 429, 144 Cal. Rptr. 862 \(2d Dist. 1978\)](#) (trustee should render an account within a reasonable time after advance so that a court may promptly review reasonableness of the advance compensation).

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[\[FN10\] Estate of Gilfillan, 79 Cal. App. 3d 429, 144 Cal. Rptr. 862 \(2d Dist. 1978\)](#).

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[\[FN11\] Estate of Gilfillan, 79 Cal. App. 3d 429, 144 Cal. Rptr. 862 \(2d Dist. 1978\)](#).

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Trusts

Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

XI. Compensation of Trustee

B. Basis, Amount, and Form of Compensation
1. Basis of Entitlement to Compensation

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§ 580. Generally

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Compensation of trustee. [Am. Jur. Legal Forms 2d, Trusts §§ 251:393 to 251:407](#)

Trustee compensation. [Am. Jur. Pleading and Practice Forms, Trusts, §§ 157 to 164](#)

The trust instrument may fix the compensation of the trustee.^[FN1] Statutes also may limit or fix the rates of compensation,^[FN2] prescribe reasonable compensation,^[FN3] or or authorize judicial review of the reasonableness of the trustee's compensation.^[FN4] Apart from provisions of the trust instrument or statutory provisions, the amount or rate of a trustee's compensation or commissions rests within the sound discretion of an appropriate court,^[FN5] which discretion is to be recognized in accordance with established principles.^[FN6]

While trustees are entitled to compensation for services directly related to their duties as a trustee,^[FN7] they may be entitled to compensation only for services actually performed on behalf of the trust.^[FN8] thus, for example, a trustee is not entitled to commissions on real estate, the principal assets of the trust, the title to which vested immediately in the remaindermen at the termination of the trust, without the necessity of any act or intervention on the part of the trustee.^[FN9] Banking activities, paying the quarterly deposits for state and federal taxes, and coordinating the grantor's funeral arrangements may qualify as the performance of a trustee's duties for which the trustee should receive compensation.^[FN10]

^[FN1] § 576.

^[FN2] [Rutanen v. Ballard](#), 424 Mass. 723, 678 N.E.2d 133 (1997); [In re Estate of Summerlyn](#), 327 N.J. Super. 269, 743 A.2d 321 (App. Div. 2000).

^[FN3] [Matter of Will of Payson](#), 148 Misc. 2d 807, 562 N.Y.S.2d 329 (Sur. Ct. 1990).

^[FN4] [In re Trust Created Under Will Dated Nov. 15, 1917 of Cunha](#), 104 Haw. 267, 88 P.3d 202 (2004).

[\[FN5\] Lampe v. Pawlarczyk, 314 Ill. App. 3d 455, 247 Ill. Dec. 94, 731 N.E.2d 867 \(1st Dist. 2000\); Matter of Trusts Created Under Will of Dwan, 371 N.W.2d 641 \(Minn. Ct. App. 1985\); In re Testamentary Trust Created Under Last Will and Testament of Ischy, 490 Pa. 71, 415 A.2d 37 \(1980\); Matter of Harbaugh's Estate, 231 Kan. 564, 646 P.2d 498 \(1982\).](#)

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[\[FN6\] Bridgeport-City Trust Co. v. First Nat. Bank & Trust Co. of Bridgeport, 124 Conn. 472, 200 A. 809, 117 A.L.R. 1148 \(1938\); North Adams Nat. Bank v. Curtiss, 278 Mass. 471, 180 N.E. 217, 83 A.L.R. 607 \(1932\).](#)

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[\[FN7\] Lampe v. Pawlarczyk, 314 Ill. App. 3d 455, 247 Ill. Dec. 94, 731 N.E.2d 867 \(1st Dist. 2000\).](#)

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[\[FN8\] § 574.](#)

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[\[FN9\] In re Cruikshank's Estate, 169 Misc. 514, 8 N.Y.S.2d 279 \(Sur. Ct. 1938\).](#)

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[\[FN10\] Lampe v. Pawlarczyk, 314 Ill. App. 3d 455, 247 Ill. Dec. 94, 731 N.E.2d 867 \(1st Dist. 2000\).](#)

- As to trustee's duties, generally, see §§ [331](#), [333](#) to [336](#), [343](#) to [348](#).

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§ 581. Nature of computation

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[Restatement Second, Trusts § 242](#)

A trustee's fees are generally based upon the amount of yearly income received and paid out by the trustee.[FN1] In particular, if an instrument creating a trust is silent as to the compensation to be paid the trustee, the trustee is entitled to receive a reasonable allowance on the income passing through his or her hands during the term of the trust and, at the end of the trust, reasonable compensation from the corpus for the trustee's care and preservation thereof.[FN2] The basis and measure of a trustee's compensation or commissions is the care and management of the estate;[FN3] in some jurisdictions it may be in form of a commission at a stated or limited percentage on the amount of income received and paid out by the trustee.[FN4] The computation of compensation on the basis of percentage is effectively for convenience in determining compensation for the responsibilities incurred and labor expended.[FN5] However, percentage measures of compensation employed by commercial trust companies are grounded in contract but in the absence of an agreement with the settlor, or conceivably, the beneficiaries, they may not be employed by other fiduciaries.[FN6]

The duties of a trustee may terminate, as to a part of the trust corpus, by the withdrawal thereof from the operation of the trust, and in such case, the trustee is entitled to a reasonable allowance for his or her services in the care and preservation of the portion of the corpus withdrawn,[FN7] but where the trustee pays over the fund to himself or herself, and another, to be continued under a further trust, no distribution has taken place which would entitle the trustee to a commission.[FN8] One who acts as trustee for successive trusts in the same estate or for successive beneficiaries of a single trust is entitled to compensation in but one capacity.[FN9]

A statute may fix the maximum allowable percentages for calculating the amount of commissions, or for estates larger than a specified amount, the statute may establish the factors to be considered by the court in exercising its discretion in determining the amount.[FN10] When considering requests for commissions and disbursements by the trustee of a special needs trust, at least passing consideration should be given to changes in circumstances from those which existed at the time of the appointment which bear upon the compensation plan.[FN11]

[FN1] [Estate of Ingram v. Ashcroft, 709 S.W.2d 956 \(Mo. Ct. App. W.D. 1986\).](#)

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[FN2] [In re Kennedy's Trust, 364 Pa. 310, 72 A.2d 124, 18 A.L.R.2d 1374 \(1950\).](#)

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[FN3] [In re Bushe, 227 N.Y. 85, 124 N.E. 154, 7 A.L.R. 1590 \(1919\); Leach v. Cowan, 125 Tenn. 182, 140 S.W. 1070 \(1911\); In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\).](#)

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[FN4] [Magruder v. Drury, 235 U.S. 106, 35 S. Ct. 77, 59 L. Ed. 151 \(1914\); In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\).](#)

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[FN5] [In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\).](#)

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[FN6] [Shear v. Gabovitch, 43 Mass. App. Ct. 650, 685 N.E.2d 1168 \(1997\).](#)

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[FN7] [In re Kennedy's Trust, 364 Pa. 310, 72 A.2d 124, 18 A.L.R.2d 1374 \(1950\).](#)

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[\[FN8\] In re Burnham's Will, 58 Misc. 2d 777, 296 N.Y.S.2d 401 \(Sur. Ct. 1968\).](#)

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[\[FN9\] In re Coutts' Will, 260 N.Y. 128, 183 N.E. 200, 85 A.L.R. 160 \(1932\).](#)

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[\[FN10\] In re Estate of Summerlyn, 327 N.J. Super. 269, 743 A.2d 321 \(App. Div. 2000\).](#)

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[\[FN11\] Perez v. Rodino, 184 Misc. 2d 855, 710 N.Y.S.2d 770 \(Sup 2000\).](#)

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§ 582. Reasonableness standard

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [314](#), [315](#), [315\(1\)](#), (2)

Forms

Reasonable compensation. [Am. Jur. Legal Forms 2d, Trusts § 251:403](#)

The fundamental criterion for determining the compensation due a trustee is reasonableness.[\[FN1\]](#) The intent of the law is that the trustee, in some manner, make a showing of the performance of his or her acts with sufficient detailed proof in connection therewith, so that the court can determine what is a fair and proper

amount of compensation to be granted.[FN2] In the absence of a specific statute applying to trustees, and upon an equitable construction of statutes allowing commissions to executors, administrators, and guardians, a trustee may be allowed such compensation as is usual for conventional trustees. [FN3]

The compensation claim by a trustee must be based on services actually performed and not on some arbitrary formula.[FN4] The size of the trust and the responsibility involved are factors to be considered in determining the reasonableness of the trustee's compensation.[FN5] Additional factors include the character of the work involved and the results achieved,[FN6] as well as the knowledge, skill, and judgment required and used.[FN7]

[FN1] Humphrey v. McClain, 219 Ky. 180, 292 S.W. 794 (1927); Estate of Ingram v. Ashcroft, 709 S.W.2d 956 (Mo. Ct. App. W.D. 1986); In re Teasdale's Estate, 261 Wis. 248, 52 N.W.2d 366 (1952).

[FN2] Lampe v. Pawlarczyk, 314 Ill. App. 3d 455, 247 Ill. Dec. 94, 731 N.E.2d 867 (1st Dist. 2000).

[FN3] Sokol v. Nattans, 26 Md. App. 65, 337 A.2d 460 (1975).

[FN4] In re Testamentary Trust Created Under Last Will and Testament of Ischy, 490 Pa. 71, 415 A.2d 37 (1980).

[FN5] Matter of Will of McDonald, 138 Misc. 2d 577, 525 N.Y.S.2d 503 (Sur. Ct. 1988), on reconsideration, 140 Misc. 2d 49, 530 N.Y.S.2d 453 (Sur. Ct. 1988).

[FN6] Virginia Trust Co. v. Evans, 193 Va. 425, 69 S.E.2d 409, 32 A.L.R.2d 769 (1952).

[FN7] Matter of Will of McDonald, 138 Misc. 2d 577, 525 N.Y.S.2d 503 (Sur. Ct. 1988), on reconsideration, 140 Misc. 2d 49, 530 N.Y.S.2d 453 (Sur. Ct. 1988); Appeal of Burke, 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 (1954).

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§ 583. Proof as to amount

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [315\(2\)](#)

Forms

Reasonable compensation. [Am. Jur. Legal Forms 2d, Trusts § 251:403](#)

The amount of compensation to be awarded to a trustee rests within the sound discretion of the trial court,[\[FN1\]](#) and an allowance will not be disturbed unless there has been an abuse of discretion.[\[FN2\]](#) The burden is on the trustee to show the reasonableness of the claim and the absence of prior payment.[\[FN3\]](#) The courts have the inherent power to review the compensation paid to trustees from trust assets, whether testamentary or created by an inter vivos instrument.[\[FN4\]](#) In exercising the power to review the amount of compensation awarded, the court must consider the totality of the circumstances.[\[FN5\]](#) The jury's role in awarding reasonable trustee's fees is similar to its role in awarding attorney's fees.[\[FN6\]](#)

A statute authorizing review of the reasonableness of a trustee's compensation permits the trial court to review the trustee's determination as to whether a particular item constituted trust income, but not to alter the statutory fee schedule entitling the trustee to a percentage of the trust income. [\[FN7\]](#) The court has no discretion to deny annual trustee commissions at the statutory rate.[\[FN8\]](#) Where the trustee agrees to a fixed payment with the settlor of the trust, the trustee is bound by that agreement and is not entitled to a judicial determination of what is fair and reasonable.[\[FN9\]](#)

A trustee may be required to submit a sworn itemized time and expense statement to show the fair value of the trustee's services.[\[FN10\]](#) There is no principle by which a trustees' compensation may be allowed in the absence of services actually performed for the trust.[\[FN11\]](#) A total lack of connection between the amounts of yearly bonuses paid to the trustee and the yearly net profits of the corporation which was the principal asset of the trust could make such bonuses unfair and unreasonable with respect to the life-income beneficiaries.[\[FN12\]](#)

[\[FN1\]](#) [Lampe v. Pawlarczyk](#), 314 Ill. App. 3d 455, 247 Ill. Dec. 94, 731 N.E.2d 867 (1st Dist. 2000).

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[\[FN2\]](#) [In re Estate of Summerlyn](#), 327 N.J. Super. 269, 743 A.2d 321 (App. Div. 2000).

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[\[FN3\]](#) [In re Breyer's Estate](#), 475 Pa. 108, 379 A.2d 1305 (1977).

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[\[FN4\]](#) [Bunn v. Kuta](#), 109 Md. App. 53, 674 A.2d 26 (1996).

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[\[FN5\]](#) [Bunn v. Kuta](#), 109 Md. App. 53, 674 A.2d 26 (1996).

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[FN6] [Edwards v. Holleman, 893 S.W.2d 115 \(Tex. App. Houston 1st Dist. 1995\)](#), writ denied, (Aug. 1, 1995).

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[FN7] [In re Trust Created Under Will Dated Nov. 15, 1917 of Cunha, 104 Haw. 267, 88 P.3d 202 \(2004\)](#).

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[FN8] [In re Arnold O., 279 A.D.2d 774, 719 N.Y.S.2d 174 \(3d Dep't 2001\)](#).

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[FN9] [Rutanen v. Ballard, 424 Mass. 723, 678 N.E.2d 133 \(1997\)](#).

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[FN10] [In re Will of Crabtree, 440 Mass. 177, 795 N.E.2d 1157 \(2003\)](#).

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[FN11] [Shear v. Gabovitch, 43 Mass. App. Ct. 650, 685 N.E.2d 1168 \(1997\)](#).

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[FN12] [Estate of Feraud, 92 Cal. App. 3d 717, 154 Cal. Rptr. 889 \(2d Dist. 1979\)](#).

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§ 584. Effect of decline in or increase in values of holdings

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West's Key Number Digest, [Trusts](#) [315\(2\)](#)

A decrease in the value of an estate may be a factor in determining the amount of compensation to which the trustee is entitled,[FN1] as may be the fact that the administration of a trust by the trustee has resulted in an increase in value of the estate.[FN2] However, there may be some difference of view as to the time when the value of the estate is to be considered in determining the compensation or commissions,[FN3] in some cases the time of final accounting; in other cases the time of the rendering of services; and in still other cases the time of the original inventory may be used.[FN4]

Where a trustee dissipates most of the security for a trust's major asset by improperly releasing the trust's collateral contrary to the terms of a stock purchase agreement, the proper measure of damages is the difference between the value, at the time of the collateral that would have been available if the trustee had acted properly and the value of the collateral that was actually in the trustee's possession at that time.[FN5]

[FN1] [In re Griffith's Estate, 151 Misc. 697, 273 N.Y.S. 729 \(Sur. Ct. 1934\)](#) (the trustee is entitled to compensation or commissions only upon the basis of the reduced value of the estate).

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[FN2] [Humphrey v. McClain, 219 Ky. 180, 292 S.W. 794 \(1927\)](#).

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[FN3] [In re Nash's Estate, 160 Misc. 642, 291 N.Y.S. 310 \(Sur. Ct. 1936\)](#).

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[FN4] [In re Nash's Estate, 160 Misc. 642, 291 N.Y.S. 310 \(Sur. Ct. 1936\)](#) (computation as of the date of the decedent's death); [In re Gardner's Estate, 323 Pa. 229, 185 A. 804 \(1936\)](#) (computation as of the time when the trustee inventories the estate).

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[FN5] [Wadsworth v. Bank of California, 97 Or. App. 491, 777 P.2d 975 \(1989\)](#).

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§ 585. Extraordinary services; operation of business

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 315(1), (2), 316(1), (2)

A trustee may be entitled to compensation for extraordinary services.[\[FN1\]](#) In the absence of anything in the statutes or the terms of the trust instrument precluding such an allowance, extra or additional compensation will be allowed a trustee for services in the administration of the trust of a character not usually rendered by trustees.[\[FN2\]](#) A trustee who is also a lawyer, for example, may be allowed compensation for the necessary services of a professional character rendered for the trust estate,[\[FN3\]](#) but a trustee who is not a real estate salesperson is not automatically entitled to a commission on the sale of real estate.[\[FN4\]](#)

As a general rule, a trustee performing services in the operation of a business is, apart from statutory limitations, entitled to compensation for such services in addition to the usual compensation.[\[FN5\]](#) The amount of compensation for services in operating a business is not necessarily limited to a fixed percentage, as is frequently used as a matter of convenience. The elements of risk, responsibility, service, time, and labor must be considered.[\[FN6\]](#)

The burden of proof is on the trustee to establish the extraordinary nature of the services or their value.[\[FN7\]](#) The allowance of extraordinary fees to a trustee and the amount of such award is a matter within the discretion of the trial court.[\[FN8\]](#) In the case of a trusteeship operating a business, the rule is that since the trustees in operating the business are still acting as trustees, services and compensation of the trustees must be treated under some method of accounting in which the trusteeship is the dominant element, and the services in the business and in the trusteeship are to be treated as a unity for the purpose of an allowance of a unity of compensation properly augmented for the extraordinary services.[\[FN9\]](#) The manner of computing the amount, however, should not result in duplicate compensation.[\[FN10\]](#)

A trustee may not increase his or her compensation by delegating to others, at the expense of the estate, the performance of duties for which the trustee is receiving compensation.[\[FN11\]](#)

[\[FN1\]](#) [Estate of Lacy, 54 Cal. App. 3d 172, 126 Cal. Rptr. 432 \(2d Dist. 1975\).](#)

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[\[FN2\]](#) [Jones v. Peabody, 182 Wash. 148, 45 P.2d 915, 100 A.L.R. 64 \(1935\); In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\).](#)

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[\[FN3\]](#) [Hardy v. Hardy, 222 Ark. 932, 263 S.W.2d 690 \(1954\); Appeal of Burke, 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 \(1954\).](#)

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[\[FN4\]](#) [Brown v. Batt, 1981 OK CIV APP 39, 631 P.2d 1346 \(Ct. App. Div. 2 1981\).](#)

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[\[FN5\]](#) [Appeal of Burke, 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 \(1954\); In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\).](#)

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[\[FN6\]](#) [In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\).](#)

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[\[FN7\] In re Duncan Trust, 480 Pa. 608, 391 A.2d 1051 \(1978\).](#)

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[\[FN8\] Estate of Lacy, 54 Cal. App. 3d 172, 126 Cal. Rptr. 432 \(2d Dist. 1975\).](#)

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[\[FN9\] In re Teasdale's Estate, 261 Wis. 248, 52 N.W.2d 366 \(1952\).](#)

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[\[FN10\] Appeal of Burke, 378 Pa. 616, 108 A.2d 58, 47 A.L.R.2d 1367 \(1954\).](#)

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[\[FN11\] In re Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204, 172 A.L.R. 977 \(1947\).](#)

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§ 586. Cotrustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [318](#)

The general rule that the compensation of a trustee when not definitely fixed by the trust instrument or by statute must be reasonable for the services rendered is applicable in the case of cotrustees.[\[FN1\]](#) Under some circumstances, cotrustees are allowed full compensation for each of them rather than a single full compensation to be divided among them.[\[FN2\]](#) The division of compensation by trustees among themselves, where the total is a reasonable allowance, will not be interfered with by the court,[\[FN3\]](#) although in some circumstances, it may be advisable for the court to fix their relative shares.[\[FN4\]](#)

Cotrustees rendering similar services generally are entitled to equal compensation or commissions, but where a trust instrument requires of some cotrustees services not required of others, differences in compensation are proper.[FN5] The allocation of compensation between those who participate in the management of the trust may be a matter to be decided by them on the basis of the services rendered by each.[FN6] A trustee may be required to obtain the authorization of the cotrustee before being compensated from the trust account, particularly where the language of the trust instrument permits the trustees to jointly authorize compensation.[FN7] The trial court may not rely on protracted arguments and disputes among the cotrustees as a basis for requiring the cotrustees to waive their contractual rights to compensation.[FN8]

[FN1] [Leach v. Cowan, 125 Tenn. 182, 140 S.W. 1070 \(1911\).](#)

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[FN2] [In re Lanier's Will, 271 N.Y. 120, 2 N.E.2d 283, 105 A.L.R. 1197 \(1936\).](#)

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[FN3] [In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\).](#)

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[FN4] [In re Kennedy's Trust, 364 Pa. 310, 72 A.2d 124, 18 A.L.R.2d 1374 \(1950\).](#)

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[FN5] [In re Peabody's Estate, 218 Wis. 541, 260 N.W. 444, 99 A.L.R. 956 \(1935\).](#)

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[FN6] [West Coast Hospital Ass'n v. Florida Nat. Bank of Jacksonville, 100 So. 2d 807 \(Fla. 1958\).](#)

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[FN7] [U.S. v. Frost, 321 F.3d 738 \(8th Cir. 2003\).](#)

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[FN8] [Hannam v. Brown, 114 Nev. 350, 956 P.2d 794 \(1998\).](#)

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§ 587. Effect of death or removal

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[Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation, 96 A.L.R.3d 1102](#)

The estate of a trustee who dies in office may be entitled to some compensation for the trustee's services, even where a statute provides for a commission only on the settlement of the estate; this may be based on the court's discretionary power to award or withhold compensation or commissions in such sum as is reasonable for the care and management of the estate.^[FN1] In the absence of specific provisions in a trust instrument, the estate of a deceased trustee is entitled to compensation on those parts of the corpus which were withdrawn from the trust during the trustee's tenure and on the balance of the corpus remaining in the trust.^[FN2]

The fact that a trustee was removed because he or she had committed various breaches of trust does not necessarily require a denial of all compensation.^[FN3] Where, however, a trustee is removed because of breach of duty involving improper motives in bad faith, it is proper for the trial court to determine that the trustee was not entitled to compensation for services.^[FN4]

^[FN1] [In re Bushe, 227 N.Y. 85, 124 N.E. 154, 7 A.L.R. 1590 \(1919\).](#)

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^[FN2] [In re Kennedy's Trust, 364 Pa. 310, 72 A.2d 124, 18 A.L.R.2d 1374 \(1950\).](#)

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^[FN3] [Sebree v. Rosen, 349 S.W.2d 865 \(Mo. 1961\); Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\).](#)

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^[FN4] [Gould v. Starr, 558 S.W.2d 755 \(Mo. Ct. App. 1977\).](#)

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§ 588. Effect of resignation

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[Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation, 96 A.L.R.3d 1102](#)

Generally a trustee who resigns the trusteeship before it terminates is entitled to be compensated for the service the trustee has rendered,^[FN1] and the rule that a party to a contract who has abandoned performance may not claim the benefits of the contract does not preclude one resigning as trustee from claiming compensation, where the trust deed provides that the trustee may resign.^[FN2] The effect of a trustee's resignation may be largely a matter of judicial discretion, both as to allowance and as to amount.^[FN3]

In a proper case, a court may make waiver of compensation conditional to resignation, or it may dismiss a trustee without compensation.^[FN4] Where a trustee resigns for his or her own convenience, making it necessary to substitute another trustee, the original trustee should not receive commissions on paying over the assets of the trust.^[FN5] Where the trust instrument allows the payment of income commissions upon disbursement of the trust income to the beneficiaries, but does not allow the payment of principal commissions until the principal is distributed, the trustee is not entitled to additional fees at the time of resignation, as the trust is still in existence.^[FN6]

The determination of the amount of compensation allowable rests within the court's discretion, provided that the amount fixed is within the statutory limits for a full commission.^[FN7] A trustee who resigns may be entitled to commissions from the principal of the trust in proportion to the time during which the trustee served.^[FN8] Where a trustee resigns before the determination of a trust and the appointment of a successor trustee becomes necessary, the court may make an equitable adjustment of commissions or compensation between such fiduciaries.^[FN9]

^[FN1] [In re Cochrane's Trust, 12 Misc. 2d 546, 169 N.Y.S.2d 536 \(Sup 1957\).](#)

[\[FN2\] Haas v. Hudson County Nat. Bank, 115 N.J. Eq. 311, 170 A. 611, 94 A.L.R. 1099 \(Ct. Err. & App. 1934\).](#)

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[\[FN3\] In re Bushe, 227 N.Y. 85, 124 N.E. 154, 7 A.L.R. 1590 \(1919\).](#)

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[\[FN4\] Cornet v. Cornet, 269 Mo. 298, 190 S.W. 333 \(1916\).](#)

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[\[FN5\] In re Delamater's Will, 266 A.D. 200, 41 N.Y.S.2d 715 \(1st Dep't 1943\), order aff'd, 292 N.Y. 518, 54 N.E.2d 205 \(1944\).](#)

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[\[FN6\] Estate of Cahen, 483 Pa. 157, 394 A.2d 958, 96 A.L.R.3d 1091 \(1978\).](#)

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[\[FN7\] In re Baltz' Estate, 17 Misc. 2d 890, 187 N.Y.S.2d 423 \(Sur. Ct. 1959\).](#)

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[\[FN8\] Corry v. Passaic Nat. Bank & Trust Co., 3 N.J. Super. 569, 67 A.2d 486 \(Ch. Div. 1949\).](#)

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[\[FN9\] In re Snyder's Estate, 346 Pa. 615, 31 A.2d 132 \(1943\).](#)

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§ 589. Waiver

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Forms

Waiver of compensation. [Am. Jur. Legal Forms 2d, Trusts § 251:407](#)

A trustee may waive its right to compensation,[\[FN1\]](#) and where the trustee either by words or deeds creates a basis for reasonable belief that compensation will not be sought, the beneficiaries are entitled to rely on such belief.[\[FN2\]](#) The right of a trustee to compensation or additional compensation may be waived by an express agreement not to demand it,[\[FN3\]](#) which may be expressed by a stipulation in the trust instrument,[\[FN4\]](#) but a mere expression of an intention not to charge commissions does not debar a trustee of a right thereto.[\[FN5\]](#)

Charging for office and other expenses in an annual accounting may not necessarily constitute a waiver of a claim for compensation for additional services when the trustee makes the final account.[\[FN6\]](#) Where a trustee fails to exercise its statutory option to charge an annual fee on principal for a long period of years, and the trustee exercises the statutory option to collect the fee upon termination of the trust, the trustee has waived the right to charge an annual fee.[\[FN7\]](#) Whether or not a trustee has made a waiver of compensation is a question of fact for the trial court.[\[FN8\]](#)

A trustee who waives the right to seek compensation as a trustee is not entitled to be compensated under a theory of quantum meruit where the trustee has fairly compensated for the trustee's investment in management duties as president of the corporation which managed the trust.[\[FN9\]](#)

[\[FN1\]](#) [In re Testamentary Trust Created Under Last Will and Testament of Ischy, 490 Pa. 71, 415 A.2d 37 \(1980\); Sokol v. Nattans, 26 Md. App. 65, 337 A.2d 460 \(1975\).](#)

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[\[FN2\]](#) [In re Testamentary Trust Created Under Last Will and Testament of Ischy, 490 Pa. 71, 415 A.2d 37 \(1980\).](#)

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[\[FN3\]](#) [McCormick v. McCormick, 180 Ill. App. 3d 184, 129 Ill. Dec. 579, 536 N.E.2d 419 \(1st Dist. 1988\).](#)

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[\[FN4\]](#) [In re Davis' Estates, 54 Misc. 2d 1065, 284 N.Y.S.2d 414 \(Sur. Ct. 1967\).](#)

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[\[FN5\]](#) [In re Drake's Will, 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 \(1935\)](#) (finding of no waiver); [Cook v. Stockwell, 206 N.Y. 481, 100 N.E. 131 \(1912\)](#) (waiver binding on legal representatives).

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[\[FN6\]](#) [In re Drake's Will, 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 \(1935\).](#)

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[\[FN7\]](#) [First Sec. Nat. Bank & Trust Co. of Lexington v. des Cognets, 563 S.W.2d 476 \(Ky. Ct. App. 1978\).](#)

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[\[FN8\]](#) [In re Drake's Will, 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 \(1935\).](#)

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[\[FN9\]](#) [McCormick v. McCormick, 180 Ill. App. 3d 184, 129 Ill. Dec. 579, 536 N.E.2d 419 \(1st Dist. 1988\).](#)

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§ 590. Generally

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Model Codes and Restatements

[Restatement Second, Trusts § 243](#)

Ordinarily, a condition of a trustee's right to compensation is that the trustee be qualified and competent.^[FN1] A trustee may forfeit the right to compensation,^[FN2] the general rule being that a trustee who repudiates the trust or violates or neglects his duty is not entitled to compensation or commissions.^[FN3] If the trustee commits a breach of trust, the court may in its discretion deny the trustee all compensation or allow a reduced compensation or allow full compensation.^[FN4] Thus, in exercising its discretion a court may, in such cases, deny or reduce compensation,^[FN5] although no such power is given to it by statute.^[FN6]

Willfulness and bad faith in misconduct are grounds for completely depriving a trustee of compensation,^[FN7] as are breaches of fiduciary duty.^[FN8] Thus, commissions may be disallowed in cases involving gross neglect,^[FN9] unfaithfulness,^[FN10] or recklessness.^[FN11] For example, a corporate trustee which is found to have breached its fiduciary duty with respect to the handling of trust assets, such as failing to diversify, may be denied its commissions as a trustee.^[FN12]

Unauthorized investments or failure otherwise in his duty as to investments, especially in the absence of good faith and the advice of counsel,^[FN13] results in denial of compensation to a trustee, at least in connection

with such investment.[FN14] Unauthorized commingling of the trust fund with other funds, as with the trustee's own, may result in depriving a trustee of compensation or commissions.[FN15]

In deciding whether to deny compensation, the court may consider whether the trustee's services have been of value to the trust.[FN16] Before reducing or denying a trustee fees, a court must find that the fees to be reduced or denied relate to the trustee's failure to render services or to render services properly.[FN17] While a trustee may forfeit the right to compensation, by an abuse of the trust confided to the trustee, the trustee does not necessarily forfeit such right because of the fact that the trustee resists unsuccessfully the beneficiary's effort to have the final account surcharged as to a particular item, not involving fraud, bad faith, or inexcusable negligence.[FN18]

[FN1] [In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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[FN2] [Traub v. Traub, 135 So. 2d 243 \(Fla. Dist. Ct. App. 2d Dist. 1961\); In re Drake's Will, 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 \(1935\).](#)

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[FN3] [In re Marchildon's Estate, 188 Minn. 38, 246 N.W. 676 \(1933\); In re Howell, 215 N.Y. 466, 109 N.E. 572 \(1915\).](#)

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[FN4] [Restatement Second, Trusts § 243.](#)

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[FN5] [In re Rutledge, 162 N.Y. 31, 56 N.E. 511 \(1900\); In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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[FN6] [In re Bushe, 227 N.Y. 85, 124 N.E. 154, 7 A.L.R. 1590 \(1919\).](#)

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[FN7] [Comingor v Louisville Trust Co., 128 Ky 697, 108 SW 950, on reh 128 Ky 713, 111 SW 681; In re Drake's Will, 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 \(1935\); In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\).](#)

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[FN8] [Lee v. Dahlin, 399 Pa. 50, 159 A.2d 679, 81 A.L.R.2d 442 \(1960\).](#)

- Where a trial court finds that a trustee has breached his fiduciary duties, the trial court sitting as a court of equity has the discretion to deny the trustee any or all of his commissions and may, in addition, hold the trustee personally liable for any tort committed by him. [Matter of Wills of Jacobs, 91 N.C. App. 138, 370 S.E.2d 860 \(1988\).](#)

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[FN9] [Matter of Acker, 128 A.D.2d 867, 513 N.Y.S.2d 786 \(2d Dep't 1987\).](#)

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[FN10] [In re Estate of Lupoli, 275 A.D.2d 781, 714 N.Y.S.2d 503 \(2d Dep't 2000\).](#)

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[FN11] [Turner v. Ryan, 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 \(1937\); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

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[FN12] [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\).](#)

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[\[FN13\] Pierce v. Dahlgren, 300 F. 268, 2 Ohio L. Abs. 741 \(C.C.A. 6th Cir. 1924\).](#)

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[\[FN14\] In re Drake's Will, 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 \(1935\); Driver v. Blakeley, 165 Or. 312, 107 P.2d 524, 131 A.L.R. 985 \(1940\).](#)

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[\[FN15\] In re Mowrey's Estate, 210 Iowa 923, 232 N.W. 82 \(1930\); In re Correll, 283 Pa. 277, 129 A. 104 \(1925\).](#)

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[\[FN16\] Wadsworth v. Bank of California, 97 Or. App. 491, 777 P.2d 975 \(1989\).](#)

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[\[FN17\] In re Trusteeship of Trust of Williams, 631 N.W.2d 398 \(Minn. Ct. App. 2001\).](#)

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[\[FN18\] In re Drake's Will, 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 \(1935\).](#)

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§ 591. Acts in good faith; minor irregularities

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Good faith and the advice of counsel may be regarded as circumstances favorable to awarding a trustee compensation despite technical breaches of the trustee's fiduciary duties.[FN1] An allowance of compensation to a trustee who has committed a breach of trust, upon a finding that the trustee was not incompetent or chargeable with actual bad faith or fraud, is largely a matter of judicial discretion and will not ordinarily be disturbed on appeal.[FN2] There is no rigid rule requiring that a constructive trustee forfeit all rights of reimbursement for the breach of any fiduciary duty; rather, indemnification depends on circumstances such as the nature of the expenses, the severity of the trustee's misconduct and the potential windfall to the beneficiary.[FN3]

In the case of minor faults of a trustee, resulting only in partial losses of trust funds for which his account has been surcharged, a court, in its discretion, may diminish the amount of the trustee's compensation.[FN4] Trivial or harmless irregularities are not grounds for refusing to allow compensation to a trustee.[FN5] A trial court does not abuse its discretion by awarding fees to trustees even if the trustees acted partially without authority and in some cases against the purpose of the trust, if the trustees lawfully served a portion of the trust for a period of many years.[FN6]

[FN1] [Pierce v. Dahlgren](#), 300 F. 268, 2 Ohio L. Abs. 741 (C.C.A. 6th Cir. 1924).

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[FN2] [In re Trusteeship of Stone](#), 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 (1941).

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[FN3] [Forbes v. Wells Beach Casino, Inc.](#), 525 A.2d 1034 (Me. 1987).

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[FN4] [Turner v. Ryan](#), 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 (1937); [In re Drake's Will](#), 195 Minn. 464, 263 N.W. 439, 101 A.L.R. 801 (1935).

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[FN5] [Turner v. Ryan](#), 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 (1937).

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[FN6] [Cafferty v. Hughes](#), 2002 UT App 105, 46 P.3d 233 (Utah Ct. App. 2002), cert. granted, 59 P.3d 603 (Utah 2002) and aff'd, 2004 UT 22, 89 P.3d 148 (Utah 2004).

