

## Title

One court fails to consider trustee's non-statutory equitable duty to carry out settlor's lawful wishes as manifested in trust's terms, a duty that perforce encompasses defending those terms from unwarranted assault

## Text

**The trustee's longstanding duty in equity to defend the trust's terms.** Unless applicable law provides otherwise, the trustee has an overarching duty to carry out the lawful intentions of the settlor as they have been duly manifested in the terms of the trust. Many a judicial decision in a trust matter opens with the maxim that settlor intent is the lodestar that must guide the court in its deliberations. A critical incident of the trustee's duty to be guided by the settlor's intentions as manifested in the trust's terms is the duty to defend those terms. So also the equity court itself has an affirmative autonomous "administrative" duty to defend the manifest intentions of settlors who are deceased or not otherwise before the court. The court may not take its marching orders in this regard from the attorneys representing the other parties to a trust relationship, such as trust counsel and the lawyers for the beneficiary-litigants.

**The Uniform Trust Code and the trustee's duty to defend the trust's terms.** The UTC neglects to "state" in its Article 8 the trustee's critical common law duty to defend the trust's terms. But the UTC also neglects to expressly negate the duty. Thus, the duty remains very much alive and well in the jurisdictions that have enacted the UTC. "The UTC is supplemented by the common law of trusts and principles of equity." Actually, vice versa is more precise. The application of the doctrines of deviation, reformation, modification, and rectification, topics that are taken up generally in §8.15.22 of *Loring and Rounds: A Trustee's Handbook* (2023), are constrained and tempered by the trustee's duty to defend. The UTC's failure to expressly "state" the trustee's duty to defend the trust's terms is a trap for the unwary trust professional who labors under the misconception that in any given situation all applicable trust law lurks only within the UTC's four corners. As an aside, the UTC's failure to mention the trustee's duty to defend the trust's terms may well be to support the UTC's most subversive and least publicized provision, namely the facially innocuous UTC §404 "benefit-of-the-beneficiaries" rule. The Rule is discussed in §6.1.2 of *Loring and Rounds: A Trustee's Handbook* (2023), the relevant portion of which section is set forth in the appendix below. The Handbook is available for purchase at <https://lawstore.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

**Now comes *Wing v. Goldman Sachs Trust Company*, 382 N.C. 288 (2022).** The plaintiffs in *Wing* had been removed by amendment as beneficiaries of a revocable trust. They asserted that the defendants, successor beneficiaries via amendment, had unduly influenced the now-deceased settlor to execute the amendment(s). Without regard to the trustee's duty to carry out the settlor's lawful wishes as manifested in the trust's terms the Court went straight to North Carolina's version of §811 of the UTC, which deals with third-party claims against the trust estate. After groping about in the official commentary, the Court emerged with a self-evident paraphrasing of the UTC section. Some are certain to construe the paraphrase as effectively gutting a trustee's general duty to defend the trust's terms, even as that duty is understood in the context of the trustee's overarching duty to carry out the settlor's lawful intentions. "...but we do hold that a duty to defend

pursuant to N.C.G.S. § 36C-8-811 only arises when the action may result in a loss to the trust estate.” Yes, but what about the extensive pre-existing and still-viable non-statutory equity jurisprudence emanating from a trustee’s overarching affirmative duty to carry out the trust’s lawful terms? Dead silence. The analysis began with the UTC and ended with the UTC. Were the trustee’s general duty to defend limited to defending the integrity of the trust corpus, the trust would be illusory, which this trust is not. The UTC’s benefit-of-the-beneficiaries rule mentioned above and elaborated on below has an intent-defeating flavor to it. Now we have *Wing*.

#### Appendix

**§6.1.2 Duty to Act; Duty to Carry Out the Terms of the Trust and the Settlor's Intentions Generally as Reflected in the Terms** [from *Loring and Rounds: A Trustee’s Handbook* (2023), available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

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**Whether the UTC benefit-the-beneficiaries rule erodes the principle that settlor intent is paramount.** Section 404 of the UTC codifies what facially are plain vanilla principles of trust law: “A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of the beneficiaries.” Yale Law School Professor John H. Langbein, however, “believes,” and, one senses, fervently hopes, that in the future the UTC’s “benefit-the-beneficiaries” rule “will interact with the growing understanding of sound fiduciary investing practices to restrain the settlor’s power to direct a course of investment imparting risk and return objectives contrary to the interests of the beneficiaries.”<sup>110</sup> In other words, there is actually an “intent-defeating” aspect to the UTC provision.<sup>111</sup> “Under Professor Langbein’s formulation of the benefit-the-beneficiaries rule, the ‘benefit’ of a trust provision is determined by reference to objective notions of prudence and efficiency rather than the settlors’ subjective intent.”<sup>112</sup>

The courts, however, have been delivering a resounding “no thanks” to Professor Langbein’s formulation.<sup>113</sup> On May 18, 2016, for example, Wyoming’s Supreme Court, referencing §6.1.2 of

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<sup>110</sup>John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, 1111(2004).

<sup>111</sup>John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105 (2004).

<sup>112</sup>Jeffrey A. Cooper, *Empty Promises: Settlor’s Intent, the Uniform Trust Code, and the Future of Trust Investment law*, 88 Boston Univ. L. Rev. 1165, 1168–1169 (2008).

