

Title

A trust is not an agency

Summary

*The trustee is not an agent of the beneficiary.*¹² The trustee's duty not to delegate the administration of the trust could well be implicated if the trustee without authority were to behave as if he were the beneficiary's agent.¹³ In the absence of agreement, the beneficiary is not personally bound to indemnify the trustee for trust administration expenses.¹⁴ The beneficiary may voluntarily undertake to make himself or herself liable to the trustee, *e.g.*, by furnishing funds to enable the trustee to improve the trust estate or by litigating in order to collect insurance proceeds.¹⁵ In England, on the other hand, the beneficiary in some cases may be personally bound to indemnify the trustee to the extent there are insufficient assets in the trust estate to do so.¹⁶ *The beneficiary of a trust is not an agent of the trustee.* The beneficiary qua beneficiary is not an agent of the trustee. The trustee owes the beneficiary duties, not the other way around. Thus, it is a "well-established principle that a trustee cannot simply delegate his own duty to provide information to his beneficiary or force the beneficiary to find avenues for information he is rightfully owed."¹ The trustee's fiduciary duty to keep the beneficiaries reasonably informed is taken up generally in §6.1.5.1 of *Loring and Rounds: A Trustee's Handbook*. The agency relationship and the trust relationship are compared and contrasted in §9.9.2 of the Handbook, which section is reproduced in its entirety below.

The Text

§9.9.2 Simple Agencies, Such as Powers of Attorney, and Complex Agencies, Such as Partnerships, Are Not Trusts [From the 2015 Edition of **Loring and Rounds: A Trustee's Handbook**]

*A trustee holds legal title for the welfare of the beneficiary, who holds equitable title. An escrow agent, on the other hand, is not vested with title to the property, though he may be entrusted with possession and he may have power to pass title.*⁴⁶

¹²*See, e.g.*, *Buck v. Haas*, 180 La. 188, 156 So. 217 (1934). *But see* Uniform Trust Code §108(e) (available on the Internet at <<http://www.uniformlaws.org/Act.aspx?title=Trust%20Code>>) (providing that a trustee may not transfer a trust's principal place of administration over the objections of a qualified beneficiary without court approval).

¹³*See generally* 3 Scott & Ascher §17.3.2 (citing to *Matter of Osborn*, 299 N.Y.S. 593 (App. Div. 1937); *Matter of JPMorgan Chase Bank, N.A.* [trust for the benefit of Mary Gill Roby, et al] 2014 NY Slip 07799 (Nov. 14, 2014) (confirming that it is default law that a trustee of an irrevocable trust may not not delegate away his investment authority to the beneficiary).

¹⁴*See* Bogert, *Trusts and Trustees* §718; 4 Scott & Ascher §22.6.

¹⁵Restatement (Second) of Trusts §278.

¹⁶*See generally* 4 Scott & Ascher §22.6 (Indemnity from Beneficiaries)

¹ *Janowiak v. Tiesi*, 932 N.E.2d 569 (Ill. 2010) (the court noting that there is "no authority for the bold assertion that a trust beneficiary has a duty to...ferret out information for himself").

⁴⁶*Albrecht v. Brais*, 324 Ill. App. 3d 188, 191, 754 N.E.2d 396, 399 (2001).

*When a debtor delivers money or other property to a third person with instructions to pay a particular creditor, the relationship that arises may be a contract for the benefit of the creditor, an agency for the debtor, or a trust.*⁴⁷

The simple agency is not a trust. Powers of attorney involving property (including “durable” powers of attorney (U.S.), “enduring” powers of attorney (U.K.) and “lasting” powers attorney (U.K.)),⁴⁸ investment management agency accounts, and escrow agency accounts are not trusts.⁴⁹ And they certainly are not powers of appointment.⁵⁰ They are all agencies. So are custodial accounts.⁵¹ With some common law and statutory exceptions,⁵² under none of these arrangements does title to the subject property pass to the agent.⁵³

One important exception is when money is involved. “When an agent receives money for a principal, the agent acquires title to the money according to the view that title to money passes with possession, but he or she remains an agent, and the principles of agency apply.”⁵⁴ That is not to say that the agent might not also be a trustee of the funds for the benefit of the principal.⁵⁵ A lawyer who deposits funds belonging to his client in an IOLTA account, for example, is separately acting as trustee incident to the lawyer-client agency relationship.⁵⁶ Likewise, an agent who undertakes to collect the proceeds from the sale of the principal’s property is a trustee of those proceeds, absent special facts.⁵⁷ Absent special facts, an insurance agent who undertakes to collect insurance premiums on behalf of the home office is a trustee of those premiums.⁵⁸ So also is a property management agent who undertakes to collect the rents on behalf

⁴⁷5 Scott & Ascher §35.1.9 (Trust for Particular Creditor).

