

Title

Guarding against a Trust's Destruction by Merger

Summary

A trust is not a trust if the “trustee” alone holds legal title to the subject property and alone possesses the entire beneficial/equitable interest. Instead, he owns the subject property outright and free of trust, all interests, both legal and equitable, being merged in him. An inadvertent merger can have adverse consequences; this has been the case since time immemorial. In the case of the ancient use, the precursor to the modern trust, a merger of the legal and equitable interests in the subject property in a single person would enable the lord to effectively claim *relevium, custodia haeredis, maritagium haeredis*, and *escaeta* upon that person's death. Today, the trustee of a “gun trust” seeks to avoid merger so as not to run afoul of Federal (U.S.) firearms regulations. Also since time immemorial, maintaining a multiplicity of trustees has been the tried and true method of insuring that a trust is not terminated by merger. Charles E. Rounds, Jr. and Charles E. Rounds, III explain in §8.15.1 of *Loring and Rounds: A Trustee's Handbook* (the use) and in §8.7 of the Handbook (the trust). Each section is reproduced in its entirety below.

Texts

§8.15.1 *Statute of Uses* [from *Loring and Rounds: A Trustee's Handbook*]

*Prior to the seventeenth century the typical form of conveyance of a present freehold estate in land was the feoffment with livery of seisin. A feoffment was the grant of a fief or feudal tenement and livery of seisin was the means by which the grant was effected.*¹⁵

*The term cestui que use is a corruption of the law French phrase cestui a que use le feoffment fuit fait (he to whose use the feoffment was made).*¹⁶

An important milestone on the road to the modern trust was reached in the early 15th century when the English chancery courts began enforcing “uses.”¹⁷ A “use” was a transfer of an interest in real estate from A to B for the benefit of C.¹⁸ In other words, it was a transfer “to his use” (*a son oes*). A landholder, in order to prevent the property from descending to his heirs at law¹⁹ or to deprive an overlord of his feudal rights²⁰ or to avoid Crown taxes,²¹ would transfer his interest in the land to a *feoffee* (a sort of paleo-trustee) for the benefit of the *cestui que use* (a sort of paleo-beneficiary).²² Now that uses could be enforced, either the *feoffor* (A) or the *cestui que use* (C) had a cause of action against a “faithless *feoffee*”

¹⁵Cornelius J. Moynihan, Introduction to the Law of Real Property 162 (2d ed. 1988).

¹⁶Moynihan at 172, n.2.

¹⁷Moynihan, chs. 8 & 9; 1 Scott on Trusts §§1, 1.1–1.11; Restatement (Second) of Trusts §§67–73 (1959); 1A Scott on Trusts §§67–73; Bogert, Trusts and Trustees §3. For the Roman, Germanic, and Islamic theories as to the origin of the English use, see §8.37 of this handbook (the origin of the Anglo-American trust); Bogert, Trusts, and Trustees §2.

¹⁸See Maitland, *The Origin of Uses*, 8 Harv. L. Rev. 127 (1894); Bogert, Trusts and Trustees §2.

¹⁹1 Scott on Trusts §1.5; Bogert, Trusts and Trustees §2.

²⁰1 Scott on Trusts §1.5; Bogert, Trusts and Trustees §2.

²¹1 Scott on Trusts §1.5; Bogert, Trusts and Trustees §2.

²²1 Scott on Trusts §1.3; Bogert, Trusts and Trustees §2.