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§ 592. Accounting failures, errors, or discrepancies

West's Key Number Digest

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The failure to keep records or accounts should, under some circumstances at least, result in denial of any compensation to a trustee;[\[FN1\]](#) however, the matter rests in the discretion of the court.[\[FN2\]](#) Thus, a testamentary trustee's default in neglecting to file regular accounts, particularly where there is comingling of trust funds with the trustee's own, may deprive the trustee of commissions.[\[FN3\]](#)

A trustee who has acted faithfully and in good faith should not be deprived of compensation because of improper items of expenditure, where the trustee's account has been surcharged with such items.[\[FN4\]](#)

[\[FN1\]](#) [Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

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[\[FN2\]](#) [In re Mowrey's Estate, 210 Iowa 923, 232 N.W. 82 \(1930\).](#)

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[\[FN3\]](#) [In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\).](#)

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[\[FN4\]](#) [Turner v. Ryan, 223 Iowa 191, 272 N.W. 60, 110 A.L.R. 554 \(1937\).](#)

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§ 593. Surcharges or partial compensation

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [321](#)

A finding of fraud, bad faith, or inexcusable neglect does not require the denial of trustee fees; rather, the district court has the discretion to reduce or deny those trustee fees that relate to any failure to render services or to render services properly.^[FN1] In cases of serious, but not necessarily criminal, breaches of trust, an equity court has the power to surcharge the trustee by reducing the trustee's commissions.^[FN2] In determining the surcharge damages for a corporate trustee's failure to diversify the assets of a testamentary trust in violation of the prudent person rule, a refusal to award the trustee any commissions is error in the absence of any self-dealing or fraud, as the beneficiaries are simply entitled to be put into the position they would have occupied had no breach occurred.^[FN3]

It may be proper for the court to deny fees and corpus commissions, to a coexecutor and a cotrustee bank, on that portion of the indebtedness to the estate which the bank did not collect.^[FN4] Where a trustee has not acted fraudulently or in bad faith, the trustee will be allowed to retain the commissions the trustee has received, less any amounts for which the trustee is surcharged.^[FN5]

^[FN1] [In re Trusteeship of Trust of Williams, 631 N.W.2d 398 \(Minn. Ct. App. 2001\).](#)

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^[FN2] [Kann v. Kann, 344 Md. 689, 690 A.2d 509 \(1997\).](#)

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^[FN3] [In re Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 \(3d Dep't 2000\).](#)

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^[FN4] [Semler v. CoreStates Bank, 301 N.J. Super. 164, 693 A.2d 1198 \(App. Div. 1997\).](#)

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^[FN5] [Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369, 63 A.L.R.2d 504 \(1956\).](#)

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1. Nature and Form of Actions

a. Right to Bring Action

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§ 594. Generally

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West's Key Number Digest, [Trusts](#) [359\(1\)](#) to (3)

Beneficiaries, for the duration of a trust, have a legally enforceable right to insist that the terms of the trust be adhered to; this is so even where the trust is revocable.[FN1] The beneficiaries have a property interest in the trust res that is enforceable either in law or in equity;[FN2] however, actions involving the enforcement of trusts or liability of trustees are generally based in equity.[FN3] A trust beneficiary may bring an action for damages against a trustee or a third person.[FN4]

Generally, there are two types of remedies available to a beneficiary who seeks to recover trust property from a trustee. The beneficiary may elect to either establish liability for breach of trust and obtain a judgment against the individual trustee, or to recover the trust property or its product.[FN5] The beneficiary of a trust can maintain a suit to compel the trustee to perform its duty; to enjoin the trustee from committing a breach of trust; to compel the trustee to redress a breach of trust; to appoint a receiver to take possession of the trust and administer the trust; or to remove the trustee.[FN6] The rule allowing a trustee to sue for the beneficiary, even

though the beneficiary is the real party in interest, implies that the beneficiary may sue someone other than the trustee concerning trust property.[FN7]

A claimant may expressly sue to establish a constructive trust, based on a legal theory justifying its creation; it is not necessary, however, for a claimant to expressly seek the creation of a constructive trust for a court to do equity.[FN8]

[FN1] [Continental Bank & Trust Co. v. Country Club Mobile Estates, Ltd., 632 P.2d 869 \(Utah 1981\).](#)

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[FN2] [Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 33 Fed. R. Serv. 3d 382 \(3d Cir. 1995\).](#)

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[FN3] [§ 597.](#)

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[FN4] [Hoyle v. Dickinson, 155 Ariz. 277, 746 P.2d 18 \(Ct. App. Div. 2 1987\).](#)

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[FN5] [In re Estate of Chaney, 232 Neb. 121, 439 N.W.2d 764 \(1989\).](#)

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[FN6] [Carstens v. Central Nat. Bank & Trust Co. of Des Moines, 461 N.W.2d 331 \(Iowa 1990\).](#)

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[FN7] [St. Martin's Episcopal Church v. Prudential-Bache Securities, Inc., 613 So. 2d 108 \(Fla. Dist. Ct. App. 4th Dist. 1993\).](#)

- As to parties, see §§ [615](#) to [621](#).

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[FN8] [United Carolina Bank v. Brogan, 155 N.C. App. 633, 574 S.E.2d 112 \(2002\).](#)

- As to suits in equity to establish a constructive trust, see [§ 668](#).

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§ 595. Actions at law

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [245.1](#), [359\(1\)](#), (3)

While the beneficiaries of a trust have a property interest in the trust res that is enforceable either in law or in equity,[\[FN1\]](#) actions involving the enforcement of trusts or liability of trustees are generally based in equity.[\[FN2\]](#) Thus, for example, a beneficiary entitled to the income of a trust cannot generally maintain an action at law against the trustee,[\[FN3\]](#) but can only enforce his or her right by resort to equity.[\[FN4\]](#) The fact that beneficiaries predicate their breach of trust claim on the trustee's alleged negligent performance of its fiduciary duties does not convert an action in equity into one cognizable in law.[\[FN5\]](#)

Nevertheless, there are limited instances in which a beneficiary may maintain an action at law against the trustee.[\[FN6\]](#) Actions against a trustee for a breach of trust are legal, not equitable, if the beneficiaries are entitled to recover money arising out of breach of trust directly upon obtaining judgment against the trustee.[\[FN7\]](#) Thus, if the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.[\[FN8\]](#) In some jurisdictions, a beneficiary of a trust may claim a legal remedy by an action at law if the trustee of a chattel is under a duty to transfer it immediately and unconditionally to the beneficiary and in breach of trust fails to transfer it.[\[FN9\]](#)

A transferee of trust property, not protected as a bona fide purchaser for value and in good faith, may be proceeded against for money had and received.[\[FN10\]](#) The beneficiary of a trust who is a party to the contract giving rise to that trust may recover damages for its breach.[\[FN11\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Trust beneficiary had an adequate remedy at law in the form of an action for conversion and thus was not entitled to an equitable remedy for alleged breach of fiduciary duty by cousin, who received stock for payment for developer's default but failed to distribute the stock to family members and instead cancelled the stock and reissued shares in order to raise funds. [Ockey v. Lehmer, 2008 UT 37, 189 P.3d 51 \(Utah 2008\)](#).

[END OF SUPPLEMENT]

[\[FN1\]](#) § 592.

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[\[FN2\]](#) § 597.

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[\[FN3\] In re Bucklin's Estate, 243 Iowa 312, 51 N.W.2d 412, 34 A.L.R.2d 1327 \(1952\).](#)

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[\[FN4\] § 597.](#)

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[\[FN5\] Magill v. Dutchess Bank and Trust Co., 150 A.D.2d 531, 541 N.Y.S.2d 437 \(2d Dep't 1989\).](#)

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[\[FN6\] Carstens v. Central Nat. Bank & Trust Co. of Des Moines, 461 N.W.2d 331 \(Iowa 1990\); Magill v. Dutchess Bank and Trust Co., 150 A.D.2d 531, 541 N.Y.S.2d 437 \(2d Dep't 1989\).](#)

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[\[FN7\] Brown v. United Missouri Bank, N.A., 78 F.3d 382 \(8th Cir. 1996\).](#)

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[\[FN8\] Carstens v. Central Nat. Bank & Trust Co. of Des Moines, 461 N.W.2d 331 \(Iowa 1990\); Magill v. Dutchess Bank and Trust Co., 150 A.D.2d 531, 541 N.Y.S.2d 437 \(2d Dep't 1989\).](#)

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[\[FN9\] Carstens v. Central Nat. Bank & Trust Co. of Des Moines, 461 N.W.2d 331 \(Iowa 1990\).](#)

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[\[FN10\] Independent School Dist. No. 1 v. Common School Dist. No. 1, 56 Idaho 426, 55 P.2d 144, 105 A.L.R. 1267 \(1936\).](#)

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[\[FN11\] Hoyle v. Dickinson, 155 Ariz. 277, 746 P.2d 18 \(Ct. App. Div. 2 1987\).](#)

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1. Nature and Form of Actions

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§ 596. Notice

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [245.1](#), [260](#)

Forms

Notice to beneficiaries of pending action against trustee. Am. Jur. Pleading and Practice Forms, Trusts, § 331

Statutory law may require a plaintiff to provide beneficiaries with written notice of an action against the trustee.[\[FN1\]](#) Where the beneficiaries interests are subject to foreclosure in a proceeding, the beneficiaries are necessary parties and a judgment rendered without notice to them is void.[\[FN2\]](#) The reason for the requirement of notice is that beneficiaries ought to be assured that their interests will be protected, and that a potential conflict of interest will not threaten the adequacy of their interests' representation.[\[FN3\]](#)

In particular, where a party seeks court intervention concerning a trust, notice must be given to any person whose rights may be affected or upon whom liability might be imposed by any proceeding. [\[FN4\]](#)

[\[FN1\]](#) [Nacol v. McNutt, 797 S.W.2d 153 \(Tex. App. Houston 14th Dist. 1990\)](#), writ denied, (Feb. 20, 1991).

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[\[FN2\]](#) [In re Estate of Barth, 339 Ill. App. 3d 651, 275 Ill. Dec. 84, 792 N.E.2d 315 \(1st Dist. 2003\)](#).

- As to necessary parties, see [§ 609](#).

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[\[FN3\]](#) [Nacol v. McNutt, 797 S.W.2d 153 \(Tex. App. Houston 14th Dist. 1990\)](#), writ denied, (Feb. 20, 1991).

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[\[FN4\]](#) [Adler v. Adler, 713 N.E.2d 348 \(Ind. Ct. App. 1999\)](#).

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§ 597. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [359\(1\)](#), (2)

Forms

Pleadings in actions to determine existence of or enforce trusts. [Am. Jur. Pleading and Practice Forms, Trusts, §§ 8 to 31](#)

The subject of trusts and the control of trust estates is one of equitable cognizance,[\[FN1\]](#) and generally a trial court acts as a court of equity in trust matters.[\[FN2\]](#) Trusts are, and have been since they were first enforced, within the peculiar province of courts of equity,[\[FN3\]](#) and the remedies available to a trust beneficiary, as against the trustee, may be exclusively equitable [\[FN4\]](#) unless the trustee's duty is to immediately and unconditionally pay money or transfer a chattel to the beneficiary.[\[FN5\]](#)

Equity has jurisdiction of a suit to recover trust funds and property;[\[FN6\]](#) to rescind and recover an unauthorized gift by a trustee;[\[FN7\]](#) or to declare or establish and enforce a trust by operation of law.[\[FN8\]](#)

One seeking as a beneficiary to enforce a trust against another as a trustee must do equity as a condition to obtaining the relief that he seeks.[\[FN9\]](#)

[\[FN1\] Matter of Edwards Irrevocable Trust, 1998 OK CIV APP 144, 966 P.2d 810 \(Div. 3 1998\).](#)

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[\[FN2\] Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\).](#)

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[\[FN3\] Kann v. Kann, 344 Md. 689, 690 A.2d 509 \(1997\).](#)

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[\[FN4\] Kann v. Kann, 344 Md. 689, 690 A.2d 509 \(1997\); Carstens v. Central Nat. Bank & Trust Co. of Des Moines, 461 N.W.2d 331 \(Iowa 1990\).](#)

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[\[FN5\] Kann v. Kann, 344 Md. 689, 690 A.2d 509 \(1997\).](#)

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[\[FN6\] Independent School Dist. No. 1 v. Common School Dist. No. 1, 56 Idaho 426, 55 P.2d 144, 105 A.L.R. 1267 \(1936\).](#)

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[\[FN7\] Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516, 79 A.L.R. 1339 \(1931\).](#)

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[\[FN8\] § 599.](#)

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[\[FN9\] Arnold v. Black, 204 Ala. 632, 87 So. 170 \(1920\).](#)

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§ 598. Actions for breach of trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [359\(2\)](#)

A trustee may be sued in equity, upon misapplication of trust funds, for a breach of trust,[\[FN1\]](#) and, indeed, the remedies available to the beneficiaries of a testamentary trust against the trustee for a breach of trust are exclusively equitable.[\[FN2\]](#) An action by beneficiaries for a breach of trust is an equitable proceeding, even if money damages are the only remedy sought.[\[FN3\]](#)

The fact that beneficiaries predicate their breach of trust claim upon the trustee's alleged negligent performance of its fiduciary duties does not convert an action in equity into one cognizable in law. In such instances, negligence is in the case, but only as an element in the breach of fiduciary duties; no common-law action in negligence is available to the beneficiaries.[\[FN4\]](#) While an action at law may be maintained to enforce payment against a trustee who is under a duty to pay money immediately and unconditionally to the

beneficiary,[FN5] where trustees are under normal obligations, beneficiaries are relegated to a suit in equity, based upon a fiduciary relationship, to compel the trustee to redress a breach of trust by restoring the corpus.[FN6]

In deciding the appropriate sanction to be applied to a trustee who has violated his duty of loyalty, the court must fashion the relief granted so that it will act as a deterrent to the errant trustee in other trustees in the future. The equitable relief granted in each case will vary according to the circumstances of both the beneficiaries and the trustee.[FN7] Damages against the trustee for a breach of trust are designed to restore the trust to the same position it would have been had no breach occurred. The court may fashion its order to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee.[FN8]

[FN1] In re Interborough Consol. Corp., 288 F. 334, 32 A.L.R. 932 (C.C.A. 2d Cir. 1923).

- As to liability of trustees for breach of duties, generally, see § 333.

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[FN2] Magill v. Dutchess Bank and Trust Co., 150 A.D.2d 531, 541 N.Y.S.2d 437 (2d Dep't 1989).

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[FN3] Masters v. Bissett, 101 Or. App. 163, 790 P.2d 16 (1990), opinion adhered to as modified on other grounds on reconsideration, 102 Or. App. 289, 794 P.2d 445 (1990).

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[FN4] Magill v. Dutchess Bank and Trust Co., 150 A.D.2d 531, 541 N.Y.S.2d 437 (2d Dep't 1989).

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[FN5] § 595.

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[FN6] Magill v. Dutchess Bank and Trust Co., 150 A.D.2d 531, 541 N.Y.S.2d 437 (2d Dep't 1989).

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[FN7] Matter of Guardianship of Eisenberg, 43 Wash. App. 761, 719 P.2d 187 (Div. 1 1986).

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[FN8] Matter of Wills of Jacobs, 91 N.C. App. 138, 370 S.E.2d 860 (1988).

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§ 599. Actions to impose constructive or resulting trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [359\(2\)](#)

Forms

Pleadings in actions to establish or enforce resulting or constructive trust. [Am. Jur. Pleading and Practice Forms, Trusts, §§ 46 to 59, 63 to 80](#)

An action to impose a constructive trust sounds in equity,^[FN1] and generally the courts have equity jurisdiction to decide a resulting trust issue.^[FN2] The facts giving rise to a resulting or constructive trust in themselves give rise to the cause of action, which is equitable in character, to declare and enforce the trust;^[FN3] the cause of action arises at the moment that the trust arises.^[FN4] An action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy.^[FN5]

When a plaintiff succeeds in enforcing a constructive trust, courts treat the plaintiff as if he or she were enforcing a duty to deliver property under an express trust and, as a result, an enforcing plaintiff has the right to receive the property or its proceeds from a constructive trustee, as well as the right to receive a money judgment for property received against the constructive trustee. In fact, where it is necessary to make the successful plaintiff whole, the plaintiff may be allowed to recover a portion of the trust property or its proceeds along with a money judgment for the remainder.^[FN6] The propriety of granting equitable relief in a particular case by way of imposing a constructive trust generally rests upon the sound discretion of the trial court exercised in accord with the facts and circumstances of the case.^[FN7] Even so, a court of equity may impose a constructive trust if its only effect is to return property to a plaintiff, but it should deny it on the same basic facts if its effect would work an unwarranted preference over general creditors.^[FN8]

[FN1] [Sulzer v. Diedrich, 263 Wis. 2d 496, 2003 WI 90, 664 N.W.2d 641 \(2003\); ProData Computer Services, Inc. v. Ponec, 256 Neb. 228, 590 N.W.2d 176 \(1999\).](#)

[FN2] [Brake v. Murphy, 687 So. 2d 842 \(Fla. Dist. Ct. App. 3d Dist. 1996\).](#)

[FN3] [Coleman v. Law, 170 Ga. 906, 154 S.E. 445, 74 A.L.R. 684 \(1930\); Gerace v. Gerace, 301 Mass. 14, 16 N.E.2d 6, 117 A.L.R. 1459 \(1938\).](#)

[\[FN4\] Ramantanin v. Poulos, 240 S.C. 13, 124 S.E.2d 611 \(1962\); Stianson v. Stianson, 40 S.D. 322, 167 N.W. 237, 6 A.L.R. 280 \(1918\).](#)

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[\[FN5\] Heckmann v. Ahmanson, 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 \(2d Dist. 1985\); Allen v. Borlin, 336 Ill. App. 460, 84 N.E.2d 575 \(4th Dist. 1949\).](#)

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[\[FN6\] Capital Investors Co. v. Executors of Estate of Morrison, 800 F.2d 424 \(4th Cir. 1986\).](#)

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[\[FN7\] David Welch Co. v. Erskine & Tulley, 203 Cal. App. 3d 884, 250 Cal. Rptr. 339 \(1st Dist. 1988\).](#)

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[\[FN8\] Pioneer Real Estate, Inc. v. Larese, 762 P.2d 720 \(Colo. Ct. App. 1988\).](#)

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§ 600. Injunctive relief

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [359\(2\)](#)

Forms

Complaint, petition, or declaration—Allegation—To enjoin sale of real property subject of resulting trust. [Am. Jur. Pleading and Practice Forms, Trusts, § 55](#)

In the exercise of its jurisdiction over trustees and its power to require compliance with, and the performance of the duties and obligations of, a trust equity will, in a proper case, at the instance of a beneficiary, decree an injunction for certain purposes, such as to restrain an unauthorized sale,[\[FN1\]](#) or diversion of the trust property.[\[FN2\]](#) A temporary injunction will lie to freeze the res of an alleged constructive trust upon a showing that the res is in probable danger of dissipation and that there is a reasonable likelihood of success on the merits with respect to the constructive trust claim.[\[FN3\]](#)

[\[FN1\] Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188, 51 A.L.R. 1100 \(1927\).](#)

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[\[FN2\] Perry Public Library Ass'n v. Lobsitz, 1913 OK 183, 35 Okla. 576, 130 P. 919 \(1913\).](#)

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[\[FN3\] Korn v. Ambassador Homes, Inc., 546 So. 2d 756 \(Fla. Dist. Ct. App. 3d Dist. 1989\).](#)

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§ 601. Generally

West's Key Number Digest

Actions regarding trusts must be brought in a proper court having jurisdiction,[\[FN1\]](#) and a court must have jurisdiction over either the trustee or the trust property in order to exercise power over the trust.[\[FN2\]](#) Jurisdiction over a trust involves both in personam and in rem jurisdiction.[\[FN3\]](#) The construction, interpretation, and operation of trusts are matters within the jurisdiction of the courts of equity,[\[FN4\]](#) and such jurisdiction is exclusive,[\[FN5\]](#) though some exceptions are recognized in some states, where, for example, a beneficiary may maintain an action at law against the trustee to enforce a duty to pay money immediately to the beneficiary.[\[FN6\]](#)

Courts of equity have jurisdiction of suits to establish the existence of a trust,[\[FN7\]](#) to protect[\[FN8\]](#) or to compel the performance of it,[\[FN9\]](#) or to protect the beneficiary.[\[FN10\]](#) Courts of equity have jurisdiction, under their general jurisdiction over trusts, to construe wills to the extent to which trusts are thereby created either expressly or by necessary implication.[\[FN11\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Where factors indicate that a trust is administered in Illinois and litigation arises with reference to the trust, an Illinois court would have jurisdiction over the trust and the designated trustee. [Sullivan v. Kodsi, 359 Ill. App. 3d 1005, 296 Ill. Dec. 710, 836 N.E.2d 125 \(1st Dist. 2005\).](#)

[END OF SUPPLEMENT]

[\[FN1\] Marston v. Premier Bank, N.A., 665 So. 2d 725 \(La. Ct. App. 2d Cir. 1995\)](#) (proper court having jurisdiction over trusts required, even though other actions were joined in the suit).

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[\[FN2\] Walton v. Harris, 38 Mass. App. Ct. 252, 647 N.E.2d 65 \(1995\).](#)

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[\[FN3\] In re Trusteeship Created by City of Sheridan, 593 N.W.2d 702 \(Minn. Ct. App. 1999\).](#)

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[\[FN4\] In re A.H. Robins Co., Inc., 880 F.2d 769 \(4th Cir. 1989\); Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 \(2001\); Melen v. First Vermont Bank & Trust Co., 144 Vt. 226, 475 A.2d 237 \(1984\).](#)

- As to equitable nature of trust actions, see §§ [597](#) to [600](#).

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[\[FN5\] McMahon v. New Castle Associates, 532 A.2d 601 \(Del. Ch. 1987\); Citizens Building & Loan Ass'n v. Knox, 146 Kan. 734, 74 P.2d 161 \(1937\); Childers v. Breese, 1949 OK 201, 202 Okla. 377, 213 P.2d 565 \(1949\).](#)

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[\[FN6\] First Alabama Bank of Huntsville, N.A. v. Spragins, 475 So. 2d 512 \(Ala. 1985\).](#)

- As to the bringing of actions at law, see § [595](#).

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[\[FN7\] Rasmusson v. Schmalenberger, 60 N.D. 527, 235 N.W. 496 \(1931\).](#)

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[\[FN8\] Village of Brookfield v. Pentis, 101 F.2d 516 \(C.C.A. 7th Cir. 1939\).](#)

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[\[FN9\] Village of Brookfield v. Pentis, 101 F.2d 516 \(C.C.A. 7th Cir. 1939\); McAulty v. Peisen, 208 Iowa 625, 226 N.W. 144 \(1929\).](#)

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[\[FN10\] United Mut. Life Ins. Co. v. Sholtz, 121 Fla. 260, 163 So. 690 \(1935\); Campbell v. Albers, 313 Ill. App. 152, 39 N.E.2d 672 \(2d Dist. 1942\).](#)

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[\[FN11\] Warrick v. Woodham, 243 Ala. 585, 11 So. 2d 150, 144 A.L.R. 1223 \(1942\).](#)

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§ 602. Jurisdiction of specific courts; probate jurisdiction

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [254](#), [363](#)

Statutes in some states confer jurisdiction on specific courts regarding trust matters,[\[FN1\]](#) or regarding the authority to impose constructive trusts.[\[FN2\]](#) In some jurisdictions, the probate court has exclusive jurisdiction over proceedings concerning the internal affairs of all trusts,[\[FN3\]](#) as in such jurisdiction over proceedings for the removal of a trustee or the review of accounts.[\[FN4\]](#)

In jurisdictions where applicable, the Uniform Probate Code specifically provides that the court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts,

including proceedings concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts,[FN5] and proceedings to appoint or remove a trustee,[FN6] or to review a trustees' fees as well as to review and settle interim or final accounts.[FN7] Such jurisdiction also includes proceedings to ascertain beneficiaries; determine any question arising in the administration or distribution of any trust including questions of the construction of trust instruments; to instruct trustees; and to determine the existence or nonexistence of any immunity, power, privilege, duty, or right,[FN8] and proceedings to release the registration of a trust.[FN9]

Collateral matters, such as a claim for the infliction of emotional distress, may be within the exclusive jurisdiction of the probate court if they arise out of matters involving administration of the trust.[FN10] A court with jurisdiction of trust matters, such as a probate court, will not necessarily have subject matter jurisdiction over claims joined in the proceeding if the claims are not concerning trusts.[FN11] Where the probate court has jurisdiction to determine whether a deed creates a trust, it also has jurisdiction to determine the purpose, scope, and duration of that trust.[FN12]

Where the construction, interpretation, and operation of trusts are matters within the jurisdiction of the courts of equity,[FN13] the probate court is without jurisdiction to interpret a trust instrument.[FN14] Additionally, in some jurisdictions, proceedings involving trusts not involving the guardianship of a ward are not be within the exclusive jurisdiction of the probate court.[FN15]

[FN1] [Matter of Green Charitable Trust, 172 Mich. App. 298, 431 N.W.2d 492 \(1988\)](#) (probate court); [Matter of Estate of Binder, 386 N.W.2d 910 \(N.D. 1986\)](#).

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[FN2] [Ragland v. Ragland, 743 S.W.2d 758 \(Tex. App. Waco 1987\)](#) (construction of state statutes led to conclusion that legislature must have intended to limit jurisdiction to impose constructive trust to particular court).

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[FN3] [In re Messer Trust, 457 Mich. 371, 579 N.W.2d 73 \(1998\)](#) (abolishing distinctions between different types of trusts).

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[FN4] [Matter of Green Charitable Trust, 172 Mich. App. 298, 431 N.W.2d 492 \(1988\)](#).

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[FN5] [Uniform Probate Code § 7-201\(a\)](#).

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[FN6] [Uniform Probate Code § 7-201\(a\)\(1\)](#).

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[FN7] [Uniform Probate Code § 7-201\(a\)\(2\)](#).

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[FN8] [Uniform Probate Code § 7-201\(a\)\(3\)](#).

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[FN9] 8 ULA, [Uniform Probate Code § 7-201\(a\)\(4\)](#).

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[FN10] [Manning v. Amerman, 229 Mich. App. 608, 582 N.W.2d 539 \(1998\)](#).

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[FN11] [Mobil Oil Corp. v. Shores, 128 S.W.3d 718 \(Tex. App. Fort Worth 2004\)](#).

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[\[FN12\] In re Pack Monadnock, 147 N.H. 419, 790 A.2d 786 \(2002\).](#)

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[\[FN13\] Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 \(2001\).](#)

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[\[FN14\] Thomas v. Arkansas Dept. of Human Services, 319 Ark. 782, 894 S.W.2d 584 \(1995\).](#)

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[\[FN15\] Long v. Waggoner, 274 Ga. 682, 558 S.E.2d 380 \(2002\).](#)

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§ 603. Effect of location of persons or property; in personam or in rem jurisdiction

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [254](#), [363](#)

Jurisdiction over a trust involves both in personam and in rem jurisdiction.[\[FN1\]](#) Courts generally have jurisdiction where the trust res is within the territorial jurisdiction of the court;[\[FN2\]](#) the courts of the state or county within which the trust property is located have jurisdiction of a suit relating to rights in such property, regardless of whether the parties are residents of such state or county.[\[FN3\]](#) Jurisdiction may be refused over trust matters where the trust property and situs were out of the state in which the court was located.[\[FN4\]](#)

A court may have jurisdiction over property within the state even if the trustee and the trustee's principal place of administration is located in another state.[\[FN5\]](#) A court which in the exercise of its inherent power as a court of equity has established a trust over assets subject to its control and is engaged in supervising and

administering the trust by its appointed trustee does not lose jurisdiction over the trust or the trust assets merely because the trustee wrongfully removes the assets to a new domicile in another jurisdiction, nor does the trustee's absence from the state impair or destroy that jurisdiction.[FN6] A court may have jurisdiction of a suit involving a trust by reason of facts other than the location of the res, although the trust property is outside the territorial jurisdiction of the court,[FN7] such as where the residence of some or all of the parties to the trust is within the territorial jurisdiction of the court.[FN8] Where a court has in personam jurisdiction over a resulting trustee to land, such court has the authority to compel the trustee to reconvey the property despite the location of the property in another state.[FN9]

A court of equity, in holding a trustee liable for a breach of trust, proceeds in personam.[FN10] A proceeding for the removal of a trustee may be regarded as one in rem.[FN11] A proceeding for the appointment of a trustee or of a substitute or successor trustee is in rem, or at least quasi in rem.[FN12] A suit by one claiming full ownership of property held in trust, to set aside the trust instrument and a purported ratification thereof, and to have the property returned free of the trust, is a proceeding quasi in rem.[FN13]

[FN1] [In re Trusteeship Created by City of Sheridan, 593 N.W.2d 702 \(Minn. Ct. App. 1999\).](#)

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[FN2] [Dixon v. Northwestern Nat. Bank of Minneapolis, 275 F. Supp. 582, 11 Fed. R. Serv. 2d 174 \(D. Minn. 1967\)](#) (applying Minnesota law; claims arising from administration of trust in state and defendants doing business in state); [Johnson v. El Paso Cattle Co., 725 P.2d 1180 \(Colo. Ct. App. 1986\)](#); [Avery v. Bender, 124 Vt. 309, 204 A.2d 314 \(1964\).](#)

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[FN3] [Gulda v. Second Nat. Bank of Boston, 323 Mass. 100, 80 N.E.2d 12, 15 A.L.R.2d 605 \(1948\)](#); [Morris v. Vyse, 154 Mich. 253, 117 N.W. 639 \(1908\)](#); [Alpern v. Coe, 352 Pa. 208, 42 A.2d 542, 161 A.L.R. 1046 \(1945\).](#)

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[FN4] [Henshaw v. Lewis, 118 N.Y.S.2d 360 \(Sup 1953\)](#), order aff'd, [282 A.D. 529, 125 N.Y.S.2d 544 \(3d Dep't 1953\).](#)

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[FN5] [Rasmuson v. Walker Bank & Trust Co., 102 Idaho 95, 625 P.2d 1098 \(1981\).](#)

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[FN6] [Boone v. Wachovia Bank & Trust Co., 163 F.2d 809, 173 A.L.R. 1285 \(App. D.C. 1947\).](#)

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[FN7] [Norton v. Bridges, 712 F.2d 1156 \(7th Cir. 1983\)](#); [Santa Cruz Ranch v. Superior Court of State, In and For Maricopa County, 76 Ariz. 19, 258 P.2d 413 \(1953\).](#)

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[FN8] [Doerr v. Warner, 247 Minn. 98, 76 N.W.2d 505 \(1956\).](#)

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[FN9] [Truman's Estate v. Gentz, 32 Ill. App. 3d 886, 336 N.E.2d 766 \(2d Dist. 1975\).](#)

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[FN10] [Abbott v. Wagner, 108 Neb. 359, 188 N.W. 113 \(1922\).](#)

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[FN11] [Boone v. Wachovia Bank & Trust Co., 163 F.2d 809, 173 A.L.R. 1285 \(App. D.C. 1947\)](#); [Portland Trust & Sav. Bank v. Rosenberg, 183 Wash. 681, 49 P.2d 467 \(1935\).](#)

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[FN12] [Portland Trust & Sav. Bank v. Rosenberg, 183 Wash. 681, 49 P.2d 467 \(1935\).](#)

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[\[FN13\] *Gulda v. Second Nat. Bank of Boston*, 323 Mass. 100, 80 N.E.2d 12, 15 A.L.R.2d 605 \(1948\).](#)

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§ 604. Effect of notice and service of process

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [254](#), [363](#), [367](#)

Proper service of process upon the necessary parties to the suit or proceeding, that is, personal service on residents and constructive service on nonresidents, or the general appearance of the parties in the suit or proceeding, generally gives the court jurisdiction of a suit or proceeding involving a trust.[\[FN1\]](#) A judgment against a trust may be void for lack of personal jurisdiction if there is no proof of service against the trust.[\[FN2\]](#) A trustee may submit himself or herself to the jurisdiction of the court by filing pleadings or appearing at a hearing.[\[FN3\]](#)

A proceeding for the removal of a trustee generally being regarded as one in rem, notice by constructive process to a trustee, who has gone out of the jurisdiction of the court appointing the trustee, is sufficient to give such court jurisdiction in a proceeding for the trustee's removal.[\[FN4\]](#) A court which probates a will, establishes the trust thereunder, appoints a qualified trustee who is a resident of the state, and is exercising its judicial supervision over the administration of the trust, has the power to remove the trustee after the trustee has moved his or her domicil to another jurisdiction taking the trust assets with him or her without authority under the will or from the court, upon service by publication and personal service on the trustee in the jurisdiction to which the trustee has moved, as the proceeding is one quasi in rem.[\[FN5\]](#) However, a proceeding to remove a nonresident

trustee who has taken the trust property with him or her with the consent of the trustor is an action in personam, and constructive service of process upon the trustee in the proceeding is insufficient.[FN6]

Under the Uniform Probate Code, courts may give notice of proceedings with regard to trusts by delivery in person within a specified time;[FN7] by publication, as specified, where the address or identity of the person is not known and cannot be ascertained with reasonable diligence; and,[FN8] or for good cause shown, by some other method of giving notice.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Initial service of process at commencement of proceedings to determine distribution of residue of testamentary trust was governed by rule generally governing service of process in civil actions, not by section of Trust Code governing notice of time and place of trust proceedings, and thus default entered against claimants who failed to respond to trustee's service by publication was not rendered invalid by trustee's alleged failure to comply with notice section of Trust Code. [MCA 72-35-306, 72-35-105](#); Rules Civ.Proc., Rule 4. [In re Estate of Bovey, 2010 MT 217, 358 Mont. 14, 244 P.3d 716 \(2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Chapman v. Northern Trust Co., 296 Ill. 353, 129 N.E. 836, 13 A.L.R. 568 \(1921\)](#); [Gulda v. Second Nat. Bank of Boston, 323 Mass. 100, 80 N.E.2d 12, 15 A.L.R.2d 605 \(1948\)](#).

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[FN2] [Bannon, Inc. v. Sea-Lake Corp., 1997 Mass. App. Div. 34, 1997 WL 129376 \(1997\)](#).

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[FN3] [In re Herskowitz's Estate, 338 So. 2d 210 \(Fla. Dist. Ct. App. 3d Dist. 1976\)](#).

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[FN4] [Letcher's Trustee v. German Nat. Bank, 134 Ky. 24, 119 S.W. 236 \(1909\)](#).

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[FN5] [Boone v. Wachovia Bank & Trust Co., 163 F.2d 809, 173 A.L.R. 1285 \(App. D.C. 1947\)](#).

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[FN6] [Parker v. Kelley, 166 F. 968 \(C.C.W.D. N.Y. 1908\)](#).

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[FN7] [Uniform Probate Code § 1-401\(a\)\(2\)](#).

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[FN8] [Uniform Probate Code § 1-401\(a\)\(3\)](#).

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[FN9] [Uniform Probate Code § 1-401\(b\)](#).