⁴⁸1 Scott on Trusts §§8–8.1.

⁴⁹*See generally* 1 Scott & Ascher §2.3.4; Bogert, Trusts and Trustees §15. *See, however*, §8.15.25 of this handbook (doctrine of undisclosed principal) (suggesting that if the agent of an undisclosed principal contracts on behalf of the undisclosed principal with a third party, the contractual rights are held in trust by the agent for the benefit of the undisclosed principal); Bogert, Trusts and Trustees §15 (noting that “Dean Ames argued that an agent for an undisclosed principal is a trustee of rights which he acquires in such capacity” and citing to James Barr Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 Yale L.J. 443 (1909)).

⁵⁰Restatement (Third) of Property (Wills and Other Donative Transfers) §17.1 cmt. j. *See generally* §8.1 of this handbook (the power of appointment).

⁵¹*See generally* Bogert, Trusts and Trustees §15. “Although the...[Uniform Transfers to Minors Act]...has become a widely used method for making gifts to minors and can be regarded as a ‘trust substitute,’ a custodian is not a trustee because both legal title and equitable ownership of the gift property are vested in the minor.” *Id.*

⁵²*See* 1 Scott on Trusts §8 n.6. *See also* Restatement (Second) of Agency §14B (one who has title to property that he 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). An agent-trustee “is not, however, entitled to the compensation to which trustees are ordinarily entitled, but only to such compensation as was agreed on or as is reasonable under the circumstances.” 4 Scott & Ascher §21.1.4. Here are the citations to the sections of the Massachusetts durable power of attorney statute: Mass. Gen. Laws ch. 190B, §§5-501, 5-502, 5-503, 5-504, 5-505, 5-506, and 5-507.

⁵³1 Scott on Trusts §8.

⁵⁴1 Scott & Ascher §2.3.4.

⁵⁵Bogert, Trusts and Trustees §§15 & 22.

⁵⁶Bogert, Trusts and Trustees §22 (confirming that in cases in which an attorney collects a judgment for a client, the attorney is acting as a trustee of the collected funds). *See generally* §6.1.3.4 of this handbook and §9.7.2 of this handbook (IOLTA accounts).

⁵⁷Bogert, Trusts and Trustees §22.

⁵⁸Bogert, Trusts and Trustees §22.

of the property owner a trustee of the funds collected.⁵⁹ One who solicits and receives cash contributions on behalf of a charity takes title to the funds, but as a trustee.⁶⁰

Nor is an agency relationship in and of itself a contractual relationship, though the consent of the parties is a critical element of each.⁶¹ Gratuitous agencies, *i.e.*, agencies that do not involve the exchange of consideration, are perhaps the most common type of agency—*e.g.*, powers of attorney that spouses grant one another. That is not to say that two parties, such as a client and a lawyer, may not contract to enter into an agency relationship. In such a situation, the agency and the contractual relationships are separate but incident to one another. The contract, for example, will fix the terms of the lawyer's compensation for acting as the client's agent in legal matters. Thus, a breach of the lawyer's fiduciary duty to the client may or may not warrant a rescission of the associated but separate compensation contract. One commentator on the law of trusts, however, has asserted without authority or elaboration that "[a]n agency is a contractual relationship."⁶²

The element of control is a critical difference between the agency and the trust. An agent is subject to the control and direction of the principal. A trust is enforceable even if the trustee is subject to the control of neither the settlor nor the beneficiaries.

An agency is terminable at the will of either the principal or the agent. In the case of a trust, its terms will determine whether it is revocable, and if so, by whom.⁶³

Upon the death of a principal, any property that is a subject of the agency will likely belong to the principal's probate estate, the agency having terminated.⁶⁴ An exception would be if *the principal* were a trustee. In the case of a trust, the death of the settlor, the trustee, or a beneficiary need not trigger its termination.⁶⁵ Thus while an agency may not function as a will substitute absent statutory authority,⁶⁶ a revocable inter vivos trust may.⁶⁷

Another difference between agency and trust relationships relates to the duty to act. Once one accepts the office of trustee, one assumes an affirmative duty to act. An agent, on the other hand, is authorized to act but assumes no duty to do so.

An agent may subject the principal to personal liability to third persons, whereas a trustee as such cannot subject the beneficiary to such liability.⁶⁸ The trustee in his dealings with third parties with respect to the trust property is a principal.⁶⁹ He is not acting as an agent of the beneficiaries.⁷⁰

An agent with discretion is a fiduciary, a topic we take up in Chapter 1 of this handbook. All trustees

⁵⁹Bogert, Trusts and Trustees §22.