<sup>113</sup>*See, e.g.,* Carter v. Carter, 965 N.E.2d 1146 (Ill. 2012); Ladysmith Rescue Squad, Inc. v. Newlin, 694 S.E.2d 604 (Va. 2010) (“We conclude that the UTC has not altered the fundamental principles that in construing, enforcing and administering wills and trusts, the testator’s or settlor’s intent prevails over the desires of the beneficiaries, and that intent is to be ascertained by the language the testator or settlor used in creating the will or trust.”); Parker v. Shullman, 983 So. 2d 643 (Fla. Dist. Ct. App. 2008); *In re Tr.* Created by Charlotte P. Hyde, 845 N.Y.S.2d 833 (2007); *cf.* Church of the Little Flower v. U.S. Bank, 979 N.E.2d 106 (Ill. App. Ct. 2012) (holding that the trial court’s granting of an equitable deviation

this handbook, rejected it in no uncertain terms.<sup>114</sup> So have the legislatures been registering their “no thanks.”<sup>115</sup> And so have the legal academics. Quinnipiac University School of Law School Professor Jeffrey A. Cooper, for one, has weighed in on the side of the settlor.<sup>116</sup> Professor Cooper outlines numerous reasons, some practical, some grounded in public policy, why any court would be ill-advised to put an “intent-defeating” gloss on the UTC’s “benefit-the-beneficiaries” rule. The first victim of the gloss would be the UTC itself: “The approach would render the UTC a fundamentally incomprehensible piece of trust legislation, requiring a reader seeking to understand the UTC’s meaning to look to the pages of law reviews rather than the UTC’s own text.”<sup>117</sup> In his *Dead Hand Investing: The Enforceability of Trust Investment Directives*, Professor Cooper articulates his global policy objection to the rule, namely that it “can be read to materially alter key principles of traditional trust law, creating significant complexities of statutory interpretation and precipitating a host of undesirable, likely unintended, consequences.”<sup>118</sup> His many reasons for coming to this conclusion are fleshed out in the article.

The UTC’s mandatory rules also appear to be muddling certain aspects of our conflict of laws jurisprudence that are trust-focused, a subject covered generally in §8.5 of this handbook. For some reason, the UTC does not codify the settlor’s general, though not limitless, common law right to designate which state’s laws shall govern the resolution of questions bearing on the trust’s

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petition to terminate a split-interest trust upon a finding that the trustee’s continuing to deduct from the trust estate its substantial but lawful fees would not be in furtherance of the interests of the beneficiaries was unwarranted in light of the trust’s particular terms).

<sup>114</sup>*See* *Shriners Hosps. for Children v. First N. Bank of Wyo.*, 373 P.3d 392 (Wyo. 2016) (asserting that the “premise” that a trustee has a “singular obligation” to act solely in the best interests of the beneficiaries is “flawed” because it ignores the trustee’s “co-equal obligation” to carry out the trust according to its terms and to carry out the settlor’s intentions.”).

<sup>115</sup>*See, e.g.*, Ohio Rev. Code Ann. §5804.04; Ga. Code Ann. §53-12-341(2); N.H. Rev. Stat. Ann. §564-B:1-112/1-105(b)(3)/4-404 (generally providing that a trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust or court order or determined not to diversify the investments of a trust in good faith in reliance on the express terms of the trust). *See also* Joseph F. McDonald, III, *Open Architecture Trust Designs under New Hampshire Law Provide Flexibility and Opportunities*, N.H. B.J. (Autumn 2008), at 38 (“A beneficiary seeking to surcharge a trustee for relying on an authority to retain under a governing instrument or court order have a formidable evidentiary burden: they now must show that the trustee acted in bad faith in following a direction or authorization not to diversify.”). Massachusetts registered its “no thanks” by leaving out of its version of UTC §404 the following sentence: “A trust and its terms must be for the benefit of its beneficiaries.” *See* Mass. Gen. Laws Ann. ch. 203E §404. So did Iowa by opting not to include any mandatory rules in its trust code.

<sup>116</sup>*Empty Promises: Settlor’s Intent, the Uniform Trust Code, and the Future of Trust Investment law*, 88 B.U. L. Rev. 1165 (2008).

<sup>117</sup>Jeffrey A. Cooper, *Empty Promises: Settlor’s Intent, the Uniform Trust Code, and the Future of Trust Investment law*, 88 B.U. L. Rev. 1165, 1179 (2008).

<sup>118</sup>Jeffrey A. Cooper, *Dead Hand Investing: The Enforceability of Trust Investment Directives*, 37 ACTEC L.J. 365, 405 (Winter 2011).

validity.<sup>119</sup> University of Texas Professor Mark L. Ascher speculates on what that reason could be:

One senses in all this the icy hand of section 105 of the UTC, which lists those issues as to which the UTC purports to be mandatory law, i.e., those issues as to which the settlor may not, by the terms of the trust, effectively provide otherwise. Among the issues listed in section 105 are “the requirements for creating a trust.” Thus, it may be that the unwillingness of section 403 to allow the settlor, by the terms of the trust, to designate the law that is to apply in determining whether the trust has been “validly created” is simply a consequence of an almost entirely cosmetic effort at buttressing section 105.<sup>120</sup>

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<sup>119</sup>*See generally* 7 Scott & Ascher §45.4.2.1.

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