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§ 605. Venue

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [364](#)

The proper venue for a trust beneficiaries' action against the trustee of the testamentary trust, in which the beneficiaries allege breaches of trust, is the court with jurisdiction over the settlor's succession.^[FN1] In a suit in which plaintiff seeks the imposition of a constructive trust on real property, the proper venue is in the county where property is located.^[FN2] The venue, as between courts within a state, of actions and proceedings relating to the administration of a trust is often fixed by express statutory provision.^[FN3] Where two courts both have jurisdiction over some claims or issues, it is not improper to change venue to the one which has exclusive jurisdiction over one of the issues, such as over actions to remove a trustee.^[FN4]

A suit against a trustee to enforce the trust or a liability on his or her part for breach of the trust is in general in personam, and thus it is transitory in character and may be brought in a court of equity in any jurisdiction in which the trustee can be found and served with a summons, no matter where the property subject to the trust may be located, even though it may be in a state other than the one where the suit is instituted.^[FN5] The rule is fully applicable to a suit against a constructive trustee or to hold a transferee from the trustee as a constructive trustee.^[FN6] Where the court has jurisdiction, based on the location of the property and other factors, the fact that the trustee is in another jurisdiction, and the laws of the other jurisdiction govern the adjudication, is a matter of venue not jurisdiction.^[FN7]

^[FN1] [Marston v. Premier Bank, N.A., 665 So. 2d 725 \(La. Ct. App. 2d Cir. 1995\).](#)

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^[FN2] [Marshall v. Mahaffey, 974 S.W.2d 942 \(Tex. App. Beaumont 1998\).](#)

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[\[FN3\] Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\).](#)

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[\[FN4\] Cone v. Gregory, 814 S.W.2d 413 \(Tex. App. Houston 1st Dist. 1991\).](#)

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[\[FN5\] State v. Superior Court of Pierce County, 55 Wash. 328, 104 P. 607 \(1909\).](#)

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[\[FN6\] Abbott v. Wagner, 108 Neb. 359, 188 N.W. 113 \(1922\).](#)

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[\[FN7\] In re Estate of McMillian, 603 So. 2d 685 \(Fla. Dist. Ct. App. 1st Dist. 1992\).](#)

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§ 606. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [246](#), [249](#), [250](#)

Forms

Complaint, petition, or declaration—By trustee suing on behalf of trust and beneficiaries thereof—General form. 24
Am. Jur. Pleading and Practice Forms, Trusts, § 319

Model Codes and Restatements

[Restatement Second, Trusts § 178](#)

The trustee is a proper party to assert the claims of a trust for any damages sustained to the trust during the term of the trust,[\[FN1\]](#) and, as a general rule, the trustee is a proper person to sue or be sued on behalf of a trust.[\[FN2\]](#) It is within the trustee's power, and a duty of the trustee, to institute actions and proceedings for the protection of the trust estate and the enforcement of claims and rights belonging to the estate, and to take all steps as are reasonably necessary.[\[FN3\]](#)

The trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate, unless under all the circumstances it is reasonable not to make such defense.[\[FN4\]](#) Thus, the trustee has a duty to defend actions against the trust estate,[\[FN5\]](#) or to intervene in actions and proceedings in which the trustee is not originally made a party whenever such intervention is necessary or proper in order to protect the trust estate.[\[FN6\]](#)

The duty of a trustee to defend suits brought with regard to the trust requires diligence in the presentation of all defenses known to the trustee and in discovery of defenses,[\[FN7\]](#) and the trustee must exercise that measure of care, diligence, and skill required of a trustee in respect to performance of other trust duties.[\[FN8\]](#)

Observation: A trustee's duties in connection with his or her office do not include the right to present an argument pro se in the courts, since in this capacity the trustee would be representing interests of others and would therefore be engaged in the unauthorized practice of law.[\[FN9\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Trustee owns the trust's assets and so, if these assets are depleted by fraud, trustee may sue to redress the injury, even though the trust will distribute all of the proceeds to its beneficial owners. [Grede v. Bank of New York Mellon, 598 F.3d 899 \(7th Cir. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\]](#) [Baldwin v. Antin, 673 So. 2d 1049 \(La. Ct. App. 1st Cir. 1996\)](#).

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[\[FN2\]](#) [Back Acres Pure Trust v. Fahnlander, 233 Neb. 28, 443 N.W.2d 604 \(1989\)](#).

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[\[FN3\]](#) [Johnson v. Curley, 83 Cal. App. 627, 257 P. 163 \(3d Dist. 1927\)](#); [Murphey v. Dalton, 314 S.W.2d 726, 67 A.L.R.2d 1278 \(Mo. 1958\)](#).

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[\[FN4\]](#) [Restatement Second, Trusts § 178](#)

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[\[FN5\]](#) [Lamb v. Jones, 202 So. 2d 810 \(Fla. Dist. Ct. App. 3d Dist. 1967\)](#).

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[\[FN6\]](#) [Brenizer v. Supreme Council, Royal Arcanum, 141 N.C. 409, 53 S.E. 835 \(1906\)](#).

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[\[FN7\] Republic Nat. Bank & Trust Co. v. Bruce, 130 Tex. 136, 105 S.W.2d 882 \(Comm'n App. 1937\).](#)

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[\[FN8\] Tuttle v. Union Bank & Trust Co., 112 Mont. 568, 119 P.2d 884, 139 A.L.R. 127 \(1941\).](#)

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[\[FN9\] Back Acres Pure Trust v. Fahnlander, 233 Neb. 28, 443 N.W.2d 604 \(1989\).](#)

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§ 607. Bringing of bills of, or in the nature of, interpleader

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [245.1](#), [249](#), [257](#)

In a proper case, a bill of interpleader may be brought by a trustee,[\[FN1\]](#) but there are many factors distinctive to the situation where an interpleader is filed by a trustee which may preclude relief.[\[FN2\]](#) A trustee may be precluded from obtaining relief of this kind where his or her entitlement to compensation under a trust agreement,[\[FN3\]](#) or the fact that the trustee incurred a liability to rival claimants,[\[FN4\]](#) is deemed incompatible with the position of a mere stakeholder. The fact that the complainant in his or her capacity as trustee is interested in the property in litigation does not necessarily disqualify him from maintaining such a bill.[\[FN5\]](#)

[\[FN1\] Campbell v. Trust Co. of Georgia, 197 Ga. 37, 28 S.E.2d 471, 152 A.L.R. 1111 \(1943\).](#)

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[\[FN2\] Boice v. Boice, 48 F. Supp. 183 \(D.N.J. 1943\)](#), order aff'd, [135 F.2d 919 \(C.C.A. 3d Cir. 1943\)](#).

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[\[FN3\] Campbell v. Trust Co. of Georgia, 197 Ga. 37, 28 S.E.2d 471, 152 A.L.R. 1111 \(1943\)](#).

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[\[FN4\] Boice v. Boice, 48 F. Supp. 183 \(D.N.J. 1943\)](#), order aff'd, [135 F.2d 919 \(C.C.A. 3d Cir. 1943\)](#).

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[\[FN5\] Dowling v. Sollie & Sollie, 234 Ala. 630, 176 So. 340 \(1937\)](#).

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§ 608. Compromise and settlement of claims or causes by trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [246](#), [249](#), [250](#)

A.L.R. Library

[Trustee's power to compromise and settle claims and actions by or against trust estate, 35 A.L.R.2d 967](#)

Model Codes and Restatements

[Restatement Second, Trusts § 192](#)

A trustee generally has the power to compromise claims and suits pertaining to the trust.^[FN1] The trustee can properly compromise, submit to arbitration or abandon claims affecting the trust property, provided that in so doing the trustee exercises reasonable prudence.^[FN2] The trustee should act prudently and in good faith in making a settlement.^[FN3] A trustee may seek the advice of court unless the trustee is sure his or her action can be shown to be beneficial to the estate.^[FN4]

^[FN1] [Seven G Ranching Co. v. Stewart Title & Trust of Tucson, 128 Ariz. 590, 627 P.2d 1088 \(Ct. App. Div. 2 1981\); Capasso v. Kingston Trust Co., 15 A.D.2d 976, 225 N.Y.S.2d 776 \(3d Dep't 1962\); Estate of Stetson, 463 Pa. 64, 345 A.2d 679, 88 A.L.R.3d 878 \(1975\).](#)

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^[FN2] [Restatement Second, Trusts § 192.](#)

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^[FN3] [Spencer v. Harris, 70 Wyo. 505, 252 P.2d 115, 35 A.L.R.2d 959 \(1953\).](#)

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^[FN4] [Redmond v. Commerce Trust Co., 144 F.2d 140 \(C.C.A. 8th Cir. 1944\).](#)

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A.L.R. Index: Trusts and Trustees

West's A.L.R. Digest: [Trusts](#) [257](#), [366\(.5\)](#) to (3)

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1. Proper and Necessary Parties, Generally

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§ 609. Generally; interested parties

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [257](#), [366\(.5\)](#) to (3)

The proper and necessary parties to proceedings involving or relating to trusts or trustees are to be determined largely by the rules governing the necessary and proper parties in other kinds of actions and proceedings, particularly equitable actions.[\[FN1\]](#) Any interested party may initiate proceedings concerning the administration and distribution of a trust, a declaration of rights, and a determination of other matters involving the trustees and the beneficiaries of a trust,[\[FN2\]](#) and in actions and proceedings pertaining to trusts and trustees, interested parties who will be materially affected by the order or decree should be made parties.[\[FN3\]](#)

Definition: An "interested party" is an heir, devisee, beneficiary, a fiduciary or trustee named in an instrument involved, or a special party;[\[FN4\]](#) in the context of the statutory scheme governing trusts, an "interested person" is defined as a person or entity with a specific financial stake in or a specific claim against the trust.[\[FN5\]](#)

The failure to join a necessary party will render a judgment void,[\[FN6\]](#) whereas proper but not necessary parties are not essential parties to a court's determination.[\[FN7\]](#)

When a beneficial interest in a trust is subject to a condition precedent, that uncertainty is not enough to deny standing to the party who seeks to protect the trust property to which such interest relates.[\[FN8\]](#) Cotrustees are not real parties in interest in a proceeding to maintain a claim against a trustee for the reimbursement of an alleged double distribution made to a beneficiary, since the cotrustees would not benefit from such an action.[\[FN9\]](#)

There is no distinction between standing to maintain an action to enforce the terms of a charitable trust and standing to maintain an action challenging the validity of a trust.[\[FN10\]](#)

CUMULATIVE SUPPLEMENT

Cases:

As general rule of Texas law, both trustee and trust beneficiaries should be made parties to suits involving trust property. [In re Endeavour Highrise, L.P., 432 B.R. 583 \(Bankr. S.D. Tex. 2010\).](#)

For relief to be granted against a trust, the trust, through its trustee, must be made a party to the action. [In re Ashton, 266 S.W.3d 602 \(Tex. App. Dallas 2008\).](#)

[END OF SUPPLEMENT]

[\[FN1\]](#) [Nelson v. Wood, 199 Ark. 1019, 137 S.W.2d 929 \(1940\).](#)

- As to parties, generally, see 59 Am. Jur. 2d, Parties.

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[\[FN2\]](#) [In re Estes Estate, 207 Mich. App. 194, 523 N.W.2d 863 \(1994\).](#)

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[\[FN3\]](#) [Scovill v. Scovill, 191 S.C. 323, 4 S.E.2d 286 \(1939\).](#)

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[\[FN4\]](#) [In re Estes Estate, 207 Mich. App. 194, 523 N.W.2d 863 \(1994\).](#)

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[\[FN5\]](#) [In re Horton, 668 N.W.2d 208 \(Minn. Ct. App. 2003\).](#)

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[\[FN6\]](#) [In re Estate of Barth, 339 Ill. App. 3d 651, 275 Ill. Dec. 84, 792 N.E.2d 315 \(1st Dist. 2003\).](#)

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[\[FN7\] Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326 \(1995\).](#)

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[\[FN8\] Matter of Estate of Morse, 177 Misc. 2d 43, 676 N.Y.S.2d 407 \(Sur. Ct. 1998\).](#)

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[\[FN9\] Misle v. Misle, 247 Neb. 592, 529 N.W.2d 54 \(1995\).](#)

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[\[FN10\] In re Estes Estate, 207 Mich. App. 194, 523 N.W.2d 863 \(1994\).](#)

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§ 610. Trust itself

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [257](#), [366\(.5\)](#), (1)

The trust itself may be a proper party,[\[FN1\]](#) and the general rule is that in suits respecting the trust property, brought either by or against the trustees, the cestuis que trust as well as the trustees are necessary parties, but an exception to general rule exists when the trustee represents the beneficiaries' interests fully and without conflict.[\[FN2\]](#) In some jurisdictions a trust is not an entity separate from its trustees,[\[FN3\]](#) and cannot sue or be sued in its own name,[\[FN4\]](#) and therefore, the trustee, rather than the trust, is the real party in interest in litigation involving trust property.[\[FN5\]](#) Thus, because a trust is not a legal entity, and the trustee is the legal owner of the trust property, if a suit is brought that involves the trust property, in some jurisdictions it is the general rule that all trustees and beneficiaries are considered necessary parties.[\[FN6\]](#)

[FN1] [John R. Boyce Family Trust v. Snyder, 128 S.W.3d 630 \(Mo. Ct. App. E.D. 2004\).](#)

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[FN2] [Markham v. Fay, 74 F.3d 1347 \(1st Cir. 1996\).](#)

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[FN3] [Sunbelt Environmental Services, Inc. v. Rieder's Jiffy Market, Inc., 138 S.W.3d 130 \(Mo. Ct. App. S.D. 2004\); Moeller v. Superior Court, 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279 \(1997\); Western Life Trust v. State, 536 N.W.2d 709 \(N.D. 1995\).](#)

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[FN4] [Western Life Trust v. State, 536 N.W.2d 709 \(N.D. 1995\).](#)

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[FN5] [Moeller v. Superior Court, 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279 \(1997\).](#)

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[FN6] [Sunbelt Environmental Services, Inc. v. Rieder's Jiffy Market, Inc., 138 S.W.3d 130 \(Mo. Ct. App. S.D. 2004\).](#)

- As to jurisdictions in which beneficiaries are not necessary parties, see [§ 611](#).

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§ 611. Trustee

West's Key Number Digest

Where the powers are given in the trust to the trustee to represent the beneficiaries, the trustee may ordinarily represent the beneficiaries in all actions relating to the trust, if rights of the beneficiaries as against the trustee, or the rights of the beneficiaries among themselves, are not brought into question.[\[FN1\]](#) The trustee is the legal owner of trust property, and as such the trustee is the proper party for actions affecting title to trust property. [\[FN2\]](#) Thus, a trustee is a necessary party to any suit or proceeding involving a disposition of trust property or funds,[\[FN3\]](#) and a trustee may maintain an action in law or equity against a third person to remedy an injury with respect to the trust property as if the trustee held the property free of the trust.[\[FN4\]](#) Therefore, in actions adverse to a trust, a trustee may sue or defend in the trustee's own name, so long as that power is vested in the trustee.[\[FN5\]](#)

While generally a trustee is a necessary party to assert or defend title to trust property,[\[FN6\]](#) particularly in an adjudication of the rights of the beneficiaries in a trust,[\[FN7\]](#) when a third party has assisted a trustee in a breach of trust, the beneficiaries may bring suit against both the trustee and the third party, but it is not necessary to join the trustee in the suit, because primarily it is the beneficiaries who are wronged and who are entitled to sue the third party.[\[FN8\]](#)

[\[FN1\]](#) [Armendaris Water Development Co. v. Rainwater, 109 N.M. 71, 781 P.2d 799 \(Ct. App. 1989\).](#)

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[\[FN2\]](#) [Ruestman v. Ruestman, 111 S.W.3d 464 \(Mo. Ct. App. S.D. 2003\)](#), reh'g and/or transfer denied, (June 6, 2003) and transfer denied, (Aug. 26, 2003).

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[\[FN3\]](#) [Northern Natural Gas Co. v. Hogoton Plains Gas & Oil Co., 55 Del. 348, 187 A.2d 432 \(Super. Ct. 1963\)](#); [Roth v. Lehmann, 741 S.W.2d 860 \(Mo. Ct. App. E.D. 1987\).](#)

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[\[FN4\]](#) [In re Cannon, 277 F.3d 838, 2002 FED App. 0026P \(6th Cir. 2002\).](#)

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[\[FN5\]](#) [Bank One Texas v. U.S., 157 F.3d 397 \(5th Cir. 1998\) \(applying Texas law\).](#)

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[\[FN6\]](#) [City Bank & Trust Co. v. Hawthorne, 517 So. 2d 970 \(La. Ct. App. 3d Cir. 1987\)](#); [Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 \(1936\).](#)

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[\[FN7\]](#) [Amrhein v. Amrhein, 29 Mass. App. Ct. 336, 560 N.E.2d 157 \(1990\).](#)

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[\[FN8\]](#) [City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329 \(1st Dist. 1998\)](#), as modified on denial of reh'g, (Jan. 6, 1999).

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XII. Actions and Proceedings

B. Parties

1. Proper and Necessary Parties, Generally

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 612. Beneficiaries

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [257](#), [366\(.5\)](#), (1)

Generally, it is the trustee who is the proper party to maintain an action in law or equity against a third person to remedy an injury with respect to the trust property, while beneficiaries of the trust cannot,[\[FN1\]](#) and since the beneficiaries are represented by the trustees,[\[FN2\]](#) where the powers are given in the trust to the trustee to represent the beneficiaries, the beneficiaries are generally not necessary parties,[\[FN3\]](#) and they do not need to be joined in an action brought by a trustee.[\[FN4\]](#) However, in some jurisdictions, in suits involving trust property, the beneficiaries are necessary parties,[\[FN5\]](#) in addition to the trustee,[\[FN6\]](#) while in others, the beneficiary of a trust may not be a necessary party,[\[FN7\]](#) particularly where the trustee has the authority to represent the trust and there is no conflict of interest.[\[FN8\]](#)

Whether the beneficiaries of a trust are necessary parties to a suit may depend upon the terms of the trust and the effect of the suit on their equitable interests.[\[FN9\]](#) Thus, the nature of the particular suit is one of the principal elements bearing on the question whether it is necessary to make the beneficiaries parties.[\[FN10\]](#) Parties will not be considered indispensable if they are beneficiaries of a trust whose interests the trustee may adequately represent.[\[FN11\]](#) However, where, for example, the extent of the duty of the trustees to disburse the trust income is raised by one of its beneficiaries, the resulting judgment will necessarily affect the concomitant right of the other beneficiaries, similarly situated, to receive such payments, and the other beneficiaries thus are not merely incidental parties to the action, but are essential parties, subject to joinder.[\[FN12\]](#)

If a trustee refuses or fails to initiate a meritorious lawsuit against a third party, the beneficiary may file a cause of action to protect the beneficiary's own interests.[\[FN13\]](#) Beneficiaries of a trust are necessary parties to an action to foreclose their interests, unless their interests are represented by others such that they receive actual and efficient representation,[\[FN14\]](#) or they are so numerous that it would be oppressive and burdensome to name them.[\[FN15\]](#) When a trust beneficiary brings a suit which affects more than his or her own interests, however, or which affects the corpus of the trust, all the other beneficiaries are generally held to be necessary parties and must be joined.[\[FN16\]](#)

A particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of duty to the beneficiary. [FN17] For example, a beneficiary ordinarily cannot bring an action at law in the trust's stead against a third party for torts or other wrongs.[FN18] However, a trust beneficiary may sue third persons who, for their own financial gain or advantage, induced the trustee to commit a breach of trust, participated with, aided or abetted the trustee in such a breach of trust, or while knowing of the breach of trust, received and retained trust property from the trustee.[FN19]

Remainder beneficiaries, particularly where their absence would have no impact on the amount of total damages in the suit, may be proper but are not necessary parties.[FN20]

CUMULATIVE SUPPLEMENT

Cases:

Father of trust beneficiaries was not "intended third-party beneficiary" of agreement between trusts, in their capacity as members of partnership, and other partner, pursuant to which this other partner acquired trusts' interests in partnership and agreed to indemnify them from any liability on guarantees which they had given on earlier partnership loans, though father, who had personally guaranteed a number of these loans, stood to benefit from indemnification clause in agreement, where there was nothing within four corners of agreement which indicated an intent by parties to benefit him, and agreement did not even mention father individually except in passing, when talking about who would be entitled to use a car provided to father post-closing; thus, father did not have standing under Texas law, as alleged third-party beneficiary, to sue for breach of indemnification provision. [In re Perry, 423 B.R. 215 \(Bankr. S.D. Tex. 2010\)](#).

Where a petition presents issues of conduct of the trustees, their handling of the trust, or the removal of a trustee, the beneficiaries have an interest in those determinations and are, thus, necessary parties in the suit. [Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon, 231 S.W.3d 158 \(Mo. Ct. App. W.D. 2007\)](#), reh'g and/or transfer denied, (July 31, 2007) and transfer denied, (Sept. 25, 2007).

Generally, beneficiaries are necessary parties in suits involving trust property because they have a beneficial or equitable interest in the trust. [Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon, 231 S.W.3d 158 \(Mo. Ct. App. W.D. 2007\)](#), reh'g and/or transfer denied, (July 31, 2007) and transfer denied, (Sept. 25, 2007).

[END OF SUPPLEMENT]

[FN1] [In re Cannon, 277 F.3d 838, 2002 FED App. 0026P \(6th Cir. 2002\)](#).

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[FN2] [Chase Manhattan Bank v. Commissioner of Revenue Services, 45 Conn. Supp. 368, 716 A.2d 950 \(Super. Tax 1997\)](#).

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[FN3] [Citizens State Bank of Dickinson v. Bowles, 663 S.W.2d 845 \(Tex. App. Houston 14th Dist. 1983\)](#), dismissed, (Mar. 21, 1984).

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[FN4] [Hackbarth v. Hackbarth, 62 Conn. App. 490, 767 A.2d 1276 \(2001\)](#).

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[FN5] [In re Estate of Barth, 339 Ill. App. 3d 651, 275 Ill. Dec. 84, 792 N.E.2d 315 \(1st Dist. 2003\)](#) (proceeding to close settlor's guardianship estate); [Roth v. Lehmann, 741 S.W.2d 860 \(Mo. Ct. App. E.D. 1987\)](#).

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[\[FN6\] Sunbelt Environmental Services, Inc. v. Rieder's Jiffy Market, Inc., 138 S.W.3d 130 \(Mo. Ct. App. S.D. 2004\)](#) (trust is not a legal entity).

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[\[FN7\] Armendaris Water Development Co. v. Rainwater, 109 N.M. 71, 781 P.2d 799 \(Ct. App. 1989\).](#)

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[\[FN8\] Bank One Texas v. U.S., 157 F.3d 397 \(5th Cir. 1998\) \(applying Texas law\).](#)

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[\[FN9\] Atwood v. Rhode Island Hospital Trust Co., 275 F. 513, 24 A.L.R. 156 \(C.C.A. 1st Cir. 1921\); Johnson v. Curley, 83 Cal. App. 627, 257 P. 163 \(3d Dist. 1927\).](#)

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[\[FN10\] Johnson v. Curley, 83 Cal. App. 627, 257 P. 163 \(3d Dist. 1927\).](#)

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[\[FN11\] Hardy v. Island Homes, Inc., 363 P.2d 637 \(Alaska 1961\).](#)

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[\[FN12\] Buechel v. Bain, 275 A.D.2d 65, 713 N.Y.S.2d 332 \(1st Dep't 2000\), aff'd, 97 N.Y.2d 295, 740 N.Y.S.2d 252, 766 N.E.2d 914 \(2001\), cert. denied, 535 U.S. 1096, 122 S. Ct. 2293, 152 L. Ed. 2d 1051 \(2002\).](#)

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[\[FN13\] Slaughter v. Swicegood, 162 N.C. App. 457, 591 S.E.2d 577 \(2004\).](#)

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[\[FN14\] In re Estate of Barth, 339 Ill. App. 3d 651, 275 Ill. Dec. 84, 792 N.E.2d 315 \(1st Dist. 2003\).](#)

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[\[FN15\] In re Estate of Barth, 339 Ill. App. 3d 651, 275 Ill. Dec. 84, 792 N.E.2d 315 \(1st Dist. 2003\); Matthies v. Seymour Mfg. Co., 270 F.2d 365, 2 Fed. R. Serv. 2d 355 \(2d Cir. 1959\).](#)

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[\[FN16\] Mertens v. Kaiser Steel Retirement Plan, 744 F. Supp. 917 \(N.D. Cal. 1990\), aff'd, 948 F.2d 1105 \(9th Cir. 1991\).](#)

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[\[FN17\] Harley v. Minnesota Min. and Mfg. Co., 284 F.3d 901 \(8th Cir. 2002\), cert. denied, 537 U.S. 1106, 123 S. Ct. 872, 154 L. Ed. 2d 775 \(2003\).](#)

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[\[FN18\] Witzman v. Gross, 148 F.3d 988, 41 Fed. R. Serv. 3d 871 \(8th Cir. 1998\).](#)

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[\[FN19\] City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329 \(1st Dist. 1998\), as modified on denial of reh'g, \(Jan. 6, 1999\).](#)

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[\[FN20\] Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326 \(1995\).](#)

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XII. Actions and Proceedings

B. Parties

1. Proper and Necessary Parties, Generally

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§ 613. Beneficiaries—Antagonistic interests

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [257](#), [366\(.5\)](#), (1)

Generally, beneficiaries are proper and necessary parties to any litigation involving their interests to which the trustee or other beneficiaries are antagonistic;[\[FN1\]](#) thus, an adverse interest in the trustee will in general render beneficiaries necessary parties.[\[FN2\]](#) While a trustee should bring claims for money damages on behalf of the trust, the beneficiaries have standing to bring an action for money damages against the trustee for a breach of trust,[\[FN3\]](#) and if a conflict of interest arises between the trustee and a beneficiary, or between two beneficiaries, a beneficiary has standing to sue individually.[\[FN4\]](#)

[\[FN1\]](#) [Atwood v. Rhode Island Hospital Trust Co.](#), 275 F. 513, 24 A.L.R. 156 (C.C.A. 1st Cir. 1921); [Cameron v. White](#), 1927 OK 293, 128 Okla. 251, 262 P. 664 (1927).

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[\[FN2\]](#) [Alexander v. Title Ins. & Trust Co.](#), 48 Cal. App. 2d 488, 119 P.2d 992 (2d Dist. 1941).

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[\[FN3\]](#) [John R. Boyce Family Trust v. Snyder](#), 128 S.W.3d 630 (Mo. Ct. App. E.D. 2004).

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[\[FN4\]](#) [Slaughter v. Swicegood](#), 162 N.C. App. 457, 591 S.E.2d 577 (2004).

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B. Parties

1. Proper and Necessary Parties, Generally

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§ 614. Intervention by one claiming interest in litigation as trust beneficiary

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [257](#), [366\(.5\)](#), (4)

Asserted beneficiaries of express trusts in some instances may be permitted to intervene in litigation between their trustee or fiduciary and other persons, where the fruits of the litigation are the trust property or beneficial interests therein, and where it appears that their interests will not be adequately represented by the trustee, and that their beneficial trust interests will be jeopardized by a judgment in the litigation.[FN1] Whether intervention is allowed or proper will depend on the particular facts of the case.[FN2] It may be error for a trial court to not allow a cobeneficiary to intervene,[FN3] particularly where, for example, the cobeneficiary has a direct and immediate interest in an action affecting interests in the trust property.[FN4] Intervention sought on behalf of beneficiaries of an express trust may be refused for a failure to allege that the applicants joined with the plaintiffs or united with the defendants or demanded anything adversely to both of them.[FN5]

Intervention may be denied where the asserted trust beneficiaries are unable to establish the existence of either any trust in their behalf or of a trust res involved in litigation between the main litigants.[FN6] An untimely motion to intervene may be denied.[FN7] Where the facts as pleaded disclose that one seeking intervention is the beneficiary of a resulting trust possessing an interest in trust property which is the subject of litigation between others, and that the one seeking intervention has rights that will be affected by the result of the litigation and the judgment entered therein, there may be a right to intervene.[FN8]

[FN1] [Starck v. Goodman](#), 288 Ill. App. 347, 6 N.E.2d 503 (1st Dist. 1937); [Gibault Home for Boys v. Terre Haute First Nat. Bank](#), 227 Ind. 410, 85 N.E.2d 824 (1949).

- Generally, as to intervention, see [59 Am. Jur. 2d, Parties §§ 160 to 253](#)

[\[FN2\] Dempster v. Baxmyer, 231 Pa. 28, 79 A. 805 \(1911\).](#)

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[\[FN3\] Board of Trustees of Employees' Retirement System of City of Baltimore v. Mayor and City Council of Baltimore City, 317 Md. 72, 562 A.2d 720 \(1989\).](#)

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[\[FN4\] Vocisano v. Vega, 602 So. 2d 680 \(Fla. Dist. Ct. App. 2d Dist. 1992\).](#)

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[\[FN5\] Bowles v. Superior Court of City and County of San Francisco, 44 Cal. 2d 574, 283 P.2d 704 \(1955\).](#)

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[\[FN6\] U.S. v. Carter, 192 F. 311 \(C.C.A. 7th Cir. 1911\); Tuck v. Hyatt, 45 Ga. App. 727, 165 S.E. 767 \(1932\); Lubowicki v. Travelers Ins. Co., 18 N.J. Misc. 19, 8 A.2d 842 \(Dist. Ct. 1939\).](#)

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[\[FN7\] Glaeske v. Shaw, 261 Wis. 2d 549, 2003 WI App 71, 661 N.W.2d 420 \(Ct. App. 2003\), review dismissed, 260 Wis. 2d 756, 2003 WI 32, 661 N.W.2d 103 \(2003\).](#)

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[\[FN8\] Miron v. Percheck, 279 Pa. 456, 124 A. 127 \(1924\); Cox v. Bowman, 71 S.D. 72, 21 N.W.2d 277 \(1945\).](#)

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XII. Actions and Proceedings

B. Parties

2. Proper Parties In Particular Actions

a. Generally

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§ 615. Actions to enforce trust or liability of trustee

West's Key Number Digest

An action or proceeding to enforce a trust or to enforce the liability of a trustee for a breach of trust can be brought by only one who has a qualifying interest in the subject matter of the suit, or who is the representative of such person.[\[FN1\]](#) An action or proceeding to enforce the trust must ordinarily be brought by beneficiaries, trustees, or someone representing them,[\[FN2\]](#) and not the settlor of the trust or a representative of the settlor.[\[FN3\]](#) However, a trustee is not precluded from maintaining an action to compel redress of a breach of a cotrustee simply because the trustee also participated in a past breach, as the action is for the benefit of the beneficiaries.[\[FN4\]](#)

A beneficiary whose interests have passed to a trustee in bankruptcy has no right to object to a settlement of the trust account, consented to by the trustee in bankruptcy, in which the interest of the beneficiary is awarded to a creditor under a purported assignment as security for a loan.[\[FN5\]](#) Where the controversy can be determined without the presence of a second beneficiary as a party, joinder of the second beneficiary is not necessary.[\[FN6\]](#) Thus, where a beneficiary seeks damages he or she claimed to have suffered as a result of the trustees' conduct and the action will not affect the trust to the damage of other beneficiaries, such other beneficiaries are not necessary parties, and the trial court does not err by refusing to dismiss the action for the plaintiff's failure to join all the beneficiaries.[\[FN7\]](#)

Beneficiaries not in being can be represented by a next friend or guardian in a suit to enforce a trust or a liability of a trustee, but only where other members of the class to which the unborn beneficiaries belong are in existence, and not where no members of a class named as beneficiaries are in existence.[\[FN8\]](#)

[\[FN1\]](#) [Shields v. Harris, 190 N.C. 520, 130 S.E. 189 \(1925\).](#)

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[\[FN2\]](#) [Webb v. Vercoe, 201 Cal. 754, 258 P. 1099, 54 A.L.R. 1200 \(1927\); Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 \(1917\).](#)

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[\[FN3\]](#) [Stagg v. Stagg, 90 Mont. 180, 300 P. 539 \(1931\).](#)

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[\[FN4\]](#) [Wilkins v. Lasater, 46 Wash. App. 766, 733 P.2d 221 \(Div. 3 1987\).](#)

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[\[FN5\]](#) [In re Aldrich's Estate, 35 Cal. 2d 20, 215 P.2d 724, 19 A.L.R.2d 885 \(1950\).](#)

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[\[FN6\]](#) [Hatcher v. U. S. Nat. Bank of Oregon, 56 Or. App. 643, 643 P.2d 359 \(1982\).](#)

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[\[FN7\]](#) [Mest v. Dugan, 101 Or. App. 196, 790 P.2d 38 \(1990\).](#)

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[\[FN8\]](#) [Morsman v. Commissioner of Internal Revenue, 90 F.2d 18, 113 A.L.R. 441 \(C.C.A. 8th Cir. 1937\).](#)

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XII. Actions and Proceedings

B. Parties

2. Proper Parties In Particular Actions

a. Generally

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§ 616. Actions to terminate or set aside trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [257](#), [366\(.5\)](#) to (3)

An action or proceeding to terminate or set aside a trust must be brought by one who has an actual existing interest in the subject matter of the suit or proceeding.^[FN1] In such an action, all parties in interest should be before a court, either in person or by representation, before it decrees the termination or setting aside of the trust.^[FN2] In some jurisdictions, the beneficiaries are necessary parties in a suit to terminate a valid trust.^[FN3] In particular, the beneficiaries of a trust, whose interests in the res are opposed to those asserted by one bringing a suit threatening the very existence of the trust, should not be compelled to depend upon the defense made by the trustee, but are entitled to be heard as parties.^[FN4] There is, however, also authority for the view that where a trustee has full power to manage the trust estate and to receive all net income during his lifetime has the power to represent all beneficiaries in a suit brought to cancel the trust instrument where the beneficiaries' interests are not in conflict with that of the trustee; in such instance, the beneficiaries are proper, but not necessary and indispensable parties.^[FN5]

Although a suit hostile to a trust, or to any of its property interests, is not ordinarily one involving issues between the beneficiaries as such, nor between them and the trustee,^[FN6] where a suit is brought by the beneficiary of a spendthrift trust seeking termination of the trust, the beneficiary's children, who have a right to receive the corpus of the trust upon the beneficiary's death, have an interest in continuing the trust, and a judgment terminating the trust will not only impair their ability to protect that interest but also might actually operate to terminate their interest; thus, in such instances, the children are necessary parties to the action.^[FN7] A beneficiary named in a trust instrument disposing of the testator's property, and whose name was subsequently stricken out, is a necessary party to a proceeding against the trustee to set aside the residuary clause of a will attempting to add the residue of the testator's property to the trust, since such a beneficiary's interests are antagonistic to those of all the other parties to the litigation.^[FN8]

[\[FN1\] Schroeder v. Gerlach, 366 Ill. 596, 10 N.E.2d 332, 112 A.L.R. 1399 \(1936\).](#)

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[\[FN2\] Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N.E. 300 \(1907\); Rehr v. Fidelity-Philadelphia Trust Co., 310 Pa. 301, 165 A. 380, 91 A.L.R. 99 \(1933\).](#)

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[\[FN3\] Featherston v. Tompkins, 339 So. 2d 306 \(Fla. Dist. Ct. App. 3d Dist. 1976\).](#)

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[\[FN4\] Gulda v. Second Nat. Bank of Boston, 323 Mass. 100, 80 N.E.2d 12, 15 A.L.R.2d 605 \(1948\).](#)

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[\[FN5\] Mason v. Mason, 366 S.W.2d 552 \(Tex. 1963\).](#)

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[\[FN6\] Mudd v. Lanier, 247 Ala. 363, 24 So. 2d 550 \(1945\).](#)

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[\[FN7\] Hansen v. Peoples Bank of Bloomington, 594 F.2d 1149 \(7th Cir. 1979\).](#)

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[\[FN8\] Atwood v. Rhode Island Hospital Trust Co., 275 F. 513, 24 A.L.R. 156 \(C.C.A. 1st Cir. 1921\).](#)

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XII. Actions and Proceedings

B. Parties

2. Proper Parties In Particular Actions

a. Generally

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 617. Requests for judicial guidance, authorizations, or modifications of trust

West's Key Number Digest

A.L.R. Library

[Trust beneficiaries as necessary parties to action relating to trust or its property, 9 A.L.R.2d 10](#)

On an application by a trustee for instructions from the court as to the distribution of unapplied income from a testamentary trust, the beneficiaries of the trust are necessary parties.[FN1] In an action or proceeding to obtain a judicial authorization of a deviation of, or departure from, the terms of a trust in its administration, the general rule is that all beneficiaries and parties whose interests will be affected by the authorization of such a deviation of, or departure from, the terms of the trust, must be made parties, or at least be represented by those made parties.[FN2] All the beneficiaries of a trust must ordinarily be joined when the trustee, without having applied for additional powers, performs acts which may be beyond the trustee's authority, and then becomes a party to litigation in which the trustee seeks to maintain the validity of such acts.[FN3]

In an action by testamentary trustees for instructions in the construction of the trust instrument, contingent beneficiaries designated not by name, but as a class, are not necessary parties, although they are allowed to appear and present their objections to the trustees' petition.[FN4] A remainderman holding a vested interest in a trust which is subject to defeasance by the exercise of a testamentary power of appointment has standing to maintain an action to modify the administrative provisions of the trust agreement.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Present or past beneficiaries of testamentary trust were not, on face of pleadings, subject to dismissal as dispensable parties to action brought by successor trustee to construe much-altered trust documents to determine administration, where determining beneficiaries' status would require evaluation of merits and beneficiaries would be affected to varying degrees by interpretation of trust documents. [Horton v. Conklin, 431 F.3d 602 \(8th Cir. 2005\)](#), petition for cert. filed, [74 U.S.L.W. 3642 \(U.S. May 9, 2006\)](#).