⁶⁰Bogert, Trusts and Trustees §22.

⁶¹"[A] trust...[however,]...is in the nature of a conveyance and consent of the trustee or beneficiary is not necessary to its origin, although either may decline the trust." Bogert, Trusts and Trustees §15.

⁶²Bogert, Trusts and Trustees §15.

⁶³See generally §8.2.2.2 of this handbook (trusts that are revocable).

⁶⁴The death of either the principal or the agent will terminate the agency. See generally 2 Scott & Ascher §12.13.1; Bogert, Trusts and Trustees §15. See, *e.g.*, Albrecht v. Brais, 324 Ill. App. 3d 188, 754 N.E.2d 396 (2001). Note, however, that the typical durable power of attorney statute provides that acts taken by the agent during any period when doubt exists as to whether the principal is deceased or alive are binding upon the principal's successors and personal representatives. Bogert, Trusts and Trustees §15.

⁶⁵See generally 1 Scott & Ascher §2.3.4.

⁶⁶The typical custodial IRAs by state statute is an effective will substitute.

⁶⁷See generally National Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944).

⁶⁸Restatement (Third) of Trusts §5 cmt. e.

⁶⁹Bogert, Trusts and Trustees §15.

⁷⁰Bogert, Trusts and Trustees §15.

are fiduciaries. Thus, the core fiduciary relationships of agency and trust can overlap functionally at times. “The duties of an agent who has authority to make and to manage investments...[, for example,...] can be quite similar to those of the trustee of a formal trust, except in so far as they are affected by the fact that the principal has control and may modify or determine the investments at any time.”⁷¹ Still, unless the parties agree otherwise, the investment manager or agent should make the investments in the name of the principal.⁷² On the other hand, a trustee in some situations can, for all intents and purposes, be an agent of the settlor. This is a topic we take up in Section 8.11 of this handbook in our discussion of the duties of the trustee of a revocable trust.⁷³ Bernard Madoff’s Ponzi scheme victims were principals in an investment management agency relationship with him; he was generally not acting as a trustee of their trusts. For fiduciary liability purposes, however, this was a distinction without a difference.⁷⁴

Such functional overlaps have implications as well when it comes to remedies, a topic we take up generally in Section 7.2.3 of this handbook. As one commentator has noted:

The remedies of the principal lie ordinarily in a court of law; those of the beneficiary usually lie in a court of equity. The fiduciary nature of agency causes equity to take jurisdiction of a suit for accounting by an agent, but this is an illustration of the special ground for equitable cognizance. In the law of trusts the beneficiary is at home in equity without regard to legal remedies that may be available.⁷⁵

If, following execution of a durable power of attorney, a court of the principal’s domicile appoints a trustee to manage the principal’s property, the attorney in fact is accountable to the trustee as well as to the principal, at least under the Uniform Probate Code.⁷⁶ The trustee would have “the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.”⁷⁷

A breach of fiduciary duty in the agency context can give rise to a constructive trust.⁷⁸ Take, for example, the situation in which *X* asks *Y* to purchase on *X*’s behalf a certain parcel of land from an *independent vendor*.⁷⁹ *Y* orally agrees to do so. *Y* (the agent), however, in violation of his *fiduciary duty* to *X* (the principal), proceeds instead to purchase *with his own money*, not *X*’s, the land for himself. A court may order *Y* to hold the land upon a constructive trust for *X*, with an appropriate offset for what *Y* had paid.⁸⁰ Were the parties in neither a confidential nor a fiduciary relationship, *Y* might well be allowed to

⁷¹Restatement (Second) of Agency §425 cmt. a.

⁷²Restatement (Second) of Agency §425 cmt. e.

⁷³See also §9.27 of this handbook (the inter vivos purpose trust) and §9.29 of this handbook (the inter vivos adapted trust).

⁷⁴See generally Charles E. Rounds, Jr., *State Common Law Aspects of the Global Unwindings of the Madoff Ponzi Scheme and the Sub-Prime Mortgage Securitization Debacle*, 27 Wis. Int’l L.J. 99 (2009).

⁷⁵Bogert, Trusts and Trustees §15.

⁷⁶Uniform Probate Code §5-503(a).

⁷⁷Uniform Probate Code §5-503(a).

⁷⁸See §3.3 of this handbook (the constructive trust generally); §7.2.3.1.6 of this handbook (the constructive trust as a procedural equitable remedy); 6 Scott & Ascher §43.1.1.

⁷⁹See generally §9.9.11 of this handbook (a contract to convey land).

⁸⁰6 Scott & Ascher §43.1.1. See §3.3 of this handbook (the constructive trust generally); §7.2.3.1.6 of this handbook (the constructive trust as a procedural equitable remedy).

keep the land, unless the arrangement had somehow been incident to an enforceable contract.⁸¹ Had X even indirectly furnished the consideration for the land transaction, then Y might be ordered to hold the land upon a purchase money resulting trust for X's benefit, a topic we take up in Section 3.3 of this handbook.⁸² One has to be nimble at the intersection of agency law and trust law. It is no place for the literal minded. The ancillary trusteeship also can be found at the intersection, a topic we take up in Section 9.32 of this handbook.

Officers of a corporation, such as its president and its secretary, are not trustees of the corporate assets.⁸³ They are agents of the entity who have undertaken contractual obligations.⁸⁴ "A suit in equity against them must be justified...on the ground of inadequacy of remedies available at law, and not on the basis of the enforcement of an express trust."⁸⁵

It is said that majority stockholders of a corporation owe certain fiduciary duties to the minority stockholders.⁸⁶ They are not, however, trustees of corporate assets, nor are they, absent special facts, agents of either the corporation or the minority stockholders.⁸⁷ Still, if the majority stockholders are unjustly enriched at the expense of the minority stockholders, whether through a breach of fiduciary duty or otherwise, the minority stockholders may be entitled to restitution.⁸⁸

Though each is a fiduciary relationship, a partnership is not a trust. A partnership is a contract of mutual agency, not a trust. "Persons associated together as co-owners for the purpose of doing business, and hence are partners, are agents and also principals for each other. Each partner is a general agent for the other."⁸⁹

In the case of a tenancy in partnership, each partner has full co-ownership of the subject property. In the case of a trust relationship, the trustee and the beneficiary simultaneously share different interests in the subject property, a phenomenon we take up in Section 5.3.1 of this handbook. Whereas the legal title is in the trustee, the equitable interest is in the beneficiary.

Absent statute, each general partner is personally liable for the contracts and torts of the collective.⁹⁰ With some exceptions, which are discussed in Section 9.6 of this handbook, a trust beneficiary is not personally liable for the contracts that the trustee enters into with third parties on behalf of the trust, nor is the beneficiary personally liable for any torts that the trustee may commit against third parties.⁹¹

As explained in Section 3.4.2 of this handbook, a trust shall not fail for want of a trustee. A partnership is different. "Ordinarily a partnership may be destroyed by the death or bankruptcy of a partner."⁹²

⁸¹See generally 6 Scott & Ascher §43.1.1; §3.3 of this handbook (the constructive trust). See also §9.9.11 of this handbook (contracts to convey land).

⁸²See also 6 Scott & Ascher §43.1.1.

⁸³Bogert, Trusts and Trustees §16.

⁸⁴Bogert, Trusts and Trustees §16.

⁸⁵Bogert, Trusts and Trustees §16.

⁸⁶Bogert, Trusts and Trustees §16.

⁸⁷Bogert, Trusts and Trustees §16 ("A shareholder's property interest is absolute and subject to no equitable interest in another").

⁸⁸See Restatement of Restitution §131 ("A person who by the sale or surrender of land, chattels, or choses in action, has tortiously terminated the interests of another therein, is under a duty of restitution to the other for the amount received from the sale or surrender of such interest").

⁸⁹Warren A. Seavey, Handbook of the Law of Agency 18 (1964).

⁹⁰Bogert, Trusts and Trustees §36.

⁹¹See generally §5.6 of this handbook (liabilities of the trust beneficiary).

⁹²Bogert, Trusts and Trustees §36.

The statute of frauds, which is covered in Section 8.15.5 of this handbook, requires that a trust of land be proved by a writing. “A partnership agreement is not subject to the statute of frauds merely because it relates to realty.”⁹³

That a partnership, in and of itself, is not a trust, however, does not mean that a partner might not, in a given situation, hold partnership assets upon a resulting or constructive trust for the benefit of the other partners.⁹⁴ The resulting trust and the constructive trust are covered in Section 3.3 of this handbook. Under certain circumstances, the partner might even hold partnership assets upon an express trust: “Under the Uniform Partnership Act (1997),...[for example,...] a partner has a duty to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of partnership opportunity.”⁹⁵

There is no better example of the intersection of agency and trust law than the doctrine of undisclosed principal, which is covered in Section 8.15.25 of this handbook.

⁹³Bogert, Trusts and Trustees §36.

⁹⁴*See generally* Bogert, Trusts and Trustees §36.

⁹⁵Section 3.3 of this handbook.