[END OF SUPPLEMENT]

[FN1] [Manufacturers Nat. Bank of Troy, N. Y. v. McCoy, 100 R.I. 154, 212 A.2d 53 \(1965\)](#).

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[FN2] [Stephens v. Collison, 274 Ill. 389, 113 N.E. 691 \(1916\)](#).

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[FN3] [Kriv v. Northwestern Securities Co., 237 Iowa 1189, 24 N.W.2d 751 \(1946\)](#).

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[FN4] [Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\)](#).

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[FN5] [Papiernik v. Papiernik, 45 Ohio St. 3d 337, 544 N.E.2d 664 \(1989\)](#).

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2. Proper Parties In Particular Actions

a. Generally

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§ 618. Proceeding for appointment, removal, or succession of trustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 257, [366\(.5\)](#) to (3)

A proceeding for the appointment of a trustee generally may be upon only the application or petition of a person interested in the trust.^[FN1] In a suit to remove or discharge a trustee from office, beneficiaries of the trust are proper parties plaintiff.^[FN2]

While beneficiaries of a trust are sometimes deemed necessary parties to a removal proceeding,^[FN3] particularly in a jurisdiction in which all persons interested in the trust, including absolute and contingent beneficiaries, are necessary parties to an action to remove the trustee,^[FN4] in other instances beneficiaries of a trust are not considered to be necessary parties in a proceeding for the removal of the trustee.^[FN5]

^[FN1] [Haggin v. Straus, 148 Ky. 140, 146 S.W. 391 \(1912\).](#)

^[FN2] [State v. Northrop, 93 Conn. 558, 106 A. 504, 7 A.L.R. 1014 \(1919\).](#)

^[FN3] [Moore v. Bowes, 8 Cal. 2d 162, 64 P.2d 423 \(1937\); Huston v. Weed, 242 Ill. App. 495, 1926 WL 3964 \(2d Dist. 1926\); In re De Beixedon's Will, 262 N.Y. 168, 186 N.E. 431 \(1933\); Moody v. Branson, 1943 OK 142, 192 Okla. 327, 136 P.2d 925 \(1943\)](#) (the "requirement" may be waived by the trustee).

[\[FN4\] In re Bellinger's Estate, 35 A.D.2d 1078, 317 N.Y.S.2d 126 \(4th Dep't 1970\).](#)

[\[FN5\] Bowles v. Superior Court of City and County of San Francisco, 44 Cal. 2d 574, 283 P.2d 704 \(1955\); In re Hensel's Estate, 144 Cal. App. 2d 429, 301 P.2d 105 \(2d Dist. 1956\).](#)

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XII. Actions and Proceedings

B. Parties

2. Proper Parties In Particular Actions

b. Actions and Proceedings by or against Strangers to Trust

[Topic Summary](#) [Correlation Table](#) [References](#)

§ 619. Where trustee is personally liable

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [257](#), [366\(.5\)](#) to (3)

Generally, in actions on choses belonging to the trust estate, where the action involves no determination as between the trustee and beneficiaries or between beneficiaries themselves, the trustee is the proper party to sue, and the beneficiaries need not be made parties.[\[FN1\]](#) The rule is ordinarily recognized by way of an exception to the real party in interest statutes and is predicated on the legal title and interest of the trustee,[\[FN2\]](#) and on the authority of the trustee to represent the beneficial owners.[\[FN3\]](#) In suits brought by strangers against the trustee to establish rights in trust assets, the question whether beneficiaries are necessary parties is influenced by the nature and extent of the trust and by an inquiry into whether the trustees may be regarded as providing sufficient representation of the beneficiaries.[\[FN4\]](#) Where the beneficiaries have only indirect interests which are not so interrelated or so directly affected that a complete and equitable adjudication of the controversy could not be made unless they were joined in the action, the beneficiaries are not necessary parties.[\[FN5\]](#) Where the trusteeship is not merely nominal nor one of meager or closely restricted powers, the trustee, save for special

circumstances, is likely to be regarded as sufficiently representing the beneficiaries in a suit to establish a lien or other charge on the trust property or to determine some priority respecting the same.[FN6]

[FN1] [Village of Brookfield v. Pentis, 101 F.2d 516 \(C.C.A. 7th Cir. 1939\)](#); [Ready v. Ready, 33 Ill. App. 2d 145, 178 N.E.2d 650, 100 A.L.R.2d 387 \(1st Dist. 1961\)](#).

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[FN2] [Colorado & S. Ry. Co. v. Blair, 214 N.Y. 497, 108 N.E. 840 \(1915\)](#).

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[FN3] [Colorado & S. Ry. Co. v. Blair, 214 N.Y. 497, 108 N.E. 840 \(1915\)](#).

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[FN4] [Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U.S. 613, 56 S. Ct. 600, 80 L. Ed. 920 \(1936\)](#).

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[FN5] [Matter of Harleaux, 359 So. 2d 961 \(La. 1978\)](#).

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[FN6] [Jackson v. Tallmadge, 246 N.Y. 133, 158 N.E. 48 \(1927\)](#).

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§ 620. Where estate is directly liable

West's Key Number Digest

In the absence of a contrary provision in the trust instrument, the beneficiaries ordinarily need not be made parties to an action against the trustee by a stranger having a claim against the trust estate, where the litigation does not involve any conflict between the trustee and the beneficiaries or between the beneficiaries themselves.[\[FN1\]](#) In this regard, beneficiaries are generally not considered necessary parties to suits against their trustee to recover money or property.[\[FN2\]](#) Whether beneficiaries are necessary parties to a suit to charge the trust estate in respect of an indebtedness incurred by the trustee for goods or services beneficial to the estate or beneficiaries largely depends upon what powers were vested in the trustee.[\[FN3\]](#) Thus, the beneficiaries are not necessary parties in a suit where the trustees are expressly authorized to maintain and defend suits against trust property.[\[FN4\]](#)

Where a trust estate is liable directly on a contract or for goods or services provided it, or for a tort, whether by force of statutory provision, subrogation to the trustee's right of exoneration, avoidance of circuity of action, unavailability of relief from the trustee personally, as in case of his insolvency, or other reason, the proper practice is either to sue the trustee as such,[\[FN5\]](#) or to join the trustee and beneficiary as defendants.[\[FN6\]](#)

[\[FN1\]](#) [Gulda v. Second Nat. Bank of Boston, 323 Mass. 100, 80 N.E.2d 12, 15 A.L.R.2d 605 \(1948\).](#)

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[\[FN2\]](#) [Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U.S. 613, 56 S. Ct. 600, 80 L. Ed. 920 \(1936\); Mercantile Trust Co. v. Schlafly, 299 F. 202 \(C.C.A. 8th Cir. 1924\).](#)

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[\[FN3\]](#) [Kincaid v. Hensel, 185 Wash. 503, 55 P.2d 1050 \(1936\).](#)

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[\[FN4\]](#) [Smith v. Wayman, 148 Tex. 318, 224 S.W.2d 211 \(1949\).](#)

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[\[FN5\]](#) [Tuttle v. Union Bank & Trust Co., 112 Mont. 568, 119 P.2d 884, 139 A.L.R. 127 \(1941\)](#) (where a trustee was by statute made a general agent for the trust property); [Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 \(1926\)](#) (tort).

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[\[FN6\]](#) [Wright v. Caney River Ry. Co., 151 N.C. 529, 66 S.E. 588 \(1909\).](#)

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§ 621. Actions against strangers to trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [257](#), [366\(.5\)](#) to (3)

As a general rule, when a trustee sues a third party with reference to the trust property, the beneficiaries of the trust need not be joined, since the trustee can so adequately represent the interests of beneficiaries that they are concluded by his suit.[FN1] Thus, a trustee with full power to manage the trust estate and to receive all net income has the power to represent all the beneficiaries in a suit brought to cancel the trust instrument where the beneficiaries' interests are not in conflict with the trustee's. The beneficiaries may be proper, but not necessary and indispensable parties.[FN2]

A trustee may be substituted for a beneficiary in a suit against a third party where the trustee is the proper party to prosecute the suit.[FN3] Where the trustees have limited powers, the beneficiaries may be regarded as necessary parties,[FN4] even though, ordinarily, suits may be brought by trustees to recover money or property without joining the beneficiaries.[FN5]

[FN1] [Matthies v. Seymour Mfg. Co.](#), 270 F.2d 365, 2 Fed. R. Serv. 2d 355 (2d Cir. 1959).

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[FN2] [Mason v. Mason](#), 366 S.W.2d 552 (Tex. 1963).

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[FN3] [City of Detroit, Mich. v. Blanchfield](#), 13 F.2d 13, 47 A.L.R. 314 (C.C.A. 6th Cir. 1926).

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[FN4] [Leatherman v. Sanders](#), 117 W. Va. 320, 185 S.E. 556 (1936).

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[FN5] [Susumu Igauye v. Howard](#), 114 Cal. App. 2d 122, 249 P.2d 558 (2d Dist. 1952).

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Forms

[24 Am. Jur. Pleading and Practice Forms, Trusts, §§ 8 to 31, 46 to 58, 319 to 237](#)

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§ 622. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 261, [371\(.5\)](#) to (8)

Forms

Pleadings in trust actions. [24 Am. Jur. Pleading and Practice Forms, Trusts, §§ 8 to 31, 46 to 58, 319 to 237](#)

In actions or proceedings involving trusts or trustees, ultimate facts upon which the claim to relief is grounded must be alleged.[\[FN1\]](#)

Where a trustee sues to enforce a claim of the trust estate and the recovery will be for the benefit of the estate or the beneficiaries thereof, the trustee may be required to set out the trustee's representative capacity in the pleadings,[\[FN2\]](#) or even allege enough of the facts and circumstances of the trust to show sufficient authority to maintain the action.[\[FN3\]](#) However, in some jurisdictions the rule is that a trustee having the legal title to the trust property or to claims of the trust estate may, where no adverse interest between the trustee and the beneficiary is involved, bring an action in the trustee's own name without alleging the fact that he or she is a trustee.[\[FN4\]](#)

It is ordinarily not necessary for a complaint or declaration founded upon a trust agreement to state that the trust is in writing.[\[FN5\]](#) However, if a plaintiff wishes to set up an oral trust, then it is necessary for the plaintiff to allege such facts in the complaint as would do so or, in opposition to a motion to dismiss, to come forth with such facts.[\[FN6\]](#)

[\[FN1\]](#) [Swon v. Huddleston, 282 S.W.2d 18, 55 A.L.R.2d 205 \(Mo. 1955\); Viall v. Rhode Island Hospital Trust Co., 45 R.I. 432, 123 A. 570, 32 A.L.R. 437 \(1924\)](#) (bill to terminate a trust and vest property in the

beneficiary).

- As to pleadings, generally, see 61A Am. Jur. 2d, Pleading.

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[\[FN2\] York v. Partridge's Estate, 99 Vt. 329, 132 A. 37 \(1926\).](#)

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[\[FN3\] School Dist. No. 42 v. Peninsular Trust Co., 1904 OK 4, 13 Okla. 479, 75 P. 281 \(1904\).](#)

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[\[FN4\] Withers v. Rockland Mines Co., 58 Nev. 98, 71 P.2d 156, 112 A.L.R. 1506 \(1937\).](#)

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[\[FN5\] Withers v. Rockland Mines Co., 58 Nev. 98, 71 P.2d 156, 112 A.L.R. 1506 \(1937\).](#)

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[\[FN6\] Baskin v. Commerce Union Bank of Rutherford County, 715 S.W.2d 350 \(Tenn. Ct. App. 1986\).](#)

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§ 623. Actions and proceedings to enforce trust or liability of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [261](#), [371\(.5\)](#) to (8)

In suits to enforce a trust or a liability of a trustee the plaintiff must state his cause of action in terms of ultimate facts, with certainty and distinctness.[\[FN1\]](#) In order to plead a cause of action for a breach of fiduciary duty against a trustee, the plaintiff must show the existence of a fiduciary relationship, its breach, and damage

proximately caused by that breach; the absence of any one of these elements is fatal to the cause of action.^[FN2] A beneficiary bringing an action against third parties for injuries to the trust caused by the third parties' active participation in a breach of trust should allege sufficient facts to establish an exception to the general rule against trust beneficiaries having standing in such suits.^[FN3]

The answer of the defendant, in an action or proceeding to enforce the trust or a liability of a trustee for a breach of trust, should, in accordance with the general rule as to the purpose of an answer, apprise the plaintiff of the nature of the defense.^[FN4] The general rule that an affirmative defense in the nature of a new matter or confession and avoidance must be pleaded specially and cannot be shown under the general denial may be applied to an action or proceeding to enforce a trust or liability of a trustee.^[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Beneficiaries who brought action against trustee alleging that trustee violated trust agreement by not apportioning taxes against real estate distributed to trustee also raised issue of whether administration expenses should be apportioned against all of the trust assets; though petition was vague and failed to mention administrative expenses specifically, petition's prayer for relief requested that all issues with respect to accounting and distribution of assets be subject to the jurisdiction of the trial court, and beneficiaries explicitly raised apportionment of administrative expenses in their opposition to trustee's motions to dismiss and for summary judgment. [Hanson v. Valma M. Hanson Revocable Trust, 855 N.E.2d 655 \(Ind. Ct. App. 2006\)](#).

[END OF SUPPLEMENT]

^[FN1] [Waschman v. Wetterman, 14 S.W.2d 886 \(Tex. Civ. App. Austin 1929\)](#).

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^[FN2] [Oates v. City of Lincoln, 93 Cal. App. 4th 25, 112 Cal. Rptr. 2d 790 \(3d Dist. 2001\)](#).

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^[FN3] [Wolf v. Mitchell, Silberberg & Knupp, 76 Cal. App. 4th 1030, 90 Cal. Rptr. 2d 792 \(2d Dist. 1999\)](#).

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^[FN4] [Ambruster v. Ambruster, 326 Mo. 51, 31 S.W.2d 28, 77 A.L.R. 782 \(1930\)](#).

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^[FN5] [Ambruster v. Ambruster, 326 Mo. 51, 31 S.W.2d 28, 77 A.L.R. 782 \(1930\)](#).

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§ 624. Actions for declaration of constructive or resulting trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [261](#), [371\(.5\)](#) to (8)

A constructive trust will not be imposed unless the complaint makes specific allegations of wrongdoing, such as fraud, breach of fiduciary duty, duress, coercion, or mistake.[\[FN1\]](#) The pleading requirements for a cause of action for a constructive trust are facts constituting the underlying cause of action, and specific, identifiable property to which the defendant has title.[\[FN2\]](#) To establish fraud as the basis for a constructive trust, for example, the facts supporting the allegation of fraud must be pleaded with specificity.[\[FN3\]](#) A general claim for money damages will not give rise to a constructive trust,[\[FN4\]](#) whereas allegations setting forth the specific facts as to the existence of a confidential or fiduciary relation, a promise, a transfer in reliance thereon, and unjust enrichment, is sufficient to state a cause of action for the imposition of a constructive trust.[\[FN5\]](#)

While an action for a constructive trust should cite a res on which the trust is to be impressed, the plaintiff seeking such trust is not required at the pleading stage to make detailed assertions as to where the money or property is to be found, provided that the complaint alleges that the money was misappropriated in some specific form.[\[FN6\]](#) In pleading a constructive trust against a transferee, it is not incumbent upon the plaintiff to plead want of notice, the payment of a valuable consideration or detriment, and good faith; such matters are affirmative in character and must be pleaded by the defendant.[\[FN7\]](#)

Where the incorrect cause of action has been asserted based on the evidence asserted, trial courts may properly allow individuals to amend their complaints to allege a constructive trust rather than a resulting trust.[\[FN8\]](#)

[\[FN1\]](#) [Suttles v. Vogel](#), 126 Ill. 2d 186, 127 Ill. Dec. 819, 533 N.E.2d 901 (1988).

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[\[FN2\]](#) [Michaelian v. State Comp. Ins. Fund](#), 50 Cal. App. 4th 1093, 58 Cal. Rptr. 2d 133 (5th Dist. 1996), as modified, (Dec. 11, 1996).

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[\[FN3\]](#) [In re Nova Real Estate Inv. Trust](#), 23 B.R. 62 (Bankr. E.D. Va. 1982).

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[\[FN4\]](#) [Burch & Cracchiolo, P.A. v. Pugliani](#), 144 Ariz. 281, 697 P.2d 674 (1985).

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[\[FN5\] Size v. Size, 276 A.D.2d 329, 714 N.Y.S.2d 266 \(1st Dep't 2000\).](#)

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[\[FN6\] People ex rel. Hartigan v. Candy Club, 149 Ill. App. 3d 498, 103 Ill. Dec. 167, 501 N.E.2d 188 \(1st Dist. 1986\).](#)

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[\[FN7\] Aetna Cas. & Sur. Co. of Hartford, Conn. v. Local Bldg. & Loan Ass'n, 1933 OK 137, 162 Okla. 141, 19 P.2d 612, 86 A.L.R. 526 \(1933\).](#)

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[\[FN8\] Lewis v. Boling, 42 N.C. App. 597, 257 S.E.2d 486 \(1979\).](#)

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§ 625. Right to jury trial

West's Key Number Digest

West's Key Number Digest, [Jury](#) [14\(5\)](#)

West's Key Number Digest, [Trusts](#) [263](#), [273](#)

Since the right to a jury trial does not extend to cases of equity jurisdiction, generally there is no right to a jury trial in actions regarding trusts that are exclusively within equity jurisdiction.[[FN1](#)] There may be a right to trial in some actions involving trusts; for example the remainder beneficiaries of an inter vivos trust are entitled to a jury trial on all factual issues as to whether the trustee has acted in good faith, and with ordinary diligence, while maintaining the trust corpus,[[FN2](#)] or where there is a legal claim such as where beneficiaries claim that the trustee charged a residual trust for inappropriate fees.[[FN3](#)]

A judge in an equitable distribution action may impose a constructive trust on property titled to a third party so long as that third party is made a party to the equitable distribution proceeding and does not ask for a jury.[FN4]

[FN1] [Bank One, N.A. v. Borse](#), 351 Ill. App. 3d 482, 286 Ill. Dec. 6, 812 N.E.2d 1021 (2d Dist. 2004), appeal pending, (Nov. 1, 2004); [Kann v. Kann](#), 344 Md. 689, 690 A.2d 509 (1997).

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[FN2] [In re Messer Trust](#), 457 Mich. 371, 579 N.W.2d 73 (1998).

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[FN3] [Brown v. United Missouri Bank, N.A.](#), 78 F.3d 382 (8th Cir. 1996).

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[FN4] [Sharp v. Sharp](#), 133 N.C. App. 125, 514 S.E.2d 312 (1999), decision rev'd, [351 N.C. 37, 519 S.E.2d 523 \(1999\)](#).

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§ 626. Questions of law or fact

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [263](#), [273](#)

Generally speaking, the existence[FN1] or establishment of a trust is a question of fact, rather than a question of law.[FN2] Interpretation of the words of a trust, however, is a question of law.[FN3] Thus, for

example, whether a trust has been perfectly created in the sense of a completed execution of the settlor's intention to create a trust, through a definite disposition of property in accordance therewith, is largely a question of fact in each case;[\[FN4\]](#) the settlor's intention is a question of fact[\[FN5\]](#) to be determined by competent evidence, and not by rules of law.[\[FN6\]](#)

Whether or not a constructive trust exists is a question of fact,[\[FN7\]](#) since, in particular, there is no set formula by which the existence of a confidential relationship may be determined, so whether two individuals have a confidential relationship is a question of fact.[\[FN8\]](#) The proper amount to be imposed as part of a constructive trust is also a question of fact, akin to a determination of damages.[\[FN9\]](#)

Ambiguous language in a trust presents a mixed question of law and fact, as to which an appellate court will not substitute its judgment for that of the trial justice unless reasonable minds would be impelled to a single conclusion.[\[FN10\]](#) For example, whether a trust document is ambiguous, so as to authorize admission of extraneous evidence to determine the settlor's intent, is ordinarily a question of law.[\[FN11\]](#) Once the court determines that the trust document is ambiguous, an interpretation of the document presents a question of fact which focuses upon the intent of the parties.[\[FN12\]](#)

A question of whether a trustee acted with gross negligence is for the trier of fact.[\[FN13\]](#) What is a reasonable request for access to trust records is a question of fact.[\[FN14\]](#)

[\[FN1\]](#) Thompson v. Orcutt, 70 Conn. App. 427, 800 A.2d 530 (2002); In re Estate of West, 252 Neb. 166, 560 N.W.2d 810 (1997).

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[\[FN2\]](#) Matter of Estate of Binder, 386 N.W.2d 910 (N.D. 1986) (where trust was created by parties to agreement in property for benefit of children).

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[\[FN3\]](#) In re Estate of West, 252 Neb. 166, 560 N.W.2d 810 (1997).

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[\[FN4\]](#) Dougherty v. Dougherty, 175 Md. 441, 2 A.2d 433 (1938); Mills v. Hayden, 128 Wash. 67, 221 P. 994, 34 A.L.R. 1372 (1924).

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[\[FN5\]](#) Eckes v. Richland County Social Services, 2001 ND 16, 621 N.W.2d 851 (N.D. 2001); Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 (1986).

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[\[FN6\]](#) Lanoue v. Commissioner, Social Sec. Admin., 146 N.H. 504, 774 A.2d 1236 (2001).

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[\[FN7\]](#) Davis v. Barnfield, 833 So. 2d 58 (Ala. Civ. App. 2002); Holley v. Holley, 660 So. 2d 608 (Ala. Civ. App. 1995).

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[\[FN8\]](#) Lucas v. Grant, 61 Ark. App. 29, 962 S.W.2d 388 (1998).

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[\[FN9\]](#) Giulietti v. Giulietti, 65 Conn. App. 813, 784 A.2d 905 (2001).

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[\[FN10\]](#) In re DiBiasio, 705 A.2d 972 (R.I. 1998).

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[\[FN11\]](#) Matter of Inter Vivos Trust Established by Thomas S. Turner, 116 Idaho 913, 782 P.2d 36 (Ct. App. 1989).

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[\[FN12\] Carl H. Christensen Family Trust v. Christensen, 133 Idaho 866, 993 P.2d 1197 \(1999\).](#)

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[\[FN13\] Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 \(1999\).](#)

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[\[FN14\] Salem v. Lane Processing Trust, 72 Ark. App. 340, 37 S.W.3d 664 \(2001\).](#)

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§ 627. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [85.1](#), [106.1](#)

Whether a trust exists is to be determined from the proof in a case.[FN1] The proof in this regard must not vary from the pleadings, but should be allowed on the issues as framed by the pleadings and in accordance with the law of evidence,[FN2] and findings must be based on the evidence in the case.[FN3]

In an action brought by a beneficiary charging a breach of trust, the beneficiary bears the burden to prove in what respects the trustee breached that duty.[FN4] While the beneficiary has the initial burden of proving the existence of the fiduciary duty and the trustee's failure to perform it,[FN5] once the trust beneficiary has established a prima facie case by demonstrating the trustees' breach of fiduciary duty, the burden of explanation or justification shifts to the fiduciaries.[FN6] The trustee must show the use of due care, diligence, and skill with respect to trust investments. In short, the trustee must prove it acted with the utmost good faith toward the beneficiary and made full disclosure of all facts related to the transactions at issue.[FN7]

The burden of proof in a claim for undue influence is on the party asserting it.[FN8] When a question arises as to the fairness of a transaction between the trustee and the beneficiary of the trust, the trustee has the burden of establishing the fairness thereof.[FN9] Where the trustee seeks to escape liability for a breach of trust or improper act, transaction, or omission in the administration of the trust, on the ground of the consent or

approval of the beneficiary to such act, transaction, or omission, he has the burden of proof on the issue,[FN10] as well as the burden to show fairness on his or her part in obtaining the consent or approval of the beneficiary.[FN11] However, the burden of proof of incompetence of a beneficiary to assent, or waive an objection, to an impropriety by the trustee in the administration of a trust is on the one asserting the incompetence.[FN12] Thus, a trustor's guardian, as the party asserting that the trustor is incompetent, has the burden of showing the trustor's lack of capacity.[FN13]

The burden of proof is on a trustee to exclude personal liability on a contract allegedly entered into on behalf of beneficiaries of the trust.[FN14] The burden of persuasion to justify the upholding of a transaction by an interested trustee rests on the fiduciary, not the beneficiary.[FN15]

[FN1] [Trubey v. Pease, 240 Ill. 513, 88 N.E. 1005 \(1909\).](#)

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[FN2] [Yates v. Yates, 255 Ill. 66, 99 N.E. 360 \(1912\).](#)

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[FN3] [Johnston v. Bee, 84 W. Va. 532, 100 S.E. 486, 7 A.L.R. 252 \(1919\).](#)

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[FN4] [Masters v. Bissett, 101 Or. App. 163, 790 P.2d 16 \(1990\)](#), opinion adhered to as modified on other grounds on reconsideration, [102 Or. App. 289, 794 P.2d 445 \(1990\)](#).

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[FN5] [LaMonte v. Sanwa Bank California, 45 Cal. App. 4th 509, 52 Cal. Rptr. 2d 861, 29 U.C.C. Rep. Serv. 2d 1263 \(2d Dist. 1996\).](#)

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[FN6] [Confederated Tribes of Warm Springs Reservation of Oregon v. U.S., 248 F.3d 1365 \(Fed. Cir. 2001\)](#); [LaMonte v. Sanwa Bank California, 45 Cal. App. 4th 509, 52 Cal. Rptr. 2d 861, 29 U.C.C. Rep. Serv. 2d 1263 \(2d Dist. 1996\).](#)

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[FN7] [Van de Kamp v. Bank of America, 204 Cal. App. 3d 819, 251 Cal. Rptr. 530 \(2d Dist. 1988\).](#)

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[FN8] [Masters v. Bissett, 101 Or. App. 163, 790 P.2d 16 \(1990\)](#), opinion adhered to as modified on other grounds on reconsideration, [102 Or. App. 289, 794 P.2d 445 \(1990\)](#).

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[FN9] [Peyton v. William C. Peyton Corp., 23 Del. Ch. 321, 7 A.2d 737, 123 A.L.R. 1482 \(1939\)](#); [In re Estate of Kaminski, 200 Ill. App. 3d 309, 146 Ill. Dec. 179, 558 N.E.2d 142 \(1st Dist. 1990\)](#); [Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 \(1917\)](#); [Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 \(1946\).](#)

- Generally, as to dealings between the trustee and the beneficiary, see [§ 355](#).

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[FN10] [White v. Sherman, 168 Ill. 589, 48 N.E. 128 \(1897\).](#)

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[FN11] [Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 \(1917\)](#); [Herpolsheimer v. Michigan Trust Co., 261 Mich. 209, 246 N.W. 81 \(1933\)](#), aff'd, [248 N.W. 610 \(Mich. 1933\)](#).

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[FN12] [In re Harper's Estate, 98 Mont. 356, 40 P.2d 51 \(1934\).](#)

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[\[FN13\] Hilbert v. Benson, 917 P.2d 1152 \(Wyo. 1996\).](#)

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[\[FN14\] Nacol v. McNutt, 797 S.W.2d 153 \(Tex. App. Houston 14th Dist. 1990\), writ denied, \(Feb. 20, 1991\).](#)

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[\[FN15\] Stegemeier v. Magness, 728 A.2d 557 \(Del. 1999\).](#)

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§ 628. As to existence of trust, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [85.1](#) to [88](#)

As a rule, the burden of proving the existence of a trust is on the party asserting its existence,[\[FN1\]](#) including proof of an express trust,[\[FN2\]](#) as well as trust imposed by the operation of law, such as resulting and constructive trusts.[\[FN3\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Burden of establishing existence of trust relationship is on party claiming the benefit of such a relationship. [In re DiStefano, 442 B.R. 146 \(Bankr. S.D. Fla. 2010\).](#)

[END OF SUPPLEMENT]

[FN1] [In re Graham](#), 111 B.R. 801 (Bankr. E.D. Ark. 1990); [Kinghorn v. Hughes](#), 297 Ark. 364, 761 S.W.2d 930 (1988); [Sacre v. Sacre](#), 143 Me. 80, 55 A.2d 592, 173 A.L.R. 1261 (1947); [Matter of Estate of Binder](#), 386 N.W.2d 910 (N.D. 1986); [Hall v. Pierce](#), 210 Or. 98, 307 P.2d 292, 65 A.L.R.2d 316 (1957); [Warner v. Burlington Federal Sav. & Loan Ass'n](#), 114 Vt. 463, 49 A.2d 93, 168 A.L.R. 1265 (1946).

- One who asserts that the ownership of property is burdened with a parol trust has the burden of establishing such trust. [Somers v. Bogart](#), 749 S.W.2d 202 (Tex. App. Dallas 1988), writ denied, (Sept. 14, 1988) and decision approved, [762 S.W.2d 577 \(Tex. 1988\)](#).

- As to the burden of proof in an action for an accounting by a trustee, see [§ 390](#).

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[FN2] [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church](#), 370 Md. 152, 803 A.2d 548 (2002), cert. denied, [537 U.S. 1171](#), 123 S. Ct. 994, 154 L. Ed. 2d 913 (2003).

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[FN3] [§ 629](#).

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§ 629. Proceeding to impose trust by operation of law

West's Key Number Digest

The burden of proof of establishing a constructive or a resulting trust is upon the requesting party.[\[FN1\]](#) In particular, the confidential relationship needed for the imposition of a constructive trust is not presumed and the burden of proving of such a relationship is upon the party asserting its existence.[\[FN2\]](#) Where a resulting trust is based on payment of consideration by one person for property conveyed in the name of another, the party seeking to establish the trust has the burden of proving the fact that he or she paid the purchase price.[\[FN3\]](#) Thereafter, the burden of going forward with the evidence shifts to the grantee under the deed who must rebut the presumption of the payor's intention that the grantee hold the property in favor of the payor.[\[FN4\]](#)

Where the existence of a special confidential or fiduciary relationship is a necessary factor in the determination whether such a trust should be declared, the burden is on the party seeking to impose the constructive or resulting trust to show the existence of such relationship.[\[FN5\]](#) However, where such a confidential relationship is established, a presumption of unfairness sometimes arises, and the burden shifts to the defendant to prove the absence of unfairness.[\[FN6\]](#) Nevertheless, the party seeking to impose a constructive trust for the violation of a confidential relationship must, in some jurisdictions, show the exercise of fraud or undue influence meeting the required standard of proof in order to be entitled to relief.[\[FN7\]](#) Once the plaintiff has established the confidential or fiduciary relationship and a breach of the resulting duty, in some jurisdictions the burden shifts to the defendant to prove good faith, the absence of undue influence, or any other affirmative defense, which would bar the creation of the constructive trust.[\[FN8\]](#)

Unjust enrichment may serve as a basis for the operation of a constructive trust, and once the unjust enrichment is established, the burden is on the claimant to trace the funds to identifiable product.[\[FN9\]](#) Although partial payment of the consideration for property may give rise to a resulting trust to the extent of the payment, the burden is on the party who asserts a pro tanto trust to establish with definiteness and specificity the proportional amount contributed.[\[FN10\]](#)

[\[FN1\]](#) [Lucas v. Grant, 61 Ark. App. 29, 962 S.W.2d 388 \(1998\); In re McKay, 110 B.R. 764 \(Bankr. W.D. Pa. 1990\)](#) (constructive trust); [Waller v. Waller, 15 Ark. App. 336, 693 S.W.2d 61 \(1985\); Farrah v. Farrah, 187 Conn. 495, 446 A.2d 1075 \(1982\)](#) (resulting trust); [Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\)](#).

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[\[FN2\]](#) [Kampschroeder v. Kampschroeder, 20 Kan. App. 2d 361, 887 P.2d 1152 \(1995\)](#).

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[\[FN3\]](#) [Nacol v. McNutt, 797 S.W.2d 153 \(Tex. App. Houston 14th Dist. 1990\)](#), writ denied, (Feb. 20, 1991); [Farrah v. Farrah, 187 Conn. 495, 446 A.2d 1075 \(1982\); Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\)](#).

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[\[FN4\]](#) [Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\)](#).

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[\[FN5\]](#) [Rollins by Rollins v. Metropolitan Life Ins. Co., 912 F.2d 911 \(7th Cir. 1990\)](#) (constructive trust).

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[\[FN6\]](#) [Mattes v. Olearain, 759 P.2d 1177 \(Utah Ct. App. 1988\)](#).

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[\[FN7\]](#) [Gitto v. Gitto, 239 Mont. 47, 778 P.2d 906 \(1989\)](#).

- As to standard of proof, see [§ 646](#).

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[\[FN8\] Rollins by Rollins v. Metropolitan Life Ins. Co., 912 F.2d 911 \(7th Cir. 1990\).](#)

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[\[FN9\] Dixon v. Smith, 119 Ohio App. 3d 308, 695 N.E.2d 284 \(3d Dist. Logan County 1997\).](#)

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[\[FN10\] Lloyds Bank California v. Wells Fargo Bank, 187 Cal. App. 3d 1038, 232 Cal. Rptr. 339 \(1st Dist. 1986\).](#)

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§ 630. Pursuit of trust property; wrongfully converted property

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [372](#), [372\(.5\)](#)

The burden of proof of tracing and identification of trust property is on one seeking to follow it.[\[FN1\]](#) Strict identification is required for tracing trust fund money to property, [\[FN2\]](#) thus the burden of proof of the presence of trust funds in a private bank account of the trustee in which they have been deposited, as a basis for their recovery as against general creditors of the trustee, is on the one asserting such presence.[\[FN3\]](#) While the successful proponent of a constructive trust bears the initial burden of tracing the trust's assets and establishing the amount of its intangible assets, to the extent that defendants have commingled their own property with the trust's assets and sought recovery of such property, the defendants have the burden of proving how much of the commingled funds they own personally.[\[FN4\]](#)

The burden is on a beneficiary to show that a general estate of the trustee which passed to a successor in interest was increased by trust assets, where the trustee converted the trust assets into his or her general estate, and the beneficiary is seeking to impress the trust on the general estate of the trustee in the hands of his or her successor in interest.^[FN5] Under the view that trust property or funds must be traced into specific property or funds in the hands of such a successor before they can be specifically recovered, the beneficiary of a trust has the affirmative burden of tracing and identifying the trust property or funds into such specific property or funds.^[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Custodians of children's Uniform Transfers to Minors Act (UTMA) funds bore the burden of proving that each transfer from funds was used for a proper purpose, rather than children having to bear burden of proving that UTMA funds were missing, in action for accounting and compensatory damages based on custodians' transfer of UTMA funds; it was far simpler for custodian to record his transactions as he made them than for the beneficiary to attempt to reconstruct the transactions after the fact. West's V.C.A. § 31–37 et seq. *Carlson v. Wells*, 281 Va. 173, 705 S.E.2d 101 (2011).

[END OF SUPPLEMENT]

^[FN1] *Schuyler v. Littlefield*, 232 U.S. 707, 34 S. Ct. 466, 58 L. Ed. 806 (1914).

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^[FN2] *In re Commissioner of Banks and Real Estate*, 327 Ill. App. 3d 441, 261 Ill. Dec. 775, 764 N.E.2d 66 (1st Dist. 2001), appeal denied, 198 Ill. 2d 592, 262 Ill. Dec. 619, 766 N.E.2d 239 (2002) and appeal denied, 198 Ill. 2d 616, 264 Ill. Dec. 325, 770 N.E.2d 219 (2002).

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^[FN3] *Heidelberg v. Campbell*, 95 Wash. 661, 164 P. 247 (1917).

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^[FN4] *Tauber v. Com. ex rel. Kilgore*, 263 Va. 520, 562 S.E.2d 118 (2002), cert. denied, 537 U.S. 1002, 123 S. Ct. 496, 154 L. Ed. 2d 398 (2002).

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^[FN5] *Holbrook Irr. Dist. v. First State Bank of Cheraw*, 84 Colo. 157, 268 P. 523 (1928); *Andrew v. State Bank of New Hampton*, 205 Iowa 1064, 217 N.W. 250 (1928); *Apple v. Hert*, 1927 OK 12, 122 Okla. 153, 252 P. 823, 55 A.L.R. 1271 (1927) (estate passing into hands of administrator).

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^[FN6] *Schuyler v. Littlefield*, 232 U.S. 707, 34 S. Ct. 466, 58 L. Ed. 806 (1914); *Hornick, More & Porterfield v. Farmers' & Merchants' Bank*, 56 S.D. 18, 227 N.W. 375, 82 A.L.R. 16 (1929).

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§ 631. Action to terminate trust or declare trust invalid

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [372](#), [372\(.5\)](#)

The burden of proving the termination of a trust, where the trust is proved or admitted and its termination is asserted, is on the party making such assertion, and in particular, where an effort is made to terminate a trust because its purposes are not being carried out as the testator or settlor directed, the burden of proving such noncompliance is on the moving party.[FN1] In an action for declaratory and injunctive relief based on the alleged invalidity of a trust agreement due to undue influence in the procurement and execution of such agreement, the plaintiff, to raise a presumption of undue influence sufficient to bring the question before the jury, must prove that there was a confidential relationship between the settlor and the beneficiaries; that the beneficiaries had a dominant and controlling influence on the settlor; and that there was undue activity by the dominant parties in procuring the execution of the trust.[FN2]

CUMULATIVE SUPPLEMENT

Cases:

In a trial setting, the party claiming that a trust document was executed by an individual without the requisite capacity has the burden to demonstrate such lack of capacity; however, in the context of summary judgment, the movant has the initial burden of making a prima facie showing of mental capacity. [Kibbee v. First Interstate Bank, 2010 WY 143, 242 P.3d 973 \(Wyo. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Scully v. Scully, 162 Neb. 368, 76 N.W.2d 239 \(1956\); In re Patterson's Estate, 333 Pa. 92, 3 A.2d 320, 120 A.L.R. 967 \(1939\).](#)

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[\[FN2\] Crump v. Moss, 517 So. 2d 609 \(Ala. 1987\).](#)

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§ 632. Good faith of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [86](#), [107](#), [372\(1\)](#)

There is presumption that the trustee has acted in good faith, and those who question the trustee's actions and seek to establish a breach of trust, have burden of proof.[\[FN1\]](#) Thus, in the absence of evidence to the contrary, the law will presume that a trustee intends to perform, and not violate, his or her duties,[\[FN2\]](#) and that the trustee faithfully administers the trust.[\[FN3\]](#)

It is presumed that the trustee does not traffic in or misappropriate the trust property or funds,[\[FN4\]](#) and that the trustee does not deal for his or her own profit with the property or moneys of a trust, expending and even wasting the same at his pleasure.[\[FN5\]](#) It is also presumed that a trustee in accepting a trust knows the duties that he or she undertakes, and that if the trustee transgresses, the trustee must abide the consequences.[\[FN6\]](#)

If a trustee fails to keep proper accounts, all doubts will be resolved against the trustee and not in the trustee's favor.[\[FN7\]](#) When a trustee's duty to act with the utmost fidelity and good faith with respect to the administration of a trust is breached, the presumption arises that the transaction at issue was fraudulent.[\[FN8\]](#) If a trustee places itself in the position where its interests might conflict with the interests of the beneficiary, the

law presumes that the trustee acted disloyally; an inquiry into such matters as whether the transaction was fair is foreclosed and the burden shifts to the trustee to show it received no benefit, and it is not necessary for the beneficiary to show that the fiduciary acted in bad faith, gained advantage, fair or unfair, or that the beneficiary was harmed.[FN9]

[FN1] [Salem v. Lane Processing Trust, 72 Ark. App. 340, 37 S.W.3d 664 \(2001\).](#)

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[FN2] [Smith v. Fuller, 86 Ohio St. 57, 99 N.E. 214 \(1912\).](#)

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[FN3] [U.S. Fidelity & Guaranty Co. v. Mississippi Valley Trust Co., 153 S.W.2d 752 \(Mo. Ct. App. 1941\); Rice v. People's Sav. Bank, 140 Wash. 20, 247 P. 1009 \(1926\).](#)

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[FN4] [U.S. Fidelity & Guaranty Co. v. Mississippi Valley Trust Co., 153 S.W.2d 752 \(Mo. Ct. App. 1941\).](#)

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[FN5] [Genesee Wesleyan Seminary v. U.S. Fidelity & Guaranty Co., 247 N.Y. 52, 159 N.E. 720, 56 A.L.R. 964 \(1928\).](#)

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[FN6] [Beaumont v. Faubus, 239 Ark. 801, 394 S.W.2d 478 \(1965\); In re Trusteeship of Stone, 138 Ohio St. 293, 20 Ohio Op. 369, 34 N.E.2d 755, 134 A.L.R. 1306 \(1941\).](#)

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[FN7] [Confederated Tribes of Warm Springs Reservation of Oregon v. U.S., 248 F.3d 1365 \(Fed. Cir. 2001\).](#)

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[FN8] [NC Illinois Trust Co. v. First Illini Bancorp, Inc., 323 Ill. App. 3d 254, 256 Ill. Dec. 925, 752 N.E.2d 1167 \(3d Dist. 2001\).](#)

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[FN9] [Ledbetter v. First State Bank & Trust Co., 85 F.3d 1537 \(11th Cir. 1996\) \(applying Georgia law\).](#)

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§ 633. In actions regarding resulting or constructive trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [86](#), [107](#), [372\(1\)](#)

Generally, a resulting trust will be presumed in favor of one who provides a purchase money for land when title is taken in the name of another.^[FN1] As a general rule, equity will presume, absent contrary evidence, that the person supplying the purchase money for the property intends to retain a beneficial interest in the property and that title is placed in the name of another for some incidental reason, and a court therefore may impose a resulting trust requiring the person with the legal title to hold that title for the benefit of the person supplying the purchase money.^[FN2]

There is no presumption that a "confidential relationship," the abuse of which between the grantee and the grantor of real property may result in the impression of a constructive trust upon the property, exists between unmarried cohabitants.^[FN3]

^[FN1] [Bressler v. Dudley](#), 694 So. 2d 1355 (Ala. Civ. App. 1996).

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^[FN2] [Hudak v. Procek](#), 806 A.2d 140 (Del. 2002).

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^[FN3] [Davis v. Barnfield](#), 833 So. 2d 58 (Ala. Civ. App. 2002).

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§ 634. As to particular acts and dealings

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 86, 107, 372(1)

In the relationship between a trustee and a beneficiary, a confidential relationship may be presumed as a matter of law,[\[FN1\]](#) however, a confidential relationship alone is not enough to raise a presumption of a trust beneficiary's undue influence over the settlor; there must be facts and circumstances tending to show that undue influence was an active factor in the transaction.[\[FN2\]](#) In situations concerning transfers in legal documents such as wills or trusts where the beneficiaries will not acquire any benefit until the grantor or settlor dies, a presumption of undue influence will arise when three conditions are met:[\[FN3\]](#)

(1) confidential relationship exists between favored beneficiary and testator/settlor;

(2) beneficiary exercises dominant and controlling influence over testator/settlor; and

(3) there is undue activity in procuring execution of legal document that creates benefit.

In construing the intent of a trust grantor, the grantor is presumed to know and intend the legal effect of the language used, and the court must give the words used their usual, ordinary, and natural meaning, unless a contrary meaning appears in the instrument.[\[FN4\]](#)

In the case of one who acts beyond his or her powers as an executor but within his or her powers as a trustee, it will be presumed that he or she acts as trustee.[\[FN5\]](#) There may be a presumption that any dealing between a trustee and a beneficiary is unfair to the beneficiary[\[FN6\]](#) or resulted from undue influence.[\[FN7\]](#)

The court may be aided in ascertaining the intent of the settlor of a trust by the use of presumptions and canons of construction.[\[FN8\]](#) Where it is assumed that a settlor's son procured the trust and that the settlor and the settlor's siblings benefitted from this procurement, a presumption that trust was result of undue influence arises and the burden of proof then shifts to the proponents of the trust to prove beyond a reasonable doubt that the settlor had both the mental capacity and the freedom of will to render the trust legally valid.[\[FN9\]](#)

The lapse of years and the death of all the original parties may be deemed a sufficient basis upon which to presume the discharge and extinguishment of a trust proved by strong circumstances once to have existed.[\[FN10\]](#)

[\[FN1\]](#) [Upman v. Clarke, 359 Md. 32, 753 A.2d 4 \(2000\).](#)

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[\[FN2\]](#) [Tobias v. Korman, 141 S.W.3d 468 \(Mo. Ct. App. E.D. 2004\).](#)

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[\[FN3\]](#) [Ex parte Henderson, 732 So. 2d 295 \(Ala. 1999\).](#)

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[\[FN4\] A.G. Edwards Trust Co. v. Miller, 59 S.W.3d 550 \(Mo. Ct. App. E.D. 2001\).](#)

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[\[FN5\] Springfield Nat. Bank of Springfield v. Couse, 288 Mass. 262, 192 N.E. 529, 94 A.L.R. 1460 \(1934\).](#)

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[\[FN6\] Colton v. Stanford, 82 Cal. 351, 23 P. 16 \(1890\); Peyton v. William C. Peyton Corp., 23 Del. Ch. 321, 7 A.2d 737, 123 A.L.R. 1482 \(1939\).](#)

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[\[FN7\] In re Estate of Kaminski, 200 Ill. App. 3d 309, 146 Ill. Dec. 179, 558 N.E.2d 142 \(1st Dist. 1990\).](#)

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[\[FN8\] In re Asserson, 184 Misc. 2d 480, 707 N.Y.S.2d 821 \(Sur. Ct. 2000\).](#)

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[\[FN9\] Noland v. Noland, 330 Ark. 660, 956 S.W.2d 173 \(1997\).](#)

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[\[FN10\] Creek v. Union Nat. Bank in Kansas City, 266 S.W.2d 737 \(Mo. 1954\).](#)

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§ 635. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [87](#), [108](#), [372\(2\)](#)

The written trust instrument creating a trust, if certain and definite in its contents, is the best evidence of the intention and meaning of the parties, and unless necessity arising from excusable inability to produce such instrument exists, secondary proof is not admissible.[FN1] When a trust instrument is fully integrated and is not ambiguous on its face, extrinsic evidence is not admissible to establish the settlor's intent.[FN2] However, extrinsic evidence is admissible to clarify the terms of a trust or remove ambiguities,[FN3] particularly when there is a patent ambiguity in the trust instrument,[FN4] such as any ambiguities regarding the settlor's intent to create a trust.[FN5] Extrinsic evidence, under these circumstances, may be admitted but used only to explain, and not to contradict, the instrument.[FN6] Where, for example, a patent ambiguity is found on the face of a testamentary trust instrument being considered, extrinsic evidence of objective, operative facts concerning events in the testator's life may be introduced in evidence in order to ascertain his or her exact intent, and to give precise and explicit meaning to the language used in the instrument.[FN7]

In cases where the ambiguity is latent, that is, where the instrument is unambiguous on its face, but becomes open to more than one interpretation when applied to the factual circumstances, not only is evidence of surrounding facts and circumstances admissible, but also, in addition, a testator's declaration of intent is admissible to explain the ambiguity; testimony regarding declarations made by the testator concerning such matters as the identity of a beneficiary, the identity of ambiguously described property, or to rebut some equity or presumption is admissible. Such evidence may include the testimony of a scrivener regarding the testator's intentions.[FN8]

In a suit predicated on a breach of duty by a trustee, evidence of the trustee's good faith in the transaction or matter alleged to constitute or involve the breach of duty is admissible.[FN9] The admission of testimony regarding ordinary standards of trust administration is at the discretion of the trial court.[FN10]

CUMULATIVE SUPPLEMENT

Cases:

Extrinsic evidence of the facts and circumstances known to the settlor and existing at the time of execution may be considered by a court when construing a trust instrument. [University of Southern Indiana Foundation v. Baker, 843 N.E.2d 528 \(Ind. 2006\).](#)

[END OF SUPPLEMENT]

[FN1] [Lambdin v. Dantzebecker, 169 Md. 240, 181 A. 353, 102 A.L.R. 277 \(1935\).](#)

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[FN2] [Jarrett v. U.S. Nat. Bank of Oregon, 81 Or. App. 242, 725 P.2d 384 \(1986\); Elmore v. Virginia Nat. Bank, 232 Va. 310, 350 S.E.2d 603 \(1986\).](#)

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[FN3] [Meyer v. Northern Indiana Bank and Trust Co., 490 N.E.2d 400 \(Ind. Ct. App. 3d Dist. 1986\); In re Merlin A. Abadie Inter Vivos Trust, 483 So. 2d 1292 \(La. Ct. App. 4th Cir. 1986\).](#)

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[FN4] [Matter of Frank and Lotus Huxtable Living Trust, 243 Kan. 531, 757 P.2d 1262 \(1988\).](#)

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[FN5] [Matter of Inter Vivos Trust Established by Thomas S. Turner, 116 Idaho 913, 782 P.2d 36 \(Ct. App. 1989\); Re Trust by Bush, 249 Minn 36, 81 NW2d 615; Brooks v. Ramsey County Community Human Services Dept., 405 N.W.2d 432 \(Minn. Ct. App. 1987\).](#)

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[\[FN6\] In re Merlin A. Abadie Inter Vivos Trust, 483 So. 2d 1292 \(La. Ct. App. 4th Cir. 1986\).](#)

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[\[FN7\] Schupbach v. Schupbach, 760 S.W.2d 918 \(Mo. Ct. App. S.D. 1988\).](#)

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[\[FN8\] Schupbach v. Schupbach, 760 S.W.2d 918 \(Mo. Ct. App. S.D. 1988\).](#)

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[\[FN9\] Young v. Hood, 209 N.C. 801, 184 S.E. 823 \(1936\).](#)

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[\[FN10\] Allard v. Pacific Nat. Bank, 99 Wash. 2d 394, 663 P.2d 104 \(1983\).](#)

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§ 636. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [88](#), [109](#), [372\(2\)](#)

Under the parol evidence rule, parol evidence of an express trust is generally inadmissible to vary, add to, or contradict a written instrument giving rise to an express trust, or affecting such a trust.[\[FN1\]](#) Parol evidence cannot be the basis for an oral express trust which would be violative of the statute of frauds.[\[FN2\]](#) However, parol evidence is admissible to show the existence of a constructive or resulting trust,[\[FN3\]](#) and involuntary trusts arising independently of any express contract,[\[FN4\]](#) and to establish a trust in personalty.[\[FN5\]](#)

Furthermore, parol evidence is admissible to explain an instrument in regard to whether it gives rise to a trust and to explain a trust created by a writing.[FN6]

Where parol evidence is admissible against one to prove a trust, it is admissible against his or her successors in legal title or interest unless they are protected as bona fide purchasers for value.[FN7]

[FN1] Bayless v. Wheeler Kelly Hagny Trust Co., 153 Kan. 81, 109 P.2d 108 (1941); Lambdin v. Dantzebecker, 169 Md. 240, 181 A. 353, 102 A.L.R. 277 (1935); Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 (1986).

[FN2] Galford v. Burkhouse, 330 Pa. Super. 21, 478 A.2d 1328 (1984).

[FN3] Stonely v. Moore, 851 So. 2d 905 (Fla. Dist. Ct. App. 3d Dist. 2003); In re Estate of Vittorio, 546 N.W.2d 751 (Minn. Ct. App. 1996).

- For full discussion of admissibility of parol evidence in constructive and resulting trust cases, see [§ 638](#).

[FN4] In re Estate of McDermott, 2002 MT 164, 310 Mont. 435, 51 P.3d 486 (2002).

[FN5] In re Estate of Pearce, 481 So. 2d 69 (Fla. Dist. Ct. App. 4th Dist. 1985).

[FN6] Union Pac. R. Co. v. Durant, 95 U.S. 576, 24 L. Ed. 391 (1877); Bartlett v. Dumaine, 128 N.H. 497, 523 A.2d 1 (1986); All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741, 159 A.L.R. 981 (1942).

[FN7] Chandler v. Georgia Chemical Works, 182 Ga. 419, 185 S.E. 787, 105 A.L.R. 837 (1936) (admissibility against a remote grantee where possession by a grantor was regarded as constructive notice).

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§ 637. As to terms, purposes, and beneficiaries in express trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [372\(2\)](#)

The parol evidence rule does not operate to exclude parol evidence which is merely explanatory of the terms, purposes, and beneficiaries of a trust.[FN1] Such evidence is admissible to explain an ambiguity as to reservation of a power to revoke a trust.[FN2] The use of parol evidence to explain an ambiguity in the language of an express trust presents a question for trier of fact. [FN3]

The fact that a condition upon the existence or anticipation of which a trust is created ceases to, or never does, exist cannot be proved by parol evidence as a ground for setting aside a trust on the theory that the trustor intended the trust to be limited by such a condition, where the trust is clear and unambiguous in its terms.[FN4] In this connection, while parol evidence cannot be introduced to show the motive or purpose of the settlor of a testamentary trust, this is not so as to the motive or purpose of the settlor of a trust inter vivos who is still living and is the sole beneficiary.[FN5]

[FN1] [Kollmann v. Latonia Deposit Bank & Trust Co., 275 Ky. 347, 121 S.W.2d 721 \(1938\).](#)

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[FN2] [Lambdin v. Dantzebecker, 169 Md. 240, 181 A. 353, 102 A.L.R. 277 \(1935\)](#) (notwithstanding the patent character of the ambiguity).

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[FN3] [Ovrevik v. Ovrevik, 254 Ga. App. 756, 564 S.E.2d 8 \(2002\).](#)

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[FN4] [Carpenter v. Carpenter's Trustee, 119 Ky. 582, 27 Ky. L. Rptr. 206, 84 S.W. 737 \(1905\).](#)

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[FN5] [Fidelity & Columbia Trust Co. v. Gwynn, 206 Ky. 823, 268 S.W. 537, 38 A.L.R. 937 \(1925\).](#)

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§ 638. Admissibility in cases involving resulting and constructive trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 88, [109](#), [372\(2\)](#)

Parol evidence may be introduced to establish a constructive^[FN1] or resulting trust,^[FN2] since these trusts arise by operation of law and are expressly excluded from the statute of frauds.^[FN3] Indeed, it is the nature of resulting trusts that they are normally established by parol evidence.^[FN4] In particular, constructive or resulting trusts involving real estate may be based on parol evidence,^[FN5] and the presumptions regarding the creation of a resulting trust by a purchaser who titles property in another's name is rebuttable on a showing of the purchaser's intent to the contrary through parol evidence.^[FN6]

Parol evidence is admissible to show the circumstances under which a resulting trust arose. For example, parol evidence concerning the circumstances surrounding the execution of a deed is admissible to challenge legal title and establish a resulting trust.^[FN7] Since a constructive trust, which is based on unjust enrichment, is construed from the circumstances surrounding the transaction, parol evidence of the agreement is admissible to prove unjust enrichment; the proving of the contract is incidental. Thus, where the plaintiff is not attempting to establish, challenge, or modify the terms of the contract, neither the parol evidence rule nor the best evidence rule is applicable.^[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Parol evidence is admissible in an action to establish or enforce a constructive trust. [Morfin v. Estate of Martinez](#), 831 N.E.2d 791 (Ind. Ct. App. 2005).

[END OF SUPPLEMENT]

^[FN1] [Muhm v. Davis](#), 580 S.W.2d 98 (Tex. Civ. App. Houston 1st Dist. 1979), writ refused n.r.e., (Sept. 12, 1979); [Ashton v. Ashton](#), 733 P.2d 147 (Utah 1987).

[\[FN2\] Saddler v. Saddler, 59 S.W.3d 96 \(Tenn. Ct. App. 2000\); Roach v. Renfro, 989 S.W.2d 335 \(Tenn. Ct. App. 1998\); Matter of Hock's Estate, 655 P.2d 1111 \(Utah 1982\); Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\).](#)

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[\[FN3\] Jahnigen v. Smith, 143 Md. App. 547, 795 A.2d 234 \(2002\), cert. denied, 369 Md. 660, 802 A.2d 439 \(2002\).](#)

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[\[FN4\] Smalling v. Terrell, 943 S.W.2d 397 \(Tenn. Ct. App. 1996\).](#)

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[\[FN5\] Stonely v. Moore, 851 So. 2d 905 \(Fla. Dist. Ct. App. 3d Dist. 2003\).](#)

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[\[FN6\] Jocoy v. Jocoy, 349 S.C. 441, 562 S.E.2d 674 \(Ct. App. 2002\); Bowen v. Bowen, 352 S.C. 494, 575 S.E.2d 553 \(2003\).](#)

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[\[FN7\] Galford v. Burkhouse, 330 Pa. Super. 21, 478 A.2d 1328 \(1984\).](#)

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[\[FN8\] Simpson v. Dailey, 496 A.2d 126 \(R.I. 1985\).](#)

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§ 639. Resulting and constructive trusts—Consideration

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [88](#), [109](#), [372\(2\)](#)

The fact that consideration came from another, so as to raise a resulting trust, may be proved by parol evidence, and this is so even where the instrument of conveyance recites consideration from the grantee,[\[FN1\]](#) since the statute of frauds is inapplicable to proof of a resulting trust.[\[FN2\]](#)

One exception to the general rule that parol evidence may be admitted to prove the existence of a resulting trust is that, as a matter of law, parol evidence may not be admitted to prove the existence of a resulting trust in favor of a deed's grantor.[\[FN3\]](#) Thus, parol evidence of consideration is not admissible as between a grantor and his or her grantee, in contradiction of a recital of consideration in the deed, in order to show a voluntary conveyance and to raise a resulting trust in favor of the grantor.[\[FN4\]](#)

[\[FN1\] Mauritz v. Bell, 81 S.W.2d 730 \(Tex. Civ. App. Galveston 1934\)](#), writ refused.

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[\[FN2\] § 638.](#)

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[\[FN3\] Keistler v. Keistler, 135 N.C. App. 767, 522 S.E.2d 338 \(1999\).](#)

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[\[FN4\] Frame v. Wright, 233 Iowa 394, 9 N.W.2d 364, 147 A.L.R. 1154 \(1943\).](#)

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§ 640. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 87, 108, [372\(.5\)](#), [372\(2\)](#)

Admissions and declarations are generally admissible in evidence in actions relating to, or involving, trusts, trustees, beneficiaries, and trust estates,[\[FN1\]](#) subject to the applicable rules of evidence pertaining to admissibility of such matters.[\[FN2\]](#)

Declarations of a settlor made subsequent to the effective date of a trust are ordinarily admissible where the trust instrument contains ambiguity.[\[FN3\]](#) Where no ambiguity is found, however, the settlor's subsequent declarations will ordinarily be excluded, particularly if tending to vary the clear terms or meaning of the trust.[\[FN4\]](#)

[\[FN1\]](#) [Fourth Nat. Bank of St. Louis v. Albaugh](#), 188 U.S. 734, 23 S. Ct. 450, 47 L. Ed. 673 (1903); [Wise v. Raynor](#), 200 N.C. 567, 157 S.E. 853 (1931).

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[\[FN2\]](#) [Sutton v. Sutton](#), 194 Va. 179, 72 S.E.2d 275 (1952).

- As to general rules of evidence regarding admissions and declarations, generally, see [Am. Jur. 2d, Evidence §§ 754 to 859](#)

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[\[FN3\]](#) [Little Rock Junior College v. Geo. W. Donaghey Foundation](#), 224 Ark. 895, 277 S.W.2d 79, 51 A.L.R.2d 806 (1955); [Graham v. Washington University](#), 58 Haw. 370, 569 P.2d 896 (1977); [Northern Trust Co. v. Winston](#), 32 Ill. App. 3d 199, 336 N.E.2d 543 (1st Dist. 1975).

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[\[FN4\]](#) [In re Sangnier's Estate](#), 28 Misc. 2d 992, 211 N.Y.S.2d 797 (Sur. Ct. 1961); [United States Nat. Bank of Denver v. Brunton](#), 112 Colo. 442, 150 P.2d 297 (1944).

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§ 641. Use to prove or disprove trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [87](#), [108](#), [372\(.5\)](#), [372\(2\)](#)

Subject to the general rules of admissibility of declarations and admissions, [\[FN1\]](#) declarations and admissions to prove or disprove a trust are admissible in evidence.[\[FN2\]](#) Admissions by act and conduct to prove or disprove a trust are also admissible.[\[FN3\]](#) In particular, an admission of a trust in open court, at least where made with the assent of a trustee's counsel, in the trustee's presence, and with his or her approval, is competent evidence to prove the trust as against the trustee.[\[FN4\]](#)

[\[FN1\]](#) [Sutton v. Sutton](#), 194 Va. 179, 72 S.E.2d 275 (1952).

- As to general rules of evidence regarding admissions and declarations, generally, see [29 Am. Jur. 2d, Evidence §§ 754 to 859](#).

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[\[FN2\]](#) [Platt v. Huegel](#), 326 Mo. 776, 32 S.W.2d 605 (1930).

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[\[FN3\]](#) [Heiden v. Cremin](#), 66 F.2d 943, 91 A.L.R. 247 (C.C.A. 8th Cir. 1933).

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[\[FN4\]](#) [Brender v. Stratton](#), 216 Mich. 166, 184 N.W. 486, 22 A.L.R. 728 (1921); [Metzger v. Metzger](#), 338 Pa. 564, 14 A.2d 285, 129 A.L.R. 683 (1940) (admission in testimony).

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§ 642. Use to prove or disprove trust—By whom made; time of making

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 87, 108, 372(.5), 372(2)

Self-serving declarations are not admissible in the proof or disproof of a trust, unless they are part of the res gestae,[\[FN1\]](#) or where they may be admissible as admissions against interest.[\[FN2\]](#) Accordingly, such admissions or declarations made, or admissions by acts, after a transaction, generally are not admissible to prove the creation or the nonexistence of a trust.[\[FN3\]](#)

Where an admission or declaration is that of a grantor, testator, or ancestor, it is admissible to prove a trust as against a grantee, devisee, legatee, or heir, where it is made before or at the time of the conveyance or before the death of the testator or ancestor, but it is not so admissible where it is revealed thereafter.[\[FN4\]](#) Where a legacy is a joint legacy, a trust may be established as to all the legatees by proof that the promise was made by one in behalf of all, and the subsequent declarations of any of the legatees are admissible against all.[\[FN5\]](#)

[\[FN1\]](#) [Dodge v. Thomas, 266 Ill. 76, 107 N.E. 261 \(1914\).](#)

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[\[FN2\]](#) [Hall v. Pierce, 210 Or. 98, 307 P.2d 292, 65 A.L.R.2d 316 \(1957\); Dodge v. Thomas, 266 Ill. 76, 107 N.E. 261 \(1914\).](#)

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[\[FN3\]](#) [Dodge v. Thomas, 266 Ill. 76, 107 N.E. 261 \(1914\); Dixon v. Dixon, 123 Md. 44, 90 A. 846 \(1914\).](#)

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[\[FN4\]](#) [Bayless v. Wheeler Kelly Hagny Trust Co., 153 Kan. 81, 109 P.2d 108 \(1941\); Richter v. North American Building & Loan Ass'n, 110 N.J. Eq. 182, 159 A. 388 \(Ch. 1932\); Townsend v. Chaillett, 45 S.W.2d 354 \(Tex. Civ. App. Austin 1931\).](#)

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[\[FN5\]](#) [Winder v. Scholey, 83 Ohio St. 204, 93 N.E. 1098 \(1910\).](#)

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§ 643. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [372\(3\)](#)

A trust must rest upon substantial proof tending affirmatively to establish an intention to create a trust.^[FN1] Generally speaking, proof of a trust and of its requisite elements must be made with clear and satisfactory^[FN2] or clear and convincing evidence.^[FN3]

The terms under which one is supposed to hold property in trust for another must be established with reasonable clarity to enable the chancellor to impress a trust on the legal title so as to set up a beneficial interest therein.^[FN4] However, the standard of proof for determining whether a second trust agreement was an amendment of the first trust agreement is a preponderance of the evidence, not clear and convincing evidence.^[FN5]

A trustor's guardian, as a party asserting that the trustor was incompetent at time the trustor executed an inter vivos irrevocable trust, has the burden of showing the lack of the trustor's contractual capacity by clear and convincing evidence.^[FN6]

^[FN1] [Matter of Estate of Binder](#), 386 N.W.2d 910 (N.D. 1986).

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^[FN2] [Heiden v. Cremin](#), 66 F.2d 943, 91 A.L.R. 247 (C.C.A. 8th Cir. 1933) (evidence held to establish holding of bank stock by father as trustee for minor children); [Peterson v. Massey](#), 155 Neb. 829, 53 N.W.2d 912 (1952); [Hall v. Pierce](#), 210 Or. 98, 307 P.2d 292, 65 A.L.R.2d 316 (1957).

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^[FN3] [From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church](#), 370 Md. 152, 803 A.2d 548 (2002), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 (2003); [Sundquist v. Sundquist](#),

[639 P.2d 181 \(Utah 1981\)](#) (applying rule to proof of trusts not involving real property).

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[FN4] [Shannon v. Murphy, 49 Haw. 661, 426 P.2d 816 \(1967\)](#).

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[FN5] [In re Estate of Davis, 2001 ME 106 \(Me., 2001\)](#).

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[FN6] [Hilbert v. Benson, 917 P.2d 1152 \(Wyo. 1996\)](#).

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§ 644. Breach of trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [372\(3\)](#)

Generally, a beneficiary seeking to obtain relief for a breach of trust must prove that the fiduciary duty existed, the trustee failed to perform the duty, and the court should grant the requested relief.[FN1] Once the beneficiary of the trust has met the burden of proving the existence of the fiduciary duty and the trustee's failure to perform it, [FN2] the trustee may be required to prove, by clear and convincing evidence, that a transaction was fair and that the trustee did not breach its duty of loyalty,[FN3] A transaction between a trustee and the beneficiary of a trust cannot be upheld if called in question by the beneficiary unless the trustee is able to prove to the satisfaction of the court by clear and satisfactory evidence that the two were at arm's length in the

transaction, that no confidence was reposed in the trustee by the beneficiary, that the bargain was profitable to the beneficiary, and that the beneficiary was fully informed in regard to the subject matter of the dealing.[FN4] For example, a trustee bank may be have the burden to prove by clear and convincing evidence that it acted in good faith in using the estate assets.[FN5]

Evidence to show want of good faith in a trustee in selling trust property, or want of good faith in the purchaser, or evidence of a conspiracy between them, must be legally sufficient to establish a breach of trust.[FN6]

CUMULATIVE SUPPLEMENT

Cases:

Where a lack of evidence is created by the malfeasance and nonfeasance of the trustee, plaintiff alleging breach of fiduciary duty need not offer the best evidence that might conceivably be found. [Osage Tribe of Indians of Oklahoma v. U.S., 96 Fed. Cl. 390 \(2010\)](#), on reconsideration in part, [2011 WL 477042 \(Ct. Fed. Cl. 2011\)](#).

[END OF SUPPLEMENT]

[FN1] [John E. Shaffer Enterprises v. City of Yuma, 183 Ariz. 428, 904 P.2d 1252 \(Ct. App. Div. 1 1995\)](#).

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[FN2] [Oates v. City of Lincoln, 93 Cal. App. 4th 25, 112 Cal. Rptr. 2d 790 \(3d Dist. 2001\)](#).

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[FN3] [NC Illinois Trust Co. v. First Illini Bancorp, Inc., 323 Ill. App. 3d 254, 256 Ill. Dec. 925, 752 N.E.2d 1167 \(3d Dist. 2001\)](#).

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[FN4] [In re Leonard's Will, 202 Wis. 117, 230 N.W. 715, 83 A.L.R. 712 \(1930\)](#).

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[FN5] [NC Illinois Trust Co. v. First Illini Bancorp, Inc., 323 Ill. App. 3d 254, 256 Ill. Dec. 925, 752 N.E.2d 1167 \(3d Dist. 2001\)](#).

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[FN6] [Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 \(1928\)](#).

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Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

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§ 645. Mistake or undue influence invalidating trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [372\(3\)](#)

Evidence must be of the most satisfactory character in order to obtain the cancellation of an irrevocable deed of trust on the ground that by mistake it does not express the real intention of the trustor.[FN1] Thus, for example, a trust instrument is not subject to revocation on the ground of mistake merely because the settlor was an elderly person in poor health and incapable of understanding a trust agreement several pages long, couched in precise and formal legal phraseology.[FN2] A trust instrument may be invalidated or set aside by a finding of undue influence, and to raise a presumption of undue influence in the procurement and execution of a trust agreement, sufficient to bring a question before the jury, requires only a scintilla of evidence of each element of undue influence. The evidence need not be direct, but can be circumstantial. However, the evidence must provide at least a reasonable inference of undue activity; mere suspicion is not enough.[FN3] A finding that a trust beneficiary was a care custodian of a dependent adult, for example, will shift the burden to the beneficiary to prove by clear and convincing evidence, excluding the beneficiary's own testimony, that the transfer created by the dependent adult was not the product of fraud, menace, duress, or undue influence. [FN4]

[FN1] [Du Pont v. Du Pont](#), 19 Del. Ch. 131, 164 A. 238 (1933); [Pernod v. American Nat. Bank & Trust Co. of Chicago](#), 8 Ill. 2d 16, 132 N.E.2d 540, 59 A.L.R.2d 1223 (1956); [Fidelity Union Trust Co. v. Parfner](#), 135 N.J. Eq. 133, 37 A.2d 675 (Ch. 1944).

[FN2] [Pernod v. American Nat. Bank & Trust Co. of Chicago](#), 8 Ill. 2d 16, 132 N.E.2d 540, 59 A.L.R.2d 1223 (1956).

[FN3] [Crump v. Moss](#), 517 So. 2d 609 (Ala. 1987).

[FN4] [Estate of Shinkle](#), 97 Cal. App. 4th 990, 119 Cal. Rptr. 2d 42 (6th Dist. 2002).

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§ 646. Generally

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Generally, in cases involving trusts which arise by operation of the law, the standard of proof applicable is one of clear and convincing evidence;[\[FN1\]](#) and in particular, proof of facts necessary to establish a trust by implication of law must be clear and convincing.[\[FN2\]](#) For this purpose, clear and convincing evidence may be defined as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.[\[FN3\]](#) To be "clear and convincing," evidence supporting a constructive trust must leave no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question.[\[FN4\]](#)

Thus, to establish a constructive trust, the applicable standard may be stated as being that the evidence must be clear and convincing,[\[FN5\]](#) though some courts have described the standard as clear, satisfactory, and convincing;[\[FN6\]](#) clear, direct, precise, and convincing;[\[FN7\]](#) or so clear, definite and unequivocal[\[FN8\]](#) as to lead to one conclusion.[\[FN9\]](#) There is also authority for the position that to establish an implied or constructive trust, the evidence must be so clear, cogent, unequivocal, and positive as to banish doubt and so convincing that no reasonable doubt can be entertained of its truth.[\[FN10\]](#) The rationale behind the strict standard of proof is to protect the security of titles.[\[FN11\]](#)

Similarly, to establish a resulting trust it is not sufficient to present vague or shadowy evidence,[\[FN12\]](#) or a mere preponderance of the evidence.[\[FN13\]](#) As in the proof necessary for a constructive trust, clear and

convincing evidence is ordinarily required to establish a resulting trust.^[FN14] However, it has also been stated that to prove a resulting trust the evidence must be clear, cogent, and convincing;^[FN15] clear, direct, precise and convincing;^[FN16] clear, strong, unequivocal, and beyond a reasonable doubt;^[FN17] and, in another instance, that to show such a trust it takes evidence that is clear, unequivocal, and decisive beyond a reasonable doubt.^[FN18]

CUMULATIVE SUPPLEMENT

Cases:

Evidence, including statement of son's attorney that son directed drafting of deed for property purchased by parents which transferred title to son upon death of either parent, was sufficient to support chancellor's imposition of constructive trust to prevent son's estate from being unjustly enriched. [Joel v. Joel, 43 So. 3d 424 \(Miss. 2010\)](#).

Substantial evidence in action to impose constructive trust supported chancellor's conclusion that son did not contribute in equity toward parents' purchase of house by allowing parents to utilize his alleged buyback agreement with house owners and purchase home \$20,500 below market value, where appraiser testified that he arrived at the higher value by ignoring fact that house had actually sold for lower figure, but he did so because he incorrectly thought sale was familial transaction, and appraiser stated that definition of market value is what willing seller will take from willing buyer. [Joel v. Joel, 43 So. 3d 424 \(Miss. 2010\)](#).

If the evidence of a resulting trust is doubtful or capable of reasonable explanation upon a theory other than the existence of the trust, it is not sufficient to support a decree declaring and enforcing the trust. [Stevens v. Radey, 117 Ohio St. 3d 65, 2008-Ohio-291, 881 N.E.2d 855 \(2008\)](#).

[END OF SUPPLEMENT]

^[FN1] [Loberg v. Alford, 372 N.W.2d 912 \(N.D. 1985\)](#); [Matter of Hock's Estate, 655 P.2d 1111 \(Utah 1982\)](#); [Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\)](#).

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^[FN2] [Allgood v. Allgood, 473 So. 2d 416 \(Miss. 1985\)](#).

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^[FN3] [Gifford v. Dennis, 230 Va. 193, 335 S.E.2d 371 \(1985\)](#).

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^[FN4] [Davis v. Combes, 294 F.3d 931 \(7th Cir. 2002\)](#).

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^[FN5] [Taylor v. Fields, 178 Cal. App. 3d 653, 224 Cal. Rptr. 186 \(2d Dist. 1986\)](#); [Abreu v. Amaro, 534 So. 2d 771 \(Fla. Dist. Ct. App. 3d Dist. 1988\)](#); [Spiess v. Schumm, 448 N.W.2d 106 \(Minn. Ct. App. 1989\)](#) (constructive trust may be imposed where there is clear and convincing evidence that trust is necessary to avoid unjust enrichment); [Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024, 11 U.C.C. Rep. Serv. 2d 251 \(Miss. 1990\)](#); [In re Estate of Lienemann, 222 Neb. 169, 382 N.W.2d 595 \(1986\)](#); [Black v. Peterson, 442 N.W.2d 426 \(N.D. 1989\)](#); [SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 \(1990\)](#); [Briggs v. Richardson, 288 S.C. 537, 343 S.E.2d 653 \(Ct. App. 1986\)](#); [Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259 \(S.D. 1988\)](#).

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^[FN6] [Koster v. City of Davenport, Iowa, 183 F.3d 762 \(8th Cir. 1999\)](#); [Lone Oak Farm Corp. v. Riverside Fertilizer Co., 229 Neb. 548, 428 N.W.2d 175 \(1988\)](#).

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[FN7] [Roberson v. Davis, 397 Pa. Super. 292, 580 A.2d 39 \(1990\)](#) (also stating that unless evidence of existence of constructive trust is of highest probative value, equity should not act to convert an absolute ownership into an estate of lesser quality).

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[FN8] [Davis v. Combes, 294 F.3d 931 \(7th Cir. 2002\)](#); [Macaulay v. Wachovia Bank of South Carolina, N.A., 351 S.C. 287, 569 S.E.2d 371 \(Ct. App. 2002\)](#).

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[FN9] [Kurtz v. Solomon, 275 Ill. App. 3d 643, 212 Ill. Dec. 31, 656 N.E.2d 184 \(1st Dist. 1995\)](#).

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[FN10] [Neal v. Sparks, 773 S.W.2d 481 \(Mo. Ct. App. W.D. 1989\)](#).

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[FN11] [Easterling v. Ferris, 1982 OK 99, 651 P.2d 677 \(Okla. 1982\)](#).

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[FN12] [Duncan v. Rayfield, 698 S.W.2d 876 \(Mo. Ct. App. S.D. 1985\)](#).

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[FN13] [Duncan v. Rayfield, 698 S.W.2d 876 \(Mo. Ct. App. S.D. 1985\)](#); [Easterling v. Ferris, 1982 OK 99, 651 P.2d 677 \(Okla. 1982\)](#); [Wootton v. Melton, 1981 OK CIV APP 24, 631 P.2d 1337 \(Ct. App. Div. 2 1981\)](#); [Latshaw v. Latshaw, 787 S.W.2d 9 \(Tenn. Ct. App. 1989\)](#).

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[FN14] [American Nat. Bank and Trust Co. of Rockford, Ill. v. U.S., 832 F.2d 1032 \(7th Cir. 1987\)](#); [In re Wilder, 42 B.R. 6 \(Bankr. D. Or. 1983\)](#); [Hanks v. Sharper, 530 So. 2d 1367 \(Ala. 1988\)](#); [Hiestand v. Geier, 396 So. 2d 744 \(Fla. Dist. Ct. App. 3d Dist. 1981\)](#); [Allgood v. Allgood, 473 So. 2d 416 \(Miss. 1985\)](#); [Loberg v. Alford, 372 N.W.2d 912 \(N.D. 1985\)](#).

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[FN15] [Prange v. Prange, 755 S.W.2d 581 \(Mo. Ct. App. E.D. 1987\)](#).

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[FN16] [Snyder v. Gravell, 446 Pa. Super. 124, 666 A.2d 341 \(1995\)](#).

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[FN17] [Persan v. Life Concepts, Inc., 738 So. 2d 1008 \(Fla. Dist. Ct. App. 5th Dist. 1999\)](#) (standard applied on review).

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[FN18] [Wootton v. Melton, 1981 OK CIV APP 24, 631 P.2d 1337 \(Ct. App. Div. 2 1981\)](#).

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§ 647. Parol evidence

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [89\(1\)](#), (5), 110

As a rule, oral proof of facts giving rise to a resulting or constructive trust must be received with caution.^[FN1] Something more than a mere preponderance of evidence is required to establish by parol a constructive^[FN2] or resulting trust.^[FN3] When one seeks to have a constructive trust imposed on the basis of parol evidence, the proof must be clear and convincing; it must be clear that the party against whom the trust is to be imposed has engaged in actual fraud or has abused a confidential or fiduciary relationship. If the evidence is doubtful or capable of reasonable explanation by other theories, the proof of the existence of a trust is insufficient.^[FN4] On the other hand, there is authority to the effect that to sustain a resulting trust upon parol evidence in the teeth of the terms of the written instrument, it is not essential that the evidence be of a character to remove all reasonable doubt,^[FN5] but only that it be so clear, cogent, and convincing as to overcome the opposing evidence, coupled with the presumption that obtains in favor of the written instrument.^[FN6]

^[FN1] [Dixon v. Dixon](#), 123 Md. 44, 90 A. 846 (1914); [Conner v. Conner](#), 238 Miss. 471, 119 So. 2d 240 (1960).

- As to admissibility of parol evidence generally, see §§ [636](#) to [639](#).

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^[FN2] [All v. Prillaman](#), 200 S.C. 279, 20 S.E.2d 741, 159 A.L.R. 981 (1942).

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^[FN3] [Estate of Wardell ex rel. Wardell v. Dailey](#), 674 S.W.2d 293 (Tenn. Ct. App. 1983).

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^[FN4] [Greenwald v. Spring Hill Ford, Inc.](#), 173 Ill. App. 3d 857, 123 Ill. Dec. 457, 527 N.E.2d 1095 (1st Dist. 1988).

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^[FN5] [Estate of Wardell ex rel. Wardell v. Dailey](#), 674 S.W.2d 293 (Tenn. Ct. App. 1983).

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^[FN6] [Latshaw v. Latshaw](#), 787 S.W.2d 9 (Tenn. Ct. App. 1989).

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§ 648. Based on transaction involving presumption of gift or settlement

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [89\(1\)](#), (5), 110

Although a resulting trust may be shown by proof that another paid the purchase price, there is an exception to this rule when the parents pay the purchase price of property and place the title in the name of their child, and vice versa; in this situation, a presumption of gift arises, and no resulting trusts exist until presumption is rebutted.[FN1] Where a presumption of a gift or settlement arises from a conveyance to one based on consideration from another, as where the payor was the husband or parent of the grantee, the proof, to overcome such presumption and to raise a resulting trust in the payor, must be of an extraordinary degree, that is, clear, positive, and unequivocal.[FN2]

Similarly, in an action to impose a constructive trust, the burden of proof in refuting any presumption of gift that may apply is by clear and convincing evidence.[FN3]

[FN1] [Amador v. Berrospe](#), 961 S.W.2d 205 (Tex. App. Houston 1st Dist. 1996).

[FN2] [Smithsonian Institution v. Meech](#), 169 U.S. 398, 18 S. Ct. 396, 42 L. Ed. 793 (1898); [Vickers v. Vickers](#), 133 Ga. 383, 65 S.E. 885 (1909); [Wright v. Wright](#), 242 Ill. 71, 89 N.E. 789 (1909).

[\[FN3\] Bogart v. Somer, 762 S.W.2d 577 \(Tex. 1988\).](#)

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§ 649. Rebuttal of trust's existence

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [89\(1\)](#) to (5), 110

The proof to rebut a resulting trust need not be as strong as the proof of consideration to raise the presumption of such a trust.[\[FN1\]](#) The fact that after property had been conveyed to a parent upon a consideration furnished by the parent's child, the parties contributed money and effort to its improvement, treating it as a family affair, does not rebut the existence of a resulting trust in favor of the child.[\[FN2\]](#)

[\[FN1\] Dodge v. Thomas, 266 Ill. 76, 107 N.E. 261 \(1914\).](#)

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[\[FN2\] Gerace v. Gerace, 301 Mass. 14, 16 N.E.2d 6, 117 A.L.R. 1459 \(1938\).](#)

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§ 650. Generally

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The mere fact that a trustee has not accepted a trust, where the trustee has not positively declined or rejected it, is no defense to an action by him or her as trustee.[\[FN1\]](#) The defense of illegality, including a conveyance to hinder, delay, or defraud creditors, can defeat an implied trust under appropriate circumstances, although the policy against unjust enrichment outweighs that consideration where there are doubtful circumstances about the claim of fraud on creditors.[\[FN2\]](#) A plaintiff seeking the imposition of a constructive trust must escape the defense of unclean hands, and escape the potential defense that the holder of the traced proceeds is a good-faith purchaser.[\[FN3\]](#) Whether a transferee of trust assets is a bona fide purchaser becomes relevant only as a defense after it has been determined that a breach of trust has occurred. [\[FN4\]](#)

Observations: A trustee can not be subjected to an enhanced prevailing party fee absent a finding that the trustee engaged in mismanagement or bad faith in the defense of the action against the trust;[\[FN5\]](#) where the trustee has a good faith basis for defending a suit challenging the trustee's actions as a trustee, attorney's fees and costs incurred in defense of the suit should be charged against the trust.[\[FN6\]](#)

[\[FN1\]](#) [First Nat. Bank v. Cash, 220 Ala. 319, 125 So. 28 \(1929\).](#)

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[\[FN2\]](#) [Paulson v. Meinke, 389 N.W.2d 798 \(N.D. 1986\).](#)

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[\[FN3\]](#) [In re Dahlquist, 34 B.R. 476 \(Bankr. D. S.D. 1983\).](#)

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[\[FN4\] Boulder Fruit Exp. & Heger Organic Farm Sales v. Transportation Factoring, Inc., 251 F.3d 1268 \(9th Cir. 2001\)](#), cert. denied, [534 U.S. 1133, 122 S. Ct. 1077, 151 L. Ed. 2d 978 \(2002\)](#).

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[\[FN5\] Pederson v. Barnes, 185 Or. App. 35, 58 P.3d 240 \(2002\)](#), review denied, [335 Or. 402, 68 P.3d 231 \(2003\)](#).

- As to attorney's fees and expenses in trust actions, see §§ [673](#) to [681](#).

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[\[FN6\] Ward v. NationsBank of Virginia, N.A., 256 Va. 427, 507 S.E.2d 616 \(1998\)](#).

- As to trustee's entitlement to reimbursement for litigation costs, generally, see [§ 572](#).

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§ 651. Estoppel or waiver; consent

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The right of the beneficiary of a trust to enforce the trust or the liability of the trustee thereunder may be barred by reason of acts, statements, or conduct on his or her part which amount to an estoppel, or a waiver of his or her right, to assert the trust obligation or the liability of the trustee.[\[FN1\]](#) The usual requisites of estoppel and waiver apply when such a defense is asserted to an action to enforce a trust or the liability of a trustee.[\[FN2\]](#) The failure to plead an affirmative defense may bar the presentation of the same matter as a counterclaim.[\[FN3\]](#)

A failure to allege sufficient facts to support the imposition of a constructive trust, may constitute a waiver of the theory of recovery.[FN4]

If a trust beneficiary consents to an act of a trustee prior to or during the commission of the act, the beneficiary cannot hold the trustee liable for it.[FN5]

Depending on the particular circumstances of the case, a trustee may respond to discovery before contesting jurisdiction in a breach of fiduciary suit by a lifetime beneficiary without such an act constituting a waiver of the claim that the court lacked personal jurisdiction over the trustee.[FN6]

[FN1] Vohmann v. Michel, 185 N.Y. 420, 78 N.E. 156 (1906); Sweeney v. Security Trust Co., 116 W. Va. 344, 180 S.E. 897 (1935).

[FN2] Boehnke v. Roenfan, 246 Iowa 240, 67 N.W.2d 585, 54 A.L.R.2d 1 (1954).

[FN3] Noonan-Judson v. Surrency, 669 So. 2d 1058 (Fla. Dist. Ct. App. 5th Dist. 1996) (regarding alleged usurious nature of transaction).

[FN4] Schultz v. Schultz, 297 Ill. App. 3d 102, 231 Ill. Dec. 598, 696 N.E.2d 1169 (2d Dist. 1998) (theory waived even though parties had briefed the issue before trial and proceeded to trial as if the issue was properly presented).

[FN5] Hanson v. Minette, 461 N.W.2d 592 (Iowa 1990).

[FN6] In re Frumkin, 912 S.W.2d 138 (Tenn. Ct. App. 1995).

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§ 652. Affirmative defenses

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [251](#), [252](#), [362](#)

The equitable doctrine that permits a resulting or constructive trust, when properly invoked, estops the opposition from relying on the general statute of limitations as an affirmative defense.^[FN1] A creditor seeking to foreclose on property in which a party has asserted an interest by virtue of a resulting trust does not have to plead, as an affirmative defense to the resulting trust claim, that there was fraud in putting the title to the property in another's name for the express purpose of hiding the property from creditors; the alleged fraud is a circumstance affecting the party's entitlement to a resulting trust.^[FN2] However, a mortgagor who fails to plead the usurious nature of a transaction as an affirmative defense in action for foreclosure and the imposition of a trust is not entitled to present usury as a counterclaim.^[FN3]

^[FN1] [Province v. Province, 196 W. Va. 473, 473 S.E.2d 894 \(1996\).](#)

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^[FN2] [Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 \(1997\).](#)

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^[FN3] [Noonan-Judson v. Surrency, 669 So. 2d 1058 \(Fla. Dist. Ct. App. 5th Dist. 1996\).](#)

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§ 653. Setoff and counterclaim

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [253](#)

A trustee cannot use a private demand against the trustor or the beneficiary as a setoff or counterclaim against the demand of the beneficiary for trust property or funds to which he or she is entitled.^[FN1] A trustee may not, under the principle that a defendant may not set off a claim unless it arose between the parties in the same capacities as they are designated in the main action, withhold trust payments from a beneficiary to obtain payment of a personal debt which he may have against the beneficiary.^[FN2] A deed of trust debtor may not assert a counterclaim personally against the trustee of a trust which acted as the lender, where the trustee was a plaintiff in the original action against the debtor only in an official capacity as a trustee; to assert a claim against trustee personally, a debtor has to file new complaint or third-party complaint, not counterclaim.^[FN3]

^[FN1] [Hanover Nat. Bank of State of New York v. Suddath, 215 U.S. 122, 30 S. Ct. 63, 54 L. Ed. 120 \(1909\); People ex rel. Belleci v. Klinger, 164 Misc. 530, 300 N.Y.S. 408 \(Magis. Ct. 1937\).](#)

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^[FN2] [Goodwillie v. City of Bayonne, 2 N.J. 88, 65 A.2d 742, 8 A.L.R.2d 206 \(1949\).](#)

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^[FN3] [Timm v. Dewsnup, 921 P.2d 1381 \(Utah 1996\).](#)

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§ 654. Applicability of statute of limitations

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [256](#), [365\(1\)](#), (3), (4)

Direct or express trusts, so long as they continue as between the trustee and the beneficiary, are not subject to the statute of limitations;[\[FN1\]](#) and thus, the statute of limitations does not apply to cases involving an express and continuing trust until the trustee openly repudiates the trust, adversely claims against the beneficiary, or recognizes someone else's beneficiary.[\[FN2\]](#) That is, the statute of limitations is tolled only so long as the trust continues, so that once the trust ceases, the statute of limitations begins to run.[\[FN3\]](#) Thus, so long as there has been no denial or repudiation of the trust, the possession of the trustee of an express and continuing trust is presumed to be that of the beneficiary, and the statute of limitations does not run between them.[\[FN4\]](#)

The statute of limitations on an express trust action begins to run when the beneficiary of the trust discovers, or should have discovered, that the trust has been terminated or repudiated by the trustee. [\[FN5\]](#)

CUMULATIVE SUPPLEMENT

Cases:

As between trustee and cestui que trust, in the case of an expressed trust, the statute of limitations has no application, and no length of time is a bar, unless the trust has been repudiated and the cestui que trust has notice thereof, either actual or constructive. [Stevens v. Howard, 197 S.W.3d 182 \(Mo. Ct. App. S.D. 2006\)](#), reh'g and/or transfer denied, (June 21, 2006) and transfer denied, (Aug. 22, 2006).

Three-year limitations period governing claims against trustee under Uniform Trust Code, rather than general three-year limitations period governing personal actions, governed trust beneficiaries' claims against interim trustee. RSA 508:4, 564-B:10-1005(c). [Billewicz v. Ransmeier, 161 N.H. 145, 13 A.3d 116 \(2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Vorholt v. One Valley Bank, 201 W. Va. 480, 498 S.E.2d 241 \(1997\).](#)

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[\[FN2\] Villarreal v. Glacken, 63 Md. App. 114, 492 A.2d 328 \(1985\).](#)

- As to limitation of actions, generally, see 51 Am. Jur. 2d, Limitation of Actions.

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[\[FN3\] Vorholt v. One Valley Bank, 201 W. Va. 480, 498 S.E.2d 241 \(1997\).](#)

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[\[FN4\] Benedict v. City of New York, 250 U.S. 321, 39 S. Ct. 476, 63 L. Ed. 1005 \(1919\); Fox v. Tay, 89 Cal. 339, 24 P. 855 \(1890\), aff'd, 89 Cal. 339, 26 P. 897 \(1891\).](#)

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[\[FN5\] Goodman v. Goodman, 128 Wash. 2d 366, 907 P.2d 290 \(1995\).](#)

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§ 655. Applicability of statute of limitations—Actions against third parties

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [256](#), [365\(1\)](#), (3), (4)

The rule that the statute of limitations does not bar a continuing trust estate[\[FN1\]](#) holds between only the trustee and the beneficiary of the trust, and not as between such parties on one side and strangers on the other.[\[FN2\]](#) If the trustee is vested with the legal estate or title, and while so vested is competent to sue, the statute of limitations running against the trustee will also run against the beneficiary.[\[FN3\]](#) This rule applies, however, only when the beneficiary has a mere equitable interest, and the trustee is competent to sue but fails to do so.[\[FN4\]](#) When a trustee cannot or will not enforce a cause of action that the trustee has against a third person and the beneficiary is allowed to enforce it, the statute of limitations should be computed from the time the trustee acquired the right to sue.[\[FN5\]](#)

With regard to a suit against a third party, it is the trustee's competency, and not that of the beneficiary, that is controlling as to the tolling of the statute of limitations.[\[FN6\]](#)

[\[FN1\] § 654.](#)

[\[FN2\] Jenkins v. Jensen, 24 Utah 108, 66 P. 773 \(1901\).](#)

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[\[FN3\] Cruse v. Kidd, 195 Ala. 22, 70 So. 166, 2 A.L.R. 36 \(1915\); Hart v. Citizens' Nat. Bank, 105 Kan. 434, 185 P. 1, 7 A.L.R. 933 \(1919\).](#)

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[\[FN4\] Hart v. Citizens' Nat. Bank, 105 Kan. 434, 185 P. 1, 7 A.L.R. 933 \(1919\).](#)

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[\[FN5\] Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864 \(Tex. App. Houston 1st Dist. 1985\), writ refused n.r.e., \(Mar. 12, 1986\).](#)

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[\[FN6\] Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864 \(Tex. App. Houston 1st Dist. 1985\), writ refused n.r.e., \(Mar. 12, 1986\).](#)

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§ 656. When statute begins to run

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [256](#), [365\(1\)](#), (3), (4)

Beneficiaries of a trust have no right of action against a voluntary trustee, and the applicable statute of limitations remains inoperative, until the trust is repudiated by the trustee[[FN1](#)] or until the trust relation

between the parties comes to an end,[\[FN2\]](#) or at the least, the statute does not begin to run, in a breach of trust case, until such time as the trust is breached by the trustee.[\[FN3\]](#)

Thus, the beneficiaries' cause of action arises when there has been some assertion of adverse claim or ownership, or a refusal to comply upon demand, or a disavowal or repudiation of the trust.[\[FN4\]](#) When a trustee of an express trust denies the trust and assumes the absolute ownership of the property, and his claim is brought home to the beneficiary, the beneficiary has a cause of action against the trustee from the time he or she receives notice of the trustee's repudiation, and the statute begins to run from that time.[\[FN5\]](#)

Where a beneficiary of a trust may enforce a cause of action against a third party upon the trustee's failure to do so, the statute of limitations should be computed from the time the trustee acquired his right to sue.[\[FN6\]](#)

CUMULATIVE SUPPLEMENT

Cases:

A cause of action for breach of trust traditionally accrues for limitations purposed when the trustee repudiates the trust and the beneficiary has knowledge of that repudiation. [Oenga v. U.S., 83 Fed. Cl. 594 \(2008\)](#).

[END OF SUPPLEMENT]

[\[FN1\]](#) [Papasan v. Allain, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209, 32 Ed. Law Rep. 1197 \(1986\); Rackley v. Mathews, 141 Fla. 307, 193 So. 69 \(1940\); Wasden v. Coltharp, 631 P.2d 849 \(Utah 1981\)](#).

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[\[FN2\]](#) [§ 658](#).

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[\[FN3\]](#) [Mayfield v. Simpson, 610 So. 2d 77 \(Fla. Dist. Ct. App. 1st Dist. 1992\)](#).

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[\[FN4\]](#) [Teachey v. Gurley, 214 N.C. 288, 199 S.E. 83 \(1938\)](#).

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[\[FN5\]](#) [Benedict v. City of New York, 250 U.S. 321, 39 S. Ct. 476, 63 L. Ed. 1005 \(1919\); Fox v. Tay, 89 Cal. 339, 24 P. 855 \(1890\), aff'd, 89 Cal. 339, 26 P. 897 \(1891\); Cavanaugh Bros. Horse Co. v. Gaston, 255 Mass. 587, 152 N.E. 623, 47 A.L.R. 1 \(1926\)](#).

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[\[FN6\]](#) [§ 655](#).

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§ 657. When statute begins to run—Sufficiency of repudiation; necessity of knowledge or notice of repudiation

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [365\(3\)](#)

Repudiation sufficient to commence the running of the statute of limitations against an express trust occurs when the trustee by words or other conduct denies there is a trust and claims the trust property is his or her own; such repudiation must be plain, strong, and unequivocal.[FN1] Thus, where it is contended that the statute of limitations was set in motion by the repudiation of a trust, it is essential, in order that he or she may claim the benefit of the statute, for the trustee to show a clear[FN2] or plain, strong, and unequivocal renunciation, amounting to an open disavowal of the trust.[FN3] The disavowal must be made in no uncertain terms and without qualification.[FN4] No mere tacit failure of the trustee to perform his or her duty should be held to amount to a repudiation so as to set the statute of limitations running.[FN5]

Generally, for a trustee's repudiation of an express trust to be sufficient to set the statute in motion in the trustee's favor against the beneficiary, the beneficiary must have knowledge[FN6] or notice of the repudiation.[FN7] In some jurisdictions the applicable rule is that the statute begins to run against the beneficiary when the beneficiary knows or reasonably should have known of the repudiation.[FN8]

A trustee's continued or subsequent recognition or acknowledgment of the trust may be regarded as showing, or as strongly indicating, that the trustee had not repudiated it up to the time of such recognition or acknowledgment.[FN9] Not only the wording of the particular communication, but also the circumstances under which it was made and, in general, the nature and terms of the trust to which it relates, ordinarily will have an important bearing on the determination of the sufficiency of the asserted repudiation.[FN10]

[FN1] [Goodman v. Goodman](#), 128 Wash. 2d 366, 907 P.2d 290 (1995).

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[FN2] [Valle v. Joint Plumbing Industry Bd.](#), 623 F.2d 196 (2d Cir. 1980).

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[FN3] [Kay v. Village of Mundelein](#), 36 Ill. App. 3d 433, 344 N.E.2d 29 (2d Dist. 1975).

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[\[FN4\] Fowle Memorial Hospital Co. v. Nicholson, 190 N.C. 119, 129 S.E. 149 \(1925\).](#)

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[\[FN5\] England v. Winslow, 196 Cal. 260, 237 P. 542 \(1925\); Spector v. Miller, 199 Cal. App. 2d 87, 18 Cal. Rptr. 426 \(4th Dist. 1962\).](#)

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[\[FN6\] Flowers v. Collins, 357 S.W.2d 179 \(Tex. Civ. App. Austin 1962\), writ dismissed, \(July 18, 1962\).](#)

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[\[FN7\] Kay v. Village of Mundelein, 36 Ill. App. 3d 433, 344 N.E.2d 29 \(2d Dist. 1975\); Kearney v. Mechanics Nat. Bank of Worcester, 343 Mass. 699, 180 N.E.2d 667 \(1962\); Hodny v. Hoyt, 243 N.W.2d 350 \(N.D. 1976\); Flowers v. Collins, 357 S.W.2d 179 \(Tex. Civ. App. Austin 1962\), writ dismissed, \(July 18, 1962\); Wasden v. Coltharp, 631 P.2d 849 \(Utah 1981\).](#)

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[\[FN8\] U.S. v. Rose, 346 F.2d 985 \(3d Cir. 1965\) \(applying Pennsylvania law\).](#)

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[\[FN9\] Meyers v. Meyers, 210 Ark. 714, 197 S.W.2d 477 \(1946\); Kay v. Village of Mundelein, 36 Ill. App. 3d 433, 344 N.E.2d 29 \(2d Dist. 1975\).](#)

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[\[FN10\] Brainard v. Jones, 117 Cal. App. 2d 217, 255 P.2d 20 \(1st Dist. 1953\).](#)

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§ 658. When statute begins to run—Termination of trust or discharge of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 256, 365(1), (4)

The fact that money due a beneficiary is allowed by the beneficiary to remain in the hands of the trustee after the termination of an express trust does not change the nature of the debt, and, until an accounting is had or demanded, in some jurisdictions the statute of limitations does not begin to run;[FN1] there is, however, other authority to the effect that when a trustee has terminated the trust and parted with control of the property, the applicable statute of limitations begins to run in the trustee's favor.[FN2]

The appointment of a successor to a defaulting trustee is not sufficient to start the running of the statute of limitations against the liability on the trustee's bond,[FN3] though there is other authority to the effect that after the trust relation is at an end and the trustee has yielded the estate to a successor, the running of the statute then begins and only actual or intentional fraud will be effective to suspend it.[FN4]

[FN1] [Pierce v. Perry](#), 189 Mass. 332, 75 N.E. 734 (1905); [Jones v. Home Sav. Bank](#), 118 Mich. 155, 76 N.W. 322 (1898).

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[FN2] [Barnes v. Barnes](#), 282 Ill. 593, 118 N.E. 1004, 4 A.L.R. 4 (1918); [Hart v. Citizens' Nat. Bank](#), 105 Kan. 434, 185 P. 1, 7 A.L.R. 933 (1919).

- The statute of limitations which applies to a cause of action against an attorney serving as a cotrustee of an express trust for rescission of the trust and breach of the defendant's fiduciary duties begins to run when the relationship terminates. [Greene v. Greene](#), 80 A.D.2d 55, 437 N.Y.S.2d 339 (1st Dep't 1981), order aff'd, 56 N.Y.2d 86, 451 N.Y.S.2d 46, 436 N.E.2d 496 (1982).

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[FN3] [State v. Northrop](#), 93 Conn. 558, 106 A. 504, 7 A.L.R. 1014 (1919).

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[FN4] [Spallholz v. Sheldon](#), 216 N.Y. 205, 110 N.E. 431 (1915).

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§ 659. Applicability of statute of limitations

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [256](#), [365\(1\)](#) to (5)

The general rule that the statute of limitations does not run against express trusts, is inapplicable in some jurisdictions to trusts created by implication or operation of law.[\[FN1\]](#) However, the equitable doctrine that permits a resulting or constructive trust, when properly invoked, may estop the opposition from relying on a general statute of limitations as an affirmative defense.[\[FN2\]](#)

Where the statute of limitations is deemed to be applicable, the time within which an implied trust is barred depends upon the applicable statutory provisions,[\[FN3\]](#) which may be the period of limitations applicable to actions for relief not otherwise provided by law.[\[FN4\]](#) In some jurisdictions, a suit seeking a constructive trust is governed by the statute of limitations applicable to the underlying cause of action.[\[FN5\]](#)

While there is authority to the contrary,[\[FN6\]](#) in some instances the bar to an action for a constructive trust of the passing of the applicable statutory limitations period will not be applied with regard to actions to impress constructive trusts on marital property.[\[FN7\]](#)

[\[FN1\]](#) [Cone v. Dunham](#), 59 Conn. 145, 20 A. 311 (1890); [Bannock County v. Bell](#), 8 Idaho 1, 65 P. 710 (1901); [Plant v. Humphries](#), 66 W. Va. 88, 66 S.E. 94 (1909).

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[\[FN2\]](#) [Province v. Province](#), 196 W. Va. 473, 473 S.E.2d 894 (1996).

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[\[FN3\]](#) [Dolmetta v. Uintah Nat. Corp.](#), 712 F.2d 15 (2d Cir. 1983); [Mattera v. Mattera](#), 125 A.D.2d 555, 509 N.Y.S.2d 831 (2d Dep't 1986); [BM & W of Fayetteville, Inc. v. Barnes](#), 75 N.C. App. 600, 331 S.E.2d 308 (1985); [Winder v. Scholey](#), 83 Ohio St. 204, 93 N.E. 1098 (1910).

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[\[FN4\]](#) [District 22 United Mine Workers of America v. Utah](#), 229 F.3d 982 (10th Cir. 2000), as amended on denial of reh'g, (Nov. 6, 2000).

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[\[FN5\]](#) [Howell Petroleum Corp. v. Samson Resources Co.](#), 903 F.2d 778 (10th Cir. 1990); [Herthel v. Barth](#), 148 Kan. 308, 81 P.2d 19, 119 A.L.R. 326 (1938).

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[\[FN6\]](#) [Kitchner v. Kitchner](#), 100 A.D.2d 954, 475 N.Y.S.2d 94 (2d Dep't 1984).

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[\[FN7\]](#) [Zuch v. Zuch](#), 117 A.D.2d 397, 503 N.Y.S.2d 343 (1st Dep't 1986).

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§ 660. When statute begins to run

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 256, 365(4), (5)

In some jurisdictions, the statute of limitations does not begin to run in the case of a constructive or resulting trust until the trustee clearly repudiates^[FN1] or disavows the trust, and such disavowal is brought home to the cestui que trust.^[FN2] However, there is also authority for the view that no repudiation of an implied or constructive trust is necessary to set the applicable statute of limitations in operation.^[FN3]

Generally, at least in the absence of fraud or concealment,^[FN4] the statute of limitations runs from the time when the act was done by which the party became chargeable as a trustee by operation or implication of law,^[FN5] or, as it is sometimes expressed, from the time when the beneficiary could have enforced a right by suit, that is, when the beneficiary knew or should have known that he or she had a cause of action.^[FN6] The statute may not run against the rights of the beneficiary until the beneficiary is apprised of the fact that the trustee does not intend to carry out the provisions of the trust,^[FN7] but it will run as of the date the plaintiff became aware that the trust had been repudiated,^[FN8] or when the claimants know the assets are gone.^[FN9]

However, where a wrongdoer has failed to destroy a will in accord with the testator's instructions, an action to impose a constructive trust may be brought as soon as the fraudulent will is probated, and the limitation period runs as of that time rather than the time of distribution of the property.^[FN10] In some jurisdictions, it has been specified that the statute of limitations applicable to the impressment of a constructive trust commences to run upon the occurrence of the wrongful act giving rise to a duty of restitution, and not from the time that the facts constituting the fraud are discovered.^[FN11]

CUMULATIVE SUPPLEMENT

Cases:

A claim of a resulting trust is governed by the 10 year statute of limitations; however, the 10 years do not begin to run until the party asserting a resulting trust has notice that the other party is claiming the subject property adversely to them. [Dillingham v. Dillingham, 688 S.E.2d 499 \(N.C. Ct. App. 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [Jirka v. Prior, 196 Neb. 416, 243 N.W.2d 754 \(1976\)](#) (applying principle as to actions for resulting trust).

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[FN2] [Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 \(1979\)](#).

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[FN3] [Norton v. Bassett, 154 Cal. 411, 97 P. 894 \(1908\)](#); [Stianson v. Stianson, 40 S.D. 322, 167 N.W. 237, 6 A.L.R. 280 \(1918\)](#).

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[FN4] [Department of Banking v. McMullen, 134 Neb. 338, 278 N.W. 551 \(1938\)](#).

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[FN5] [Renz v. Beeman, 589 F.2d 735 \(2d Cir. 1978\)](#); [Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136 \(Miss. 1988\)](#) (rule applied with regard to running of statute of limitations for imposition of constructive trust); [Meyer v. Kneip, 457 N.W.2d 463 \(S.D. 1990\)](#) (statute begins to run when party becomes charged as constructive trustee).

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[FN6] [Knesek v. Witte, 754 S.W.2d 814 \(Tex. App. Houston 1st Dist. 1988\)](#), writ denied, (Mar. 1, 1989); [Malunney v. Meade, 45 Ill. App. 3d 473, 4 Ill. Dec. 139, 359 N.E.2d 1091 \(2d Dist. 1977\)](#).

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[FN7] [Manker v. Manker, 263 Neb. 944, 644 N.W.2d 522 \(2002\)](#).

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[FN8] [Stapleton v. Macchi, 401 Mass. 725, 519 N.E.2d 273 \(1988\)](#).

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[FN9] [Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136 \(Miss. 1988\)](#); [State v. Wilkerson, 533 So. 2d 136 \(La. Ct. App. 1st Cir. 1988\)](#).

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[FN10] [Ludwicki v. Guerin, 57 Cal. 2d 127, 17 Cal. Rptr. 823, 367 P.2d 415 \(1961\)](#).

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[FN11] [Dolmetta v. Uintah Nat. Corp., 712 F.2d 15 \(2d Cir. 1983\)](#) (applying New York law); [Mattera v. Mattera, 125 A.D.2d 555, 509 N.Y.S.2d 831 \(2d Dep't 1986\)](#).

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§ 661. Generally; express trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [365\(2\)](#), (4)

Generally, an action to enforce an express trust is not barred by a mere lapse of time, at least where the trust beneficiary is not given reason to know of improper conduct on the part of the trustee.[\[FN1\]](#) In particular, laches is no defense to a beneficiary of trust who is justifiably ignorant of the trustees' default or where the default has been concealed.[\[FN2\]](#)

Where applicable, the elements of laches as a defense to a suit by a beneficiary against a trustee are the same as in other cases, namely, a lapse of time, the want of diligence, knowledge or inexcusable ignorance, and a change in the value of the property after the cause of action arises.[\[FN3\]](#) Some sort of prejudice resulting from the delay to bring a trust-related action also must be shown in order to require relief based on laches;[\[FN4\]](#) to show prejudice it must be shown that some change in the condition or relations of the parties occurred during the period the complainant unreasonably failed to act, and upon the failure to make such a showing, a trial court's dismissal of the complaint on the grounds of laches is improper.[\[FN5\]](#) Laches may apply where the plaintiff clearly understood and approved of the change in the trust, there was no fraud or overreaching, and the plaintiff ratified it.[\[FN6\]](#) Residuary beneficiaries may be barred by laches if they delay making claims until after the trustees making the disputed decisions are dead.[\[FN7\]](#)

Laches will not apply until the lapse of time is great, or until the active duties of the trustee are terminated except for turning over the trust property or funds to the beneficiaries,[\[FN8\]](#) or the trustee openly denies or repudiates the trust,[\[FN9\]](#) and the beneficiary is notified, or is chargeable with constructive notice thereof,[\[FN10\]](#) or is otherwise plainly put on guard against the trustee.[\[FN11\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Claimants to residue of testamentary trust were precluded under doctrine of laches from petitioning for re-distribution of trust proceeds; claimants had notice of settlor's death, were aware that residue of trust would not be distributed until beneficiary's death, were subsequently aware of beneficiary's death, and yet failed to assert claim to portion of residue until seven years after beneficiary's death, after settlor's heirs had engaged in years of litigation to determine distribution of trust proceeds. [In re Estate of Bovey, 2010 MT 217, 358 Mont. 14, 244 P.3d 716 \(2010\).](#)

[END OF SUPPLEMENT]

[\[FN1\] Tersavich v. First Nat. Bank & Trust Co. of Rockford, 194 Ill. App. 3d 972, 141 Ill. Dec. 628, 551 N.E.2d 815 \(2d Dist. 1990\), judgment aff'd, 143 Ill. 2d 74, 156 Ill. Dec. 753, 571 N.E.2d 733 \(1991\).](#)

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[\[FN2\] Smith v. Baptist Foundation of Oklahoma, 2002 OK 57, 50 P.3d 1132 \(Okla. 2002\).](#)

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[\[FN3\] Patterson v. Hewitt, 195 U.S. 309, 25 S. Ct. 35, 49 L. Ed. 214 \(1904\); Williams v. Woodruff, 35 Colo. 28, 85 P. 90 \(1905\); Citizens' State Bank v. Jones, 100 Fla. 1492, 131 So. 369 \(1930\).](#)

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[\[FN4\] Getty v. Getty, 187 Cal. App. 3d 1159, 232 Cal. Rptr. 603 \(2d Dist. 1986\).](#)

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[\[FN5\] Kehoe v. Gilroy, 320 Pa. Super. 206, 467 A.2d 1 \(1983\).](#)

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[\[FN6\] Preston v. City Nat. Bank of Miami, 294 So. 2d 11 \(Fla. Dist. Ct. App. 3d Dist. 1974\).](#)

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[\[FN7\] Rembert v. Gressette, 318 S.C. 519, 458 S.E.2d 552 \(Ct. App. 1995\).](#)

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[\[FN8\] Newman v. Newman, 60 W. Va. 371, 55 S.E. 377 \(1906\).](#)

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[\[FN9\] Stianson v. Stianson, 40 S.D. 322, 167 N.W. 237, 6 A.L.R. 280 \(1918\); Newman v. Newman, 60 W. Va. 371, 55 S.E. 377 \(1906\).](#)

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[\[FN10\] Stianson v. Stianson, 40 S.D. 322, 167 N.W. 237, 6 A.L.R. 280 \(1918\); Leggroan v. Zion's Sav. Bank & Trust Co., 120 Utah 93, 232 P.2d 746 \(1951\).](#)

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[\[FN11\] Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co., 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219 \(1920\).](#)

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3. Laches

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§ 662. Constructive or resulting trusts

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [365\(2\)](#), (4)

Laches constitutes a defense to a suit to declare and enforce a constructive trust.[\[FN1\]](#) For the purpose of the rule, repudiation of the constructive trust is not required,[\[FN2\]](#) and time runs from the moment that the law creates the trust.[\[FN3\]](#) Laches in an action to impose a constructive trust is an affirmative defense to be pleaded and proved by the defendant. The elements that must be established to prevail on such a defense are an unreasonable delay and a disadvantage of the person raising the defense as a result of such delay.[\[FN4\]](#)

Laches may also constitute a bar to an action to declare and enforce a resulting trust.[\[FN5\]](#) For example, in a claim for a resulting trust arising out of an alleged oral agreement, laches bars a claim brought 35 years after the time of the alleged agreement,[\[FN6\]](#) and laches barred another claim based on a constructive trust brought a similarly long period of time after the conveyance involved occurred.[\[FN7\]](#) In some jurisdictions an action to establish a resulting trust is subject to the limitation of laches after the lapse of a particular period without action.[\[FN8\]](#) However, the beneficiary is not bound to act until the trustee affirmatively disclaims the trust and begins to hold adversely to beneficial owner.[\[FN9\]](#) Ordinarily, some sort of prejudice must have resulted to the defendant in order for laches to bar a suit to impose a constructive or resulting trust.[\[FN10\]](#)

[\[FN1\]](#) [In re Neisz's Estate](#), 152 Wash. 336, 277 P. 849 (1929); [Newman v. Newman](#), 60 W. Va. 371, 55 S.E. 377 (1906).

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[\[FN2\]](#) [Stianson v. Stianson](#), 40 S.D. 322, 167 N.W. 237, 6 A.L.R. 280 (1918).

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[\[FN3\]](#) [Stianson v. Stianson](#), 40 S.D. 322, 167 N.W. 237, 6 A.L.R. 280 (1918).

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[FN4] [Knesek v. Witte, 754 S.W.2d 814 \(Tex. App. Houston 1st Dist. 1988\)](#), writ denied, (Mar. 1, 1989).

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[FN5] [Peacock v. Firman, 177 So. 2d 560 \(Fla. Dist. Ct. App. 3d Dist. 1965\)](#); [Streeter v. Gamble, 298 Ill. 332, 131 N.E. 589, 23 A.L.R. 1485 \(1921\)](#).

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[FN6] [Trustman v. Gelfman, 724 So. 2d 1266 \(Fla. Dist. Ct. App. 3d Dist. 1999\)](#).

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[FN7] [Cagle v. Cagle, 277 Ga. 219, 586 S.E.2d 665 \(2003\)](#).

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[FN8] [Flowers v. Anderson, 49 Ill. App. 2d 15, 198 N.E.2d 111 \(1st Dist. 1964\)](#) (five years).

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[FN9] [Peacock v. Firman, 177 So. 2d 560 \(Fla. Dist. Ct. App. 3d Dist. 1965\)](#).

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[FN10] [Mills v. Holcomb, 389 So. 2d 223 \(Fla. Dist. Ct. App. 5th Dist. 1980\)](#); [Hudak v. Procek, 806 A.2d 140 \(Del. 2002\)](#).

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§ 663. Estoppel or waiver precluding laches as defense

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [365\(2\)](#), (4)

Estoppel to assert laches against the enforcement of a trust or the liability of a trustee may be predicated upon a continuous recognition of a resulting trust.[FN1] One who claims the benefit derived from a breach of trust in which he or she actively participates, and who shows no prejudice resulting from the delay in bringing suit to compel him or her to account, cannot complain of laches.[FN2]

[FN1] [Wright v. Wright](#), 242 Ill. 71, 89 N.E. 789 (1909).

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[FN2] [U.S. v. Dunn](#), 268 U.S. 121, 45 S. Ct. 451, 69 L. Ed. 876 (1925).

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[24 Am. Jur. Pleading and Practice Forms, Trusts, §§ 83, 84](#)

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§ 664. Generally

A court is entrusted with discretion in determining the appropriate relief in equity,[\[FN1\]](#) and thus, in fashioning an adequate remedy in equity, the court is bound by no unyielding formula, but is free to effect justice according to the equities peculiar to each transaction wherever a failure to perform a duty to convey would result in unjust enrichment.[\[FN2\]](#) In event of a breach of duty by the trustee of a private trust, the beneficiaries may obtain damages and an equitable decree enforcing the trust.[\[FN3\]](#) The appropriate remedy for a breach of fiduciary duties arising from overcharges of trustee fees is to allot to the trusts a proportionate share of the trustees' profits during years of such misappropriation; the option of restitution with simple interests may not give the trusts an amount close to equaling a share in profits made with their money.[\[FN4\]](#) The beneficiary of a constructive trust is entitled to have his or her original interest restored in the property which was wrongfully taken.[\[FN5\]](#)

A decree enforcing or terminating a trust will make allowance for any reimbursement owing the trustee,[\[FN6\]](#) except where evidence upon which to state an account is lacking.[\[FN7\]](#)

[\[FN1\] Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v. E-Systems, Inc., 257 F.3d 461 \(5th Cir. 2001\).](#)

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[\[FN2\] Hanson v. F.D.I.C., 113 F.3d 866 \(8th Cir. 1997\).](#)

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[\[FN3\] City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613, 82 Cal. Rptr. 2d 859 \(4th Dist. 1999\).](#)

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[\[FN4\] Nickel v. Bank of America Nat. Trust and Sav. Ass'n, 290 F.3d 1134 \(9th Cir. 2002\),](#) as amended on denial of reh'g, (June 19, 2002).

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[\[FN5\] Bender v. CenTrust Mortg. Corp., 51 F.3d 1027 \(11th Cir. 1995\),](#) opinion modified on denial of reh'g, [Bender v. Centrust Mortg. Corp., 60 F.3d 1507 \(11th Cir. 1995\).](#)

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[\[FN6\] Warner v. Tullis, 206 Iowa 680, 218 N.W. 575 \(1928\).](#)

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[\[FN7\] Gerace v. Gerace, 301 Mass. 14, 16 N.E.2d 6, 117 A.L.R. 1459 \(1938\).](#)

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§ 665. Imposition of constructive or resulting trusts

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Judgments declaring a resulting trust. [24 Am. Jur. Pleading and Practice Forms, Trusts, §§ 83, 84](#)

A court of equity in decreeing a constructive trust is bound by no unyielding formula.[\[FN1\]](#) The equity of the transaction must shape the measure of relief.[\[FN2\]](#) When a court impresses a constructive trust upon the property for the benefit of a claimant, it exercises its equitable powers to fashion remedies.[\[FN3\]](#)

[\[FN1\] Simonds v. Simonds, 45 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189 \(1978\).](#)

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[\[FN2\] In re Possick, 196 Misc. 2d 796, 763 N.Y.S.2d 902 \(Sur. Ct. 2003\).](#)

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[\[FN3\] Weatherford v. Keenan, 128 N.C. App. 178, 493 S.E.2d 812 \(1997\).](#)

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§ 666. Judgment as against trustee personally or officially

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 265, 375

If there is breach of fiduciary duties, a plaintiff has right to recover fees against the trustee personally.^[FN1] A deed of trust debtor may not assert a counterclaim personally against trustee of trust which acted as the lender, where the trustee was a plaintiff in the original action against the debtor only in an official capacity as trustee.^[FN2] An individual who is sued by beneficiaries in the individual's capacities as a trustee and a personal representative of estate, but not in a personal capacity, cannot be ordered to pay the beneficiaries' attorney fees, despite the claim that it would be inequitable for the individual not to pay them personally; such an individual is, in effect, not a party.^[FN3]

^[FN1] [Matter of Estate of Cooper, 81 Wash. App. 79, 913 P.2d 393 \(Div. 3 1996\).](#)

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^[FN2] [Timm v. Dewsnup, 921 P.2d 1381 \(Utah 1996\).](#)

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^[FN3] [McNeely v. Hiatt, 138 Or. App. 434, 909 P.2d 191 \(1996\), on reconsideration, 142 Or. App. 522, 920 P.2d 1150 \(1996\).](#)

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§ 667. Confession or consent judgments

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [265](#), [266](#), [374](#) to [375\(1\)](#)

A court of equity has jurisdiction to award appropriate relief against an unauthorized or improper confession or consent judgment.^[FN1] The court may take jurisdiction for the purpose of specifically compelling both the trustee and those who have benefited by the trustee's breach of trust to restore the status quo and thereby undo the wrong comprehended in such consent judgment.^[FN2]

In the case of a consent judgment between beneficiaries of a trust and the trustee, the trustee must exercise the utmost good faith and make full disclosure to the beneficiaries.^[FN3]

^[FN1] [United Mut. Life Ins. Co. v. Sholtz](#), 121 Fla. 260, 163 So. 690 (1935).

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^[FN2] [United Mut. Life Ins. Co. v. Sholtz](#), 121 Fla. 260, 163 So. 690 (1935); [Campbell v. Albers](#), 313 Ill. App. 152, 39 N.E.2d 672 (2d Dist. 1942).

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^[FN3] [Assets Corp. v. Perrin Properties](#), 48 Cal. App. 2d 220, 119 P.2d 375 (3d Dist. 1941).

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§ 668. Generally; persons bound

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [266](#), [374](#), [375](#)

A judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust.[\[FN1\]](#) A judgment in a suit in which the beneficiaries should be, but are not made parties, does not bind them or their interest in the trust res.[\[FN2\]](#) Likewise, a judgment against beneficiaries in a suit in which the trustee should be, but is not, made a party does not bind the trustee or the trust res.[\[FN3\]](#)

[\[FN1\] Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 \(1996\); Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 \(1996\).](#)

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[\[FN2\] Johnson v. Curley, 83 Cal. App. 627, 257 P. 163 \(3d Dist. 1927\); Gibson v. Ledwitch, 84 Kan. 505, 114 P. 851 \(1911\); Kincaid v. Hensel, 185 Wash. 503, 55 P.2d 1050 \(1936\).](#)

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[\[FN3\] Watts v. Watts, 151 Kan. 125, 98 P.2d 125 \(1940\); Kincaid v. Hensel, 185 Wash. 503, 55 P.2d 1050 \(1936\).](#)

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§ 669. Judgment as res judicata

West's Key Number Digest

The doctrine of res judicata, that an existing final judgment rendered upon the merits without fraud or collusion by a court of competent jurisdiction is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, is generally applicable in suits involving or relating to trusts and trustees.^[FN1] The effect of an order approving a trustee's account is, where no objections to the account are raised, limited to the questions raised by the trustee's petition that the account be allowed.^[FN2] In this regard, an order settling a trustee's account is res judicata as to the propriety of the purchase of investment certificates which were issued contrary to statute.^[FN3]

A decree settling and allowing a trustee's first intermediate account is conclusive against the parties as to only matters or items embraced therein, and is not res judicata as to items in the second intermediate account for the intervening period, or as to matters not theretofore reviewed by any court.^[FN4] An order approving a trustee's account is not conclusive of the permissibility of self-dealing not disclosed by the account or petition for its allowance.^[FN5]

Insofar as a judgment in an action to subject the interest of a beneficiary of a trust to the payment of a claim against him or her may operate as an adjudication of the validity of the trust, it is not binding on person not parties to the suit.^[FN6] An order allowing attorney's fees out of a trust estate is a bar to a distinct and independent attempt to obtain additional compensation for the same services.^[FN7]

^[FN1] [Johnson v. Whilden](#), 166 N.C. 104, 81 S.E. 1057 (1914), on reh'g, 171 N.C. 153, 88 S.E. 223 (1916).

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^[FN2] [In re Enger's Will](#), 225 Minn. 229, 30 N.W.2d 694, 1 A.L.R.2d 1048 (1948).

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^[FN3] [Pacific Mut. Life Ins. Co. of Cal. v. McConnell](#), 44 Cal. 2d 715, 285 P.2d 636 (1955).

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^[FN4] [In re Hubbell's Will](#), 302 N.Y. 246, 97 N.E.2d 888, 47 A.L.R.2d 176 (1951).

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^[FN5] [In re Enger's Will](#), 225 Minn. 229, 30 N.W.2d 694, 1 A.L.R.2d 1048 (1948).

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^[FN6] [Ford v. Yost](#), 299 Ky. 682, 186 S.W.2d 896, 162 A.L.R. 149 (1944).

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^[FN7] [Atwood v. Holmes](#), 229 Minn. 37, 38 N.W.2d 62, 11 A.L.R.2d 311 (1949).

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§ 670. Enforcement

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 266, [375\(2\)](#)

Under the equity powers conferred upon it, a court may enforce its orders or decrees against a trustee by attachment for contempt,[\[FN1\]](#) except where the trustee is unable through no fault of his or her own to comply therewith;[\[FN2\]](#) but contempt exists where the inability to comply with the court's order results from the fault of the trustee.[\[FN3\]](#)

Where the trustee individually, and not in his representative capacity, is liable on a contract or tort made or committed in the course of the administration of the trust estate, and suit therefor must be brought against the trustee individually, and judgment can be rendered only against the trustee in his or her individual but not official capacity, execution can issue against only the individual property of the trustee, and not against the trust property.[\[FN4\]](#)

[\[FN1\] Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 \(1939\); People v. La Mothe, 331 Ill. 351, 163 N.E. 6, 60 A.L.R. 316 \(1928\).](#)

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[\[FN2\] Garlington v. Coker, 141 Ga. 678, 81 S.E. 1107 \(1914\).](#)

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[\[FN3\] Cox v. Rice, 375 Ill. 357, 31 N.E.2d 786, 134 A.L.R. 923 \(1940\).](#)

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[\[FN4\] Hewitt v. Phelps, 105 U.S. 393, 26 L. Ed. 1072 \(1881\); Kirchner v. Muller, 280 N.Y. 23, 19 N.E.2d 665, 127 A.L.R. 681 \(1939\); Smith v. Chambers, 117 W. Va. 204, 185 S.E. 211 \(1936\) \(although a business trust\).](#)

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§ 671. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 265, 374

Where supported, beneficiaries may obtain money damages in addition to equitable relief.[FN1] A measure of damages commensurate with the loss and that will make the injured party whole, to the degree possible, must be applied when a fiduciary fails to perform prudently with a resultant loss to the beneficiaries.[FN2] The measure of damages for a trustee's breach of trust is the difference between the value of the beneficiary's rights to the principal and income before and after the breach.[FN3] The beneficiary of the trust is entitled to be put in the position the beneficiary would have been in if no breach of fiduciary duty had been committed.[FN4]

Speculative damages should not be awarded.[FN5] Where the trust has been damaged but there is uncertainty as to extent of the damage, the damages awarded must be closely approximated by drawing reasonable and probable inferences from the facts proven.[FN6]

The proper measure of damages where a trustee improperly allowed the release of collateral of a trust contrary to the terms of a stock purchase agreement, was the difference between the value, at the time of trial, of the collateral that would have been available at the time of the default if the trustee had acted properly, and the value of the collateral that was actually in defendant's possession at that time.[FN7] Where the trustee's liability is based on selling property for less than its fair value, the general rule is that the loss of the trust is measured by the difference between the fair value and the amount received, or the amount the estate would otherwise have received.[FN8] A trust beneficiary who brings an action against a trustee for failure to maintain property that is the subject of a trust cannot be awarded damages for both the value of the property before depreciation and the value and damages for lost rents, where the allowance of such damages would result in the beneficiary's being compensated twice for his or her losses.[FN9] Where a constructive trust is created as the result of a mistaken omission of land from the buyer's deed and the conveyance of the omitted land to a third-party, a bona fide purchaser, the measure of equitable relief is the value of the particular land omitted from the deed at the moment of the third-party conveyance.[FN10] Prejudgment interest may be awarded in trust cases in some jurisdictions upon liquidated or readily ascertainable damages, if there is an equitable basis for such an award.[FN11]

A damages award will be required to be paid to the trust, and not to the beneficiary directly, in a beneficiaries' suit against a trustee for a breach of fiduciary duty, where the beneficiary is not entitled to gross income, and is instead entitled to "current net income" under the will, which means any trust income, minus expenses.[FN12]

[FN1] [Deutsch v. Wolff, 994 S.W.2d 561 \(Mo. 1999\).](#)

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[FN2] [Matter of Estate of Janes, 165 Misc. 2d 743, 630 N.Y.S.2d 472 \(Sur. Ct. 1995\), judgment aff'd as modified, 223 A.D.2d 20, 643 N.Y.S.2d 972 \(4th Dep't 1996\), order aff'd, 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 \(1997\).](#)

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[FN3] [Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 \(Iowa 2001\).](#)

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[FN4] [Berish v. Bornstein, 437 Mass. 252, 770 N.E.2d 961 \(2002\).](#)

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[FN5] [Pietz v. Toledo Trust Co., 63 Ohio App. 3d 17, 577 N.E.2d 1118 \(6th Dist. Lucas County 1989\).](#)

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[FN6] [Vento v. Colorado Nat. Bank-Pueblo, 907 P.2d 642 \(Colo. Ct. App. 1995\).](#)

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[FN7] [Wadsworth v. Bank of California, 97 Or. App. 491, 777 P.2d 975 \(1989\).](#)

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[FN8] [Matter of Green Charitable Trust, 172 Mich. App. 298, 431 N.W.2d 492 \(1988\).](#)

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[FN9] [Matter of Trust of Rosati, 177 Mich. App. 1, 441 N.W.2d 30 \(1989\).](#)

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[FN10] [Mt. Sneffels Co. v. Estate of Scott, 789 P.2d 464 \(Colo. Ct. App. 1989\).](#)

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[FN11] [Toombs v. Daniels, 361 N.W.2d 801 \(Minn. 1985\).](#)

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[FN12] [Lee v. Lee, 47 S.W.3d 767 \(Tex. App. Houston 14th Dist. 2001\).](#)

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§ 672. Punitive damages

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 265, 374

While in some jurisdictions punitive damages generally are not available under the law of trusts in an action for breach of a trustee's fiduciary duty,[\[FN1\]](#) in others, punitive damages may be awarded against trustees,[\[FN2\]](#) such as in cases where malice or fraud is involved,[\[FN3\]](#) or where there is evidence that the trustee's management of the estate was in bad faith or conscious indifference to the rights of the beneficiaries.[\[FN4\]](#) Whether punitive damages are warranted in a trust beneficiaries' breach of fiduciary duty action against the trustee is a question for the jury.[\[FN5\]](#)

[\[FN1\] Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618 \(7th Cir. 1987\); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456 \(5th Cir. 1986\).](#)

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[\[FN2\] Hamilton v. Mercantile Bank of Cedar Rapids, 621 N.W.2d 401 \(Iowa 2001\)](#) (judgment based on breach of the trustee's most basic duty).

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[\[FN3\] Fairhope Single Tax Corp. v. Rezner, 527 So. 2d 1232 \(Ala. 1987\); Robinson v. Kirbie, 1990 OK CIV APP 45, 793 P.2d 315 \(Ct. App. Div. 3 1990\).](#)

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[\[FN4\] Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 \(1986\).](#)

- As to duties and liabilities of trustees for conduct in the administration of trusts, generally, see §§ [309](#) to [331](#).

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[\[FN5\] Estate of Smith By and Through Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 \(1997\).](#)

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§ 673. Discretion of court

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 268, 377

The allowance of counsel fees and litigation expenses is generally within the discretion of the trial court in an action pertaining to trusts.[FN1] A trial court has discretion in determining the need for an award of attorney's fees in an action to construe a trust,[FN2] and may award the beneficiary such fees particularly where the action results in benefit to the trust.[FN3]

A trial court's discretion to award attorney's fees in trust cases is not absolute.[FN4] However, trial court's refusal to award fees in litigation involving a trust generally will not be disturbed absent an abuse of discretion.[FN5] If the trial court has abused its discretion, its ruling on fees will be reversed.[FN6] For example, a trial court abuses its discretion when it awards attorney's fees to a trustee for litigation caused by the trustee's misconduct,[FN7] and a trustee who committed misconduct is not entitled to attorney's fees even if the trustee is successful in defending against some of the beneficiaries' claims.[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Trial court's decision not to award attorney fees when calculating award of damages to beneficiaries for trustee's breach of fiduciary duty and breach of contract was warranted, although state code gave the court discretion to award attorney's fees upon finding of breach of fiduciary duty, where trial court found that trustee did not act in bad faith, was not stubbornly litigious, and did not cause beneficiaries unnecessary trouble and expense. West's [Ga.Code Ann. §§ 13-6-11, 53-12-193\(a\)\(4\)](#). [Wachovia Bank of Georgia, N.A. v. Namik, 275 Ga. App. 229, 620 S.E.2d 470 \(2005\)](#).

Trial court did not abuse its discretion in awarding adopted adult children of grantor's son attorney fees under the Trust Code and Declaratory Judgment Act, in action regarding whether the adopted adult children were beneficiaries of the trust, though adopted adult children did not prevail and grantor's son had advanced their attorney fees subject to reimbursement if they recovered any money from the trust; a court could award attorney fees to a party under the Declaratory Judgment Act even if that party not the prevailing party, all of the parties had stipulated that the requested attorney fees were reasonable and necessary, dispute was whether the awarded fees were also equitable and just, and there was no authority for the proposition that it was inequitable and unjust to award attorney fees to parties who had their fees paid up front by another party, subject to

reimbursement. [In re Ray Ellison Grandchildren Trust, 261 S.W.3d 111 \(Tex. App. San Antonio 2008\)](#), review denied, (Nov. 14, 2008).

[END OF SUPPLEMENT]

[\[FN1\] *Brisacher v. Tracy-Collins Trust Company*, 277 F.2d 519, 3 Fed. R. Serv. 2d 855 \(10th Cir. 1960\); *Matter of Ward's Estate*, 58 A.D.2d 606, 395 N.Y.S.2d 671 \(2d Dep't 1977\); *Gorger v. Gorger*, 276 Or. 267, 555 P.2d 1 \(1976\); *Peoples Nat. Bank of Wash. in Seattle v. Jarvis*, 58 Wash. 2d 627, 364 P.2d 436 \(1961\).](#)

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[\[FN2\] *Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 148 Ill. Dec. 364, 560 N.E.2d 961 \(1st Dist. 1990\); *Allard v. Pacific Nat. Bank*, 99 Wash. 2d 394, 663 P.2d 104 \(1983\); *Wilkins v. Lasater*, 46 Wash. App. 766, 733 P.2d 221 \(Div. 3 1987\).](#)

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[\[FN3\] *Dardovitch v. Haltzman*, 190 F.3d 125 \(3d Cir. 1999\).](#)

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[\[FN4\] *Allard v. Pacific Nat. Bank*, 99 Wash. 2d 394, 663 P.2d 104 \(1983\).](#)

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[\[FN5\] *Rennacker v. Rennacker*, 156 Ill. App. 3d 712, 109 Ill. Dec. 137, 509 N.E.2d 798 \(3d Dist. 1987\).](#)

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[\[FN6\] *Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 148 Ill. Dec. 364, 560 N.E.2d 961 \(1st Dist. 1990\).](#)

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[\[FN7\] *Allard v. Pacific Nat. Bank*, 99 Wash. 2d 394, 663 P.2d 104 \(1983\).](#)

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[\[FN8\] *Malachowski v. Bank One, Indianapolis, N.A.*, 682 N.E.2d 530 \(Ind. 1997\).](#)

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§ 674. Statutory basis for fees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [268](#), [377](#)

In exercising its discretion to award attorney's fees in trust cases, the court must determine that the issues presented are neither immaterial nor trifling; the conduct of the parties or counsel is not vexatious or litigious; and that there has been no unnecessary delay or expense. Furthermore, the court must determine that the litigation is indispensable to the proper administration of the trust; a trial court may allow and properly charge attorney's fees to a trust estate for litigation that is necessary to the administration of the trust.^[FN1] The allowance or disallowance of costs or attorney's fees with respect to litigation involving an express trust, brought by a beneficiary thereof, may also be controlled or affected by provisions of applicable statutes.^[FN2] In some jurisdictions an attorney's fee cannot be charged personally against a defeated plaintiff suing a trustee as a beneficiary absent statutory authority.^[FN3] In other jurisdictions the courts may award attorney fees in the absence of a statute or a contractual provision when the trust beneficiary at his or her own expense, and not for his or her sole benefit, successfully brings a suit to benefit the estate or the trust as a whole.^[FN4]

For example, an action seeking to recover for a bank trustee's breach of fiduciary duty is an "action," within the meaning of a statute providing for the recovery of attorney fees in actions challenging the proper exercise of a trustee's powers,^[FN5] and the statute's application is not limited to statutory actions.^[FN6] The applicable statute providing for an award of attorney fees may call for fees to be awarded as justice and equity may require.^[FN7]

^[FN1] [Allard v. Pacific Nat. Bank, 99 Wash. 2d 394, 663 P.2d 104 \(1983\).](#)

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^[FN2] [Wadsworth v. Bank of California, 97 Or. App. 491, 777 P.2d 975 \(1989\).](#)

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^[FN3] [Webbe v. First Nat. Bank and Trust Co. of Barrington, 139 Ill. App. 3d 806, 93 Ill. Dec. 886, 487 N.E.2d 711 \(2d Dist. 1985\).](#)

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^[FN4] [McNeely v. Hiatt, 142 Or. App. 522, 920 P.2d 1150 \(1996\).](#)

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^[FN5] [First Union Nat. Bank v. Turney, 839 So. 2d 774 \(Fla. Dist. Ct. App. 1st Dist. 2003\)](#), review denied, [858 So. 2d 331 \(Fla. 2003\)](#).

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^[FN6] [Republic Nat. Bank v. Araujo, 697 So. 2d 164 \(Fla. Dist. Ct. App. 3d Dist. 1997\).](#)

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^[FN7] [Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\).](#)

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§ 675. Statutory basis for fees—Effect of who benefits from results

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 268, 377

In exercising its discretion to award attorney's fees in trust cases the trial court's underlying consideration must be whether the litigation and the participation of the parties seeking attorney's fees caused a benefit to the trust.^[FN1]

Thus, one of the situations in which a court may award attorney's fees in litigation concerning a trust is where the litigation results in a benefit to the trust as a whole.^[FN2] In this regard, counsel fees generally will be allowed in the case of successful suits by beneficiaries for the preservation, protection, or increase of trust funds.^[FN3] Even where the plaintiff-beneficiaries' action does not preserve or increase the common fund of the trust, but nonetheless benefits all the trust beneficiaries, the plaintiffs are entitled to attorney's fees.^[FN4] For example, if a party, having a common interest in a trust fund takes proper proceedings to save it from destruction and restore it to the purposes of the trust, then that party is entitled to an award of attorney's fees either out of the fund itself or by proportional contributions from those who accept the benefits of the effort.^[FN5]

While attorney's fees may not be warranted if the suit was brought for the beneficiary's own benefit, not the benefit of the trust,^[FN6] in some instances, such fees may be allowed to beneficiaries, notwithstanding that they have unsuccessfully sought personal benefit from a suit,^[FN7] or, in some instances, where they have successfully brought litigation which has not benefited the trust.^[FN8]

The propriety of an allowance of fees out of the trust estate is sometimes made to depend upon whether the litigation was for the benefit of the trust as a whole rather than the individual benefit of the trustee or one or

more of the beneficiaries. If it was for the benefit of the estate as a whole, costs and fees will be allowed out of the trust fund; if it was not, no allowance out of the estate will be made.[FN9]

[FN1] Allard v. Pacific Nat. Bank, 99 Wash. 2d 394, 663 P.2d 104 (1983).

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[FN2] Dardovitch v. Haltzman, 190 F.3d 125 (3d Cir. 1999).

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[FN3] U.S. v. Equitable Trust Co. of New York, 283 U.S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 (1931); Copley v. Copley, 126 Cal. App. 3d 248, 178 Cal. Rptr. 842 (4th Dist. 1981); Shriner v. Dyer, 462 So. 2d 1122 (Fla. Dist. Ct. App. 4th Dist. 1984).

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[FN4] Lowery v. Evonuk, 95 Or. App. 98, 767 P.2d 489 (1989).

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[FN5] Rennacker v. Rennacker, 156 Ill. App. 3d 712, 109 Ill. Dec. 137, 509 N.E.2d 798 (3d Dist. 1987).

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[FN6] Whittlesey v. Aiello, 104 Cal. App. 4th 1221, 128 Cal. Rptr. 2d 742 (3d Dist. 2002), review denied, (Apr. 9, 2003).

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[FN7] Jennings v. Murdock, 220 Kan. 182, 553 P.2d 846 (1976).

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[FN8] Jones v. Heritage Pullman Bank and Trust Co., 164 Ill. App. 3d 596, 115 Ill. Dec. 653, 518 N.E.2d 178 (1st Dist. 1987).

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[FN9] Palmer v. Hartford Nat. Bank & Trust Co., 160 Conn. 415, 279 A.2d 726 (1971); Saulsbury v. Denton Nat. Bank, 25 Md. App. 669, 335 A.2d 199 (1975); Matter of Estate of Holscher, 724 S.W.2d 577 (Mo. Ct. App. E.D. 1986).

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§ 676. Awards to beneficiaries in actions against trustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 268, [377](#)

Attorney's fees generally may be assessed in a breach of trust action,^[FN1] the object being to make the injured party whole again.^[FN2] Where the defendant has breached a fiduciary duty, the plaintiffs should be granted their request to recover all attorney's fees expended at both the trial and on appeal on behalf of the plaintiffs and all minor beneficiaries and unknown beneficiaries.^[FN3] An award of attorney's fees against a trustee generally turns on the trustee's active culpability.^[FN4]

An award of attorney's fees in an action brought by beneficiaries against cotrustees for certain breaches of their fiduciary duties with regard to the trust are properly allowed where such action serves to protect the entire trust res from improper depletion by trustees.^[FN5] When an action is brought successfully against a trustee for a breach of trust, the award of an attorney's fee to the plaintiff is proper.^[FN6] If cotrustees negligently permitted a third person to obtain possession of the trust property, the expenses of the litigation that resulted must be borne by the cotrustees personally.^[FN7] A trustee engaged in self-dealing is an unusual circumstance, and, therefore, the trial court may assess attorney's fees against the trustee personally in a breach of trust action.^[FN8]

CUMULATIVE SUPPLEMENT

Cases:

Trial court abused its discretion in denying co-trustees' motion to vacate, on grounds of mistake or neglect, an order awarding beneficiary attorney's fees and costs, where trial court clerk stated original order was lost, beneficiary's counsel acted ex parte in obtaining subsequent identical order, and beneficiary relied on later order as basis for post-judgment writ of garnishment. [West's F.S.A. RCP Rule 1.540\(a, b\)](#). [Jacobson v. Sklaire, 50 So. 3d 1 \(Fla. Dist. Ct. App. 3d Dist. 2010\)](#).

There was sufficient evidence that custodians of children's Uniform Transfers to Minors Act (UTMA) funds engaged in a pattern of misconduct or pervasive, wanton dereliction of the duties imposed by the General Assembly on UTMA custodians, as required to support award of attorney fees in action for accounting and compensatory damages based on custodians' transfer of UTMA funds; custodians deliberately withheld records of UTMA accounts from children for more than a year, and those records, once produced, revealed that custodian had improperly commingled UTMA funds, and subsequently used a charitable contribution made from UTMA funds to children's school as a charitable deduction on his personal income tax return and used UTMA funds to reimburse himself for a child support payment. West's [V.C.A. §§ 31-48\(E\), 31-50](#). [Carlson v. Wells, 281 Va. 173, 705 S.E.2d 101 \(2011\)](#).

[END OF SUPPLEMENT]

[\[FN1\] Hosey v. Burgess, 319 Ark. 183, 890 S.W.2d 262 \(1995\).](#)

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[\[FN2\] Buder v. Sartore, 774 P.2d 1383 \(Colo. 1989\).](#)

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[\[FN3\] Fred Hutchinson Cancer Research Center v. Holman, 107 Wash. 2d 693, 732 P.2d 974 \(1987\).](#)

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[\[FN4\] Dardovitch v. Haltzman, 190 F.3d 125 \(3d Cir. 1999\).](#)

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[\[FN5\] Robinson v. Kirbie, 1990 OK CIV APP 45, 793 P.2d 315 \(Ct. App. Div. 3 1990\).](#)

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[\[FN6\] Liles v. Liles, 289 Ark. 159, 711 S.W.2d 447 \(1986\).](#)

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[\[FN7\] Wiglesworth v. Taylor, 239 Va. 603, 391 S.E.2d 299 \(1990\).](#)

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[\[FN8\] Feinberg v. Adolph K. Feinberg Hotel Trust, 922 S.W.2d 21 \(Mo. Ct. App. E.D. 1996\).](#)

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§ 677. Recovery by trustees

West's Key Number Digest

A trustee is entitled to reimbursement from the trust for reasonable[FN1] attorney's fees expended in protecting[FN2] or preserving[FN3] the trust or trust estate. However, a trustee is not entitled to charge the trust estate with the fees for defending his own maladministration against the justifiable complaint of the beneficiaries.[FN4] If the litigation was necessitated by the fault or omission of the trustee, the trustee will not be granted an allowance for costs and fees;[FN5] a decision to award attorney fees to the trustee is a matter within the sound discretion of the trial judge.[FN6] Thus, for example, if cotrustees negligently permit a third person to obtain possession of trust property, they will not be entitled to reimbursement for attorney's fees from the trust.[FN7]

A trustee may generally be entitled to attorney fees to be paid from the trust if the trustee successfully defends an action brought by the beneficiary,[FN8] but where a trustee breaches its duty to administer the trust according to its terms and performs in a manner which favors one beneficiary over another, the trustee is not entitled to attorney's fees and costs even though the breach is technical in nature, done in good faith, and causes no harm.[FN9] It may be error to award the trustee attorney fees absent a finding that the beneficiary's action was frivolous, unreasonable, or litigated in bad faith, as required by the statute authorizing such an assessment.[FN10]

The success of the trustee in the suit is a factor in whether the trustee should be awarded fees.[FN11] A trustee who unsuccessfully defends against charges of a breach of fiduciary duties obviously has not caused a benefit to the trust,[FN12] but where a trustee has successfully defended itself against the beneficiaries' efforts to remove the trustee, the trustee should be entitled to payment of the defense expenses from the trust shares of the beneficiaries seeking such removal.[FN13]

[FN1] [Sundquist v. Sundquist](#), 639 P.2d 181 (Utah 1981); [Wiglesworth v. Taylor](#), 239 Va. 603, 391 S.E.2d 299 (1990).

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[FN2] [Citizens and Southern Nat. Bank v. Haskins](#), 254 Ga. 131, 327 S.E.2d 192 (1985); [Wiglesworth v. Taylor](#), 239 Va. 603, 391 S.E.2d 299 (1990).

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[FN3] [Citizens and Southern Nat. Bank v. Haskins](#), 254 Ga. 131, 327 S.E.2d 192 (1985); [Sundquist v. Sundquist](#), 639 P.2d 181 (Utah 1981).

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[FN4] [Citizens and Southern Nat. Bank v. Haskins](#), 254 Ga. 131, 327 S.E.2d 192 (1985).

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[FN5] [Wiglesworth v. Taylor](#), 239 Va. 603, 391 S.E.2d 299 (1990).

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[FN6] [Lattuca v. Robsham](#), 442 Mass. 205, 812 N.E.2d 877 (2004).

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[FN7] [Wiglesworth v. Taylor](#), 239 Va. 603, 391 S.E.2d 299 (1990).

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[FN8] [Jacob v. Davis](#), 128 Md. App. 433, 738 A.2d 904 (1999).

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[FN9] [Northern Trust Co. v. Heuer](#), 202 Ill. App. 3d 1066, 148 Ill. Dec. 364, 560 N.E.2d 961 (1st Dist. 1990).

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[\[FN10\] Matter of Fitton, 605 N.E.2d 1164 \(Ind. Ct. App. 2d Dist. 1992\).](#)

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[\[FN11\] Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 \(2000\); Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 \(1999\); Atwood v. Atwood, 2001 OK CIV APP 48, 25 P.3d 936 \(Div. 4 2001\).](#)

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[\[FN12\] Allard v. Pacific Nat. Bank, 99 Wash. 2d 394, 663 P.2d 104 \(1983\).](#)

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[\[FN13\] Jennings v. Murdock, 220 Kan. 182, 553 P.2d 846 \(1976\).](#)

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§ 678. Recovery by trustees—Actions against cotrustees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [268](#), [377](#)

A trustee who prevails in an action against a cotrustee will usually be allowed attorney's fees out of the trust estate,[\[FN1\]](#) although the prevailing trustee may sometimes be denied payment of attorney's fees from the trust estate.[\[FN2\]](#) Even a nonprevailing trustee may be allowed attorney's fees from the trust estate in some cases,[\[FN3\]](#) as, for example, where the litigation between individual and corporate trustees is necessary to resolve an impasse between such trustees, and despite the fact that the court had adopted the prevailing party's

position.[FN4] The award of attorney's fees to a minority trustee who is unsuccessful in the litigation is a matter for the discretion of the trial court.[FN5]

[FN1] [Birmingham Trust Nat. Bank v. Harrison, 403 So. 2d 224 \(Ala. 1981\)](#); [Wilmington Trust Co. v. Coulter, 42 Del. Ch. 253, 208 A.2d 677 \(1965\)](#); [In re Hoops' Estate, 272 Wis. 238, 75 N.W.2d 279 \(1956\)](#).

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[FN2] [Wagstaff v. Manufacturers Nat. Bank of Detroit, 588 F. Supp. 1389 \(E.D. Mich. 1984\)](#).

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[FN3] [Stuart v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 68 Ill. 2d 502, 12 Ill. Dec. 248, 369 N.E.2d 1262 \(1977\)](#); [Matter of Gabeline, 288 N.W.2d 341 \(Iowa 1980\)](#).

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[FN4] [Stuart v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 68 Ill. 2d 502, 12 Ill. Dec. 248, 369 N.E.2d 1262 \(1977\)](#).

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[FN5] [Forth v. Forth, 409 N.E.2d 1107 \(Ind. Ct. App. 1st Dist. 1980\)](#); [In re Hoops' Estate, 272 Wis. 238, 75 N.W.2d 279 \(1956\)](#).

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§ 679. Proceedings to construe trust provisions

West's Key Number Digest

When the trust instrument in dispute is sufficiently ambiguous to require litigation to establish its meaning and effect, it is proper to award an allowance of costs^[FN1] and attorney's fees.^[FN2]

In a declaratory judgment action by a trustee for clarification of a trust instrument, a trial court may properly apply equitable principles to deny the attorney's fees from the trust to the claimed beneficiaries who intervene, where the intervention is not for the benefit of the trust and the intervenors could assert their claim to be beneficiaries in a separate suit against the trustee.^[FN3]

The costs of litigation to construe a trust in which there are adverse claims are ordinarily paid by the trust estate.^[FN4]

CUMULATIVE SUPPLEMENT

Cases:

Trial court had authority to address issue of attorney fees and costs following entry of judgment in settlor's action that sought order requiring trustees to pay to him a sum of money from family trust sufficient to provide for his support, where settlor timely filed post-judgment application for fees and costs. West's [Wyo.Stat. Ann. § 1-14-126](#); Rules Civ.Proc., Rule 54(d). [Garwood v. Garwood, 2010 WY 91, 233 P.3d 977 \(Wyo. 2010\)](#).

[END OF SUPPLEMENT]

^[FN1] [Garrison v. Garrison, 354 Mo. 62, 188 S.W.2d 644 \(1945\)](#).

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^[FN2] [Matter of Ward, 360 N.W.2d 650 \(Minn. Ct. App. 1985\)](#); [Garrison v. Garrison, 354 Mo. 62, 188 S.W.2d 644 \(1945\)](#).

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^[FN3] [Connecticut Bank and Trust Co. v. Coffin, 212 Conn. 678, 563 A.2d 1323 \(1989\)](#).

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^[FN4] [Northern Trust Co. v. Heuer, 202 Ill. App. 3d 1066, 148 Ill. Dec. 364, 560 N.E.2d 961 \(1st Dist. 1990\)](#); [Moore v. Neely, 212 Tenn. 496, 370 S.W.2d 537 \(1963\)](#).

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§ 680. Amount of costs and fees allowed; general matters considered in determining attorney's fees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [268](#), [377](#)

Where attorney's fees are to be fixed by the court, the amount allowable is sometimes controlled by a statute or rule, but in the absence of controlling statutory provisions, the amount of the fees allowed should be based upon the reasonable worth of the attorney's services.[FN1] A trial court has discretion in determining the amount of attorney's fees in an action to construe a trust.[FN2] In awarding attorney's fees in connection with proceedings to save a trust from destruction and restore to it the purposes of the trust, the court must establish a sum that is reasonable and commensurate with the services rendered and the amount in controversy.[FN3] An itemization of exactly how the work benefited the trust, and how the time was actually spent, may be required to support an award for fees.[FN4]

In determining what constitutes reasonable fees for attorneys in litigation pertaining to trusts, consideration is to be given such elements as the ability,[FN5] professional standing,[FN6] experience and professional reputation,[FN7] as well as the skills required of the attorneys performing the services, the means of the client, the nature and importance of the cause,[FN8] the nature and value of services involved, and the time and labor required[FN9] or actually expended on behalf of the client.[FN10] Other factors include the amount involved in the litigation,[FN11] results obtained or the amount recovered,[FN12] the novelty and difficulty of questions, the likelihood that acceptance of the employment would preclude other employment of the attorneys, and the customary fees charged.[FN13]

CUMULATIVE SUPPLEMENT

Cases:

Beneficiaries, who brought action against trustee alleging that trustee violated trust agreement by not apportioning administrative expenses and taxes against all of the trust's assets, did not waive argument that trustee was not entitled to any attorney fees by accepting distribution checks from trustee from which trustee had withheld a portion of his attorney fees and by failing to file a formal petition alleging trustee improperly withheld attorney fees, when, after discovering that trustee had withheld attorney fees from such distributions in addition to a portion of taxes assessed against trust, beneficiaries raised argument at subsequent court hearing. [Hanson v. Valma M. Hanson Revocable Trust, 855 N.E.2d 655 \(Ind. Ct. App. 2006\)](#).

Once it has been determined that authority exists to award attorney fees and costs in a proceeding involving the administration of a trust, a trial court has extremely broad discretion to rule on the amount of such an award. West's [Wyo.Stat.Ann. § 4-10-1004](#). [Garwood v. Garwood, 2010 WY 91, 233 P.3d 977 \(Wyo. 2010\)](#).

[END OF SUPPLEMENT]

[FN1] [U.S. v. Equitable Trust Co. of New York, 283 U.S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 \(1931\)](#); [Van Gorden v. Lunt, 234 Iowa 832, 13 N.W.2d 341 \(1944\)](#); [In re Atwood's Trust, 227 Minn. 495, 35 N.W.2d 736, 9 A.L.R.2d 1126 \(1949\)](#).

[FN2] [First Union Nat. Bank v. Turney, 839 So. 2d 774 \(Fla. Dist. Ct. App. 1st Dist. 2003\)](#), review denied, [858 So. 2d 331 \(Fla. 2003\)](#); [Northern Trust Co. v. Heuer, 202 Ill. App. 3d 1066, 148 Ill. Dec. 364, 560 N.E.2d 961 \(1st Dist. 1990\)](#).

[FN3] [Rennacker v. Rennacker, 156 Ill. App. 3d 712, 109 Ill. Dec. 137, 509 N.E.2d 798 \(3d Dist. 1987\)](#).

[FN4] [Matter of Trust of McDonald, 858 S.W.2d 271 \(Mo. Ct. App. S.D. 1993\)](#).

[FN5] [U.S. v. Equitable Trust Co. of New York, 283 U.S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 \(1931\)](#); [Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\)](#).

[FN6] [U.S. v. Equitable Trust Co. of New York, 283 U.S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 \(1931\)](#); [Kinney v. Uglow, 163 Or. 539, 98 P.2d 1006 \(1940\)](#).

[FN7] [Ingalls v. Hare, 266 Ala. 221, 96 So. 2d 266 \(1957\)](#); [Allard v. First Interstate Bank of Washington, N.A., 112 Wash. 2d 145, 768 P.2d 998 \(1989\)](#), opinion amended, [773 P.2d 420 \(Wash. 1989\)](#).

[FN8] [U.S. v. Equitable Trust Co. of New York, 283 U.S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 \(1931\)](#); [Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\)](#).

[FN9] [Ingalls v. Hare, 266 Ala. 221, 96 So. 2d 266 \(1957\)](#).

[FN10] [U.S. v. Equitable Trust Co. of New York, 283 U.S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 \(1931\)](#).

[FN11] [U.S. v. Equitable Trust Co. of New York, 283 U.S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 \(1931\)](#); [Willett & Willett v. First Nat. Bank, 234 Ala. 577, 176 So. 344 \(1937\)](#); [Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\)](#).

[FN12] [U.S. v. Equitable Trust Co. of New York, 283 U.S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 \(1931\)](#); [Willett & Willett v. First Nat. Bank, 234 Ala. 577, 176 So. 344 \(1937\)](#); [Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\)](#); [Kinney v. Uglow, 163 Or. 539, 98 P.2d 1006 \(1940\)](#).

[FN13] [Allard v. First Interstate Bank of Washington, N.A., 112 Wash. 2d 145, 768 P.2d 998 \(1989\)](#), opinion amended, [773 P.2d 420 \(Wash. 1989\)](#).

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H. Recovery of Damages and Litigation Expenses

2. Attorney's Fees; Litigation Expenses

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§ 681. Amount of costs and fees allowed; general considered in determining attorney's fees—Specific items allowable as costs or fees

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [268](#), [377](#)

Examples of specific items which may be allowed as costs or disbursements in litigation respecting an express trust brought by a beneficiary thereof are: masters', referees', or auditors' fees;[FN1] the costs or expenses of an audit or reference;[FN2] fees of expert witnesses;[FN3] reporters' and stenographers' fees;[FN4] and accountants' fees.[FN5]

[FN1] [In re Isenberg's Estate, 28 Haw. 590, 1925 WL 3154 \(1925\)](#), rev'd on other grounds, [26 F.2d 609 \(C.C.A. 9th Cir. 1928\)](#), opinion adhered to on reh'g, [31 F.2d 553 \(C.C.A. 9th Cir. 1929\)](#).

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[FN2] [In re Kline's Estate, 280 Pa. 41, 124 A. 280, 32 A.L.R. 926 \(1924\)](#).

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[\[FN3\] Moore v. Cavett, 1961 OK 288, 368 P.2d 224, 94 A.L.R.2d 1293 \(Okla. 1961\).](#)

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[\[FN4\] Home for Destitute Crippled Children v. Boomer, 320 Ill. App. 541, 51 N.E.2d 830 \(1st Dist. 1943\).](#)

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[\[FN5\] Chapin v. Collard, 29 Wash. 2d 788, 189 P.2d 642 \(1948\).](#)

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1. In General

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§ 682. Nature and standard of review, generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [267](#), [376](#)

Appellate courts review a district court's findings of fact concerning trusts under a clearly erroneous standard and review conclusions of law de novo.^[FN1] The final appellate court's scope of review of findings of fact is limited; such findings should not be set aside so long as they are supported by substantial credible evidence.^[FN2] The standard of review in appeals of orders denying a request for compensation for trustee's fees and for attorney fees is an abuse of discretion.^[FN3] The standard of appellate review of an order finding the proof insufficient to establish a resulting trust is limited to ascertaining whether anyone could not find that the supporting evidence was clear, strong, unequivocal, and beyond a reasonable doubt.^[FN4] The existence of a confidential relationship, and the existence of an implied trust, are questions of fact subject to a review under the clearly erroneous standard.^[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Meaning of the provisions of a trust document is a matter of law to which the Court of Appeals applies a de novo standard of review. [Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust No. 1 U/A January 18, 2002, 855 N.E.2d 592 \(Ind. Ct. App. 2006\)](#), transfer denied, [869 N.E.2d 451 \(Ind. 2007\)](#).

[END OF SUPPLEMENT]

[FN1] [In re Estate of King, 668 N.W.2d 6 \(Minn. Ct. App. 2003\)](#).

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[FN2] [In re Administration of Estate of Abernathy, 778 So. 2d 123 \(Miss. 2001\)](#).

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[FN3] [Lampe v. Pawlarczyk, 314 Ill. App. 3d 455, 247 Ill. Dec. 94, 731 N.E.2d 867 \(1st Dist. 2000\)](#).

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[FN4] [Persan v. Life Concepts, Inc., 738 So. 2d 1008 \(Fla. Dist. Ct. App. 5th Dist. 1999\)](#).

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[FN5] [Schroeder v. Buchholz, 2001 ND 36, 622 N.W.2d 202 \(N.D. 2001\)](#).

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§ 683. Collateral attack of judgments

West's Key Number Digest

While a judgment is generally not subject to collateral attack where the court had jurisdiction of the subject matter and of the parties or, in proceedings in rem, of the res, there are some circumstances where collateral attack upon a judgment is justified.[\[FN1\]](#) The rules pertaining to collateral attack upon judgments[\[FN2\]](#) are fully applicable with regard to judgments involving or relating in any way to trusts or trustees,[\[FN3\]](#) such as a decree appointing a trustee,[\[FN4\]](#) and a judgment, in accordance with an agreement and settlement between parties, that a trust be closed and terminated.[\[FN5\]](#)

An error in holding that a trust does not protect real estate from creditors of the beneficiary does not render the judgment void on a collateral attack.[\[FN6\]](#) Furthermore, a suit by one party to an agreement and settlement that a trust be closed and terminated, against the other party, to have vacated so much of the judgment as declares the trust terminated, is a prohibited collateral attack.[\[FN7\]](#)

On the other hand, the general rule that a judgment may be collaterally attacked on the ground of fraud committed by third persons whose rights were affected by the judgment[\[FN8\]](#) has been recognized with respect to judgments in suits by or against a trustee in which beneficiaries are not made parties.[\[FN9\]](#) In addition, a judgment which is void as to the beneficiaries of a trust can be attacked by them whenever it is sought to be enforced against them, and it is not incumbent upon them to move to set aside such judgment within any given time.[\[FN10\]](#)

[\[FN1\]](#) Am. Jur. 2d, Judgments § 897.

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[\[FN2\]](#) Am. Jur. 2d, Judgments §§ 897 et seq.

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[\[FN3\]](#) Spencer v. Spencer, 31 Ind. App. 321, 67 N.E. 1018 (Div. 1 1903).

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[\[FN4\]](#) Haggin v. Straus, 148 Ky. 140, 146 S.W. 391 (1912).

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[\[FN5\]](#) Spencer v. Spencer, 31 Ind. App. 321, 67 N.E. 1018 (Div. 1 1903).

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[\[FN6\]](#) Manson v. Duncanson, 166 U.S. 533, 17 S. Ct. 647, 41 L. Ed. 1105 (1897).

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[\[FN7\]](#) Spencer v. Spencer, 31 Ind. App. 321, 67 N.E. 1018 (Div. 1 1903).

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[\[FN8\]](#) Am. Jur. 2d, Judgments § 932.

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[\[FN9\]](#) Vetterlein v. Barnes, 124 U.S. 169, 8 S. Ct. 441, 31 L. Ed. 400 (1888); Snelling v. American Freehold Land Mortg. Co. of London, 107 Ga. 852, 33 S.E. 634 (1899).

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[\[FN10\]](#) Snelling v. American Freehold Land Mortg. Co. of London, 107 Ga. 852, 33 S.E. 634 (1899).

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§ 684. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [267](#), [376](#)

A matter with regard to trusts generally cannot be raised for the first time on appeal.[\[FN1\]](#) Thus, matters not raised in the trial will not be considered on appeal.[\[FN2\]](#)

A motion first made in an appellate court to amend a bill to establish a trust in real estate will be overruled, where it does not appear that the alleged facts have been recently discovered, and there is no affidavit in respect to them.[\[FN3\]](#)

Where the evidence warrants the auditing judge's finding with respect to the extent and value of services rendered by counsel to an accounting trustee, such findings may not be disturbed on appeal.[\[FN4\]](#) Whether a trust is ambiguous is a question of law and thus fully reviewable on appeal.[\[FN5\]](#)

[\[FN1\]](#) [Proudfoot v. Proudfoot](#), 214 W. Va. 841, 591 S.E.2d 767 (2003); [Hatleberg v. Norwest Bank Wisconsin](#), 271 Wis. 2d 225, 2004 WI App 48, 678 N.W.2d 302 (Ct. App. 2004), review granted, 2004 WI 123, 687 N.W.2d 522 (Wis. 2004); [Seven G Ranching Co. v. Stewart Title & Trust of Tucson](#), 128 Ariz. 590, 627 P.2d 1088 (Ct. App. Div. 2 1981).

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[\[FN2\]](#) [Edwards v. First Federal Sav. & Loan Ass'n of Clovis](#), 102 N.M. 396, 696 P.2d 484 (Ct. App. 1985); [In re John L. Norris Trust](#), 143 Vt. 325, 465 A.2d 1385 (1983).

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[\[FN3\] Hodgson v. Federal Oil & Development Co., 274 U.S. 15, 47 S. Ct. 502, 71 L. Ed. 901, 54 A.L.R. 869 \(1927\).](#)

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[\[FN4\] In re Davidson's Trust Estate, 354 Pa. 333, 47 A.2d 145, 165 A.L.R. 768 \(1946\).](#)

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[\[FN5\] Matter of Estate of Schmidt, 1997 ND 244, 572 N.W.2d 430 \(N.D. 1997\).](#)

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§ 685. Order or judgment as to removal of trustee

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [267](#), [376](#)

Ordinarily, an order either denying[\[FN1\]](#) or granting an application for removal of a trustee may be appealed.[\[FN2\]](#) A judgment removing a trustee and reserving the appointment of a successor trustee for a later determination is not appealable where the judgment is not yet final.[\[FN3\]](#) Where appealable, an order for removal of a trustee will be disturbed on appeal only upon clear and convincing grounds, the removal being within the sound discretion of the lower court.[\[FN4\]](#)

[\[FN1\] Geib v. Geib's Estate, 182 Ind. App. 377, 395 N.E.2d 336 \(3d Dist. 1979\)](#) (denial of petition to revoke letters improvidently issued); [Matter of Butterfield, 100 Mich. App. 657, 300 N.W.2d 359 \(1980\)](#); [In re Mayer's](#)

[Estate, 29 Wis. 2d 497, 139 N.W.2d 111 \(1966\).](#)

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[\[FN2\] Matter of Guardianship of Green, 525 N.E.2d 634 \(Ind. Ct. App. 3d Dist. 1988\); Matter of Butterfield, 100 Mich. App. 657, 300 N.W.2d 359 \(1980\); In re Estate of Snover, 233 Neb. 198, 443 N.W.2d 894 \(1989\).](#)

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[\[FN3\] McCormick v. Hines, 503 S.W.2d 333 \(Tex. Civ. App. Amarillo 1973\).](#)

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[\[FN4\] McDonald v. O'Donnell, 8 F.2d 792, 45 A.L.R. 328 \(App. D.C. 1925\); Shirk v. Walker, 298 Mass. 251, 10 N.E.2d 192, 125 A.L.R. 620 \(1937\).](#)

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§ 686. Imposition of constructive trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [267](#), [376](#)

In some jurisdictions, the rule is that a reviewing court will not disturb the trial judge's decision to impose a constructive trust unless it is clearly erroneous or manifestly unjust,[\[FN1\]](#) the standard being that applicable to the review of an equity action.[\[FN2\]](#) The limited scope of review of a court's determination as to whether to impose a constructive trust, pursuant to which the trial court's determination must stand unless it is clearly erroneous or involves an abuse of discretion, is consistent with the general proposition that equitable determinations that depend on a balancing of many factors are committed to the sound discretion of a trial

court.[FN3] However, there is a de novo review as to all questions of law, including those regarding the applicability of a constructive trust.[FN4]

In some jurisdictions, an action for a constructive trust may be reviewed de novo on the record in the state supreme court,[FN5] giving consideration, where the evidence is in conflict, to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.[FN6] Whether the facts in a particular case warrant the imposition of a constructive trust may be deemed a question of law, and therefore the appellate court would review such question independently, without deference to the lower court's decision or its reasoning.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Appellate courts review the trial court's decision regarding imposition of constructive trust for abuse of discretion; this is a deferential standard that requires a showing that the trial court has withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent. [Gregoire v. Gregoire, 2009 VT 87, 987 A.2d 909 \(Vt. 2009\)](#).

[END OF SUPPLEMENT]

[FN1] [Truett v. Johnson, 526 So. 2d 14 \(Ala. 1988\)](#).

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[FN2] [Hanigan v. Trumble, 252 Neb. 376, 562 N.W.2d 526 \(1997\)](#).

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[FN3] [Riccio v. Riccio, 75 Conn. App. 556, 816 A.2d 733 \(2003\)](#).

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[FN4] [In re Administration of Estate of Abernathy, 778 So. 2d 123 \(Miss. 2001\)](#).

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[FN5] [Lone Oak Farm Corp. v. Riverside Fertilizer Co., 229 Neb. 548, 428 N.W.2d 175 \(1988\)](#).

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[FN6] [Evertson v. Cannon, 226 Neb. 370, 411 N.W.2d 612 \(1987\)](#).

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[FN7] [Hendricks v. M.C.I., Inc., 152 Wis. 2d 363, 448 N.W.2d 289 \(Ct. App. 1989\)](#)

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3. Powers and Duties of Trustees to Appeal

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§ 687. Generally

West's Key Number Digest

West's Key Number Digest, [Trusts](#) 267, 376

It is within the power and the duty of the trustee in a proper case, in order to serve the trust, to take appeals and to appear in appellate courts in actions or proceedings involving the trust estate.^[FN1] A trustee's right to take an appeal is also recognized where the trustee's personal rights are affected by an order or judgment.^[FN2] Where an order or judgment affects merely the rights of the trust beneficiaries among themselves, and all the trust beneficiaries are in existence and in court, or adequately represented, the trustee is not aggrieved thereby and has no appealable interest.^[FN3] However, where an order or judgment affects or threatens the very existence, validity, or continuance of the trust, or prevents the trustee from discharging duties under the trust, or threatens to defeat the purpose of the trust, the trustee, though having no personal interest in the litigation, is not a disinterested party; in such case the trustee, in a fiduciary or representative capacity, is aggrieved by the judgment or order, and may appeal therefrom.^[FN4]

Where he has a right to appeal, an aggrieved cotrustee may bring such an appeal with regard to trust matters even though a cotrustee refuses to join in the appeal.^[FN5]

^[FN1] [Chinnis v. Cobb](#), 210 N.C. 104, 185 S.E. 638 (1936).

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^[FN2] [Waite v. Harvey](#), 312 Mass. 384, 45 N.E.2d 1 (1942).

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^[FN3] [In re Campbell's Estate](#), 46 Haw. 475, 382 P.2d 920 (1963).

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^[FN4] [Toledo Trust Co. v. Farmer](#), 165 Ohio St. 378, 60 Ohio Op. 8, 135 N.E.2d 356 (1956); [In re Thompson's Estate](#), 416 Pa. 249, 206 A.2d 21 (1965).

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^[FN5] [Sokol v. Nattans](#), 23 Md. App. 600, 329 A.2d 115 (1974).

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§ 688. Order or judgment terminating or invalidating trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [267](#), [376](#)

Generally, a trustee may appeal from an order or judgment terminating or dissolving the trust, or declaring it invalid,[\[FN1\]](#) or from an order holding that no trust was ever created.[\[FN2\]](#) A trustee may appeal from an order terminating the trust or dissolving a spendthrift trust, even though all the beneficiaries consent to the immediate distribution of the trust estate.[\[FN3\]](#)

[\[FN1\]](#) [Stein v. La Salle Nat. Bank, 328 Ill. App. 3, 65 N.E.2d 216 \(1st Dist. 1946\).](#)

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[\[FN2\]](#) [In re Bunn's Estate, 33 Cal. 2d 897, 206 P.2d 635 \(1949\).](#)

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[\[FN3\]](#) [In re Ferrall's Estate, 33 Cal. 2d 202, 200 P.2d 1, 6 A.L.R.2d 142 \(1948\).](#)

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§ 689. Order or judgment for payment from trust

West's Key Number Digest

West's Key Number Digest, [Trusts](#) [267](#), [376](#)

A trustee may have the right of appeal from an order making an allowance from the trust estate, or invading or depleting the trust res or income.[\[FN1\]](#) In this regard, where an order or judgment depletes the trust fund by allowance of unreasonable or unfounded claims against it, the trustee, though having no personal interest in the litigation, is aggrieved by the judgment or order, and may appeal therefrom,[\[FN2\]](#) whether the litigation is between the beneficiaries themselves or between the trust and third parties.[\[FN3\]](#) For example, a trustee has an appealable interest where it is directed to pay trust assets to creditors even though it has no personal stake in the suit.[\[FN4\]](#)

CUMULATIVE SUPPLEMENT

Cases:

Trial court did not lose its jurisdiction to address issues of attorney fees and costs when trustees filed notice of appeal regarding judgment that ordered trustees to make monthly payments to beneficiary from trust; issues of attorney fees and costs were not subject of appeal. West's [Wyo.Stat.Ann. § 1-14-126](#); Rules Civ.Proc., Rule 54(d); Rules App.Proc., Rule 6.01(b). [Garwood v. Garwood, 2010 WY 91, 233 P.3d 977 \(Wyo. 2010\)](#).

[END OF SUPPLEMENT]

[\[FN1\]](#) [In re Kessler's Estate, 32 Cal. 2d 367, 196 P.2d 559 \(1948\)](#); [Tree v. Rives, 347 Ill. App. 358, 106 N.E.2d 870 \(1st Dist. 1952\)](#); [Offutt v. Offutt, 204 Md. 101, 102 A.2d 554 \(1954\)](#).

[\[FN2\] In re Thompson's Estate, 416 Pa. 249, 206 A.2d 21 \(1965\); In re Hartt's Estate, 75 Wyo. 305, 295 P.2d 985 \(1956\).](#)

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[\[FN3\] In re Ferrall's Estate, 33 Cal. 2d 202, 200 P.2d 1, 6 A.L.R.2d 142 \(1948\).](#)

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[\[FN4\] Lundgren v. Hoglund, 219 Mont. 295, 711 P.2d 809 \(1985\).](#)

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Trusts

Laura Dietz, J. D., William Lindsley, J.D., Lucas Martin, J.D., Anne Payne, J.D., Jeffrey Shampo, J.D., Eric C. Surette, J. D.

[Topic Summary](#)

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