(B).²³ “The process by which the chancellor acted was known as a *subpoena*.”²⁴ Prof. Maitland explains why it was customary to have more than one *feoffee*:

If there were a single owner, a single *feoffatus*, he might die, and then the lord would claim the ordinary rights of a lord; *relevium, custodia haereditis, maritagium haereditis, escaeta*, all would follow as a matter of course. But here the Germanic *Gesammthandschaft* comes to our help. Enfoeff five or perhaps ten friends *zu gesamter Hand* (“as joint tenants”). When one of them dies there is no inheritance; there is merely accrescence. The lord can claim nothing. If the number of the *feoffati* is running low, then indeed it will be prudent to introduce some new ones, and this can be done by some transferring and retransferring.²⁵

Already by the time of the Wars of the Roses (1455–1485), most of the land in England was held to uses.²⁶ In an attempt to “put a stop to the drainage of royal revenues by the evasion of feudal dues through the practice of conveying to uses,” Parliament, in 1536, enacted the Statute of Uses.²⁷ The statute provided that title to land held upon a use would now lodge with the *cestui que use* (the beneficiary).²⁸ In other words, the interest of the *cestui que use* was converted into a legal estate or, as they say, “executed.”²⁹ The intention was that the title-holding *feoffee* (trustee) would then be out of the picture.³⁰ Now the *cestui que use* (the beneficiary) would have *both* the legal title and the entire equitable interest.³¹ Now the beneficial owner would have no “use” (trust) to hide behind for the purpose of avoiding taxes and feudal obligations.³² At least that was how things were supposed to work. In practice, however, the common law judges quickly set about defanging the statute’s provisions to the point where about the only

²³1 Scott on Trusts §1.4; Bogert, Trusts and Trustees §2.

²⁴Bogert, Trusts and Trustees §3 (“It commanded the defendant to do or refrain from doing a certain act. The relief was personal and specific, not merely money damages. Hence historians say that the *cestui que use* had a remedy only by subpoena.”).

²⁵*Frederic William Maitland, Selected Essays (1936) 158. See also* Bogert, Trusts and Trustees §2 (“In order to avoid the feudal burdens which would ensue upon the death of a single feoffee, several feoffees could be used as joint tenants and their number renewed from time to time.”); §3.4.4.1 of this handbook (multiple trustees (cotrustees)) (noting that today both at common law and by statute trustees take title to trust property jointly).

²⁶1 Scott & Ascher §1.5 (noting the extreme damage that the use had done to the feudal system); Bogert, Trusts and Trustees §2 (“Indeed, by the time of Henry V (1413–1422)...[uses]...were the rule rather than the exception in landholding.”).

²⁷Moynihan at 203; *see generally* Bogert, Trusts and Trustees §4 n.4 (containing the full text of the preamble to the statute of uses, which is essentially a catalog of the various nefarious purposes to which the use was allegedly being put). The citation to the statute of uses is 27 Hen. VIII, c. 10. (1536). *See also* Attorney-Gen. v. Sands, Hardres, 488, 491 per Atkyns, arguendo (1669) (“A trust is altogether the same that an use was before...[the Statute of Uses]..., and they have the same parents, fraud and fear; and the same nurse, a court of conscience.”); Bogert, Trusts and Trustees §2 (“The reasons for the introduction of uses were in some instances dishonorable.”).

²⁸1 Scott on Trusts §1.5.

²⁹Moynihan at 180; 1 Scott & Ascher §3.4.1; Bogert, Trusts and Trustees §2.

³⁰Moynihan at 180; 1 Scott on Trusts §§1.5, 1.6; 1 Scott & Ascher §3.4.1; Bogert, Trusts and Trustees §2.

³¹Moynihan at 180; 1 Scott on Trusts §§1.5, 1.6; 1 Scott & Ascher §3.4.1; Bogert, Trusts and Trustees §2.

³²1 Scott & Ascher §3.4.1; Bogert, Trusts and Trustees §2.

equitable arrangement that did not manage to escape its snare was the passive trust.³³ Those equitable arrangements, those uses, that did escape are referred to today as *trusts*.³⁴ They constitute the basis of modern trust law.³⁵

The statute was subsequently held inapplicable by the courts to trusts where the trustee had *active responsibilities*.³⁶ (Those responsibilities might be as minimal as collecting and disbursing rents.³⁷) And of course it did not apply to *trusts of personal property*.³⁸ Most trusts today fall into one or both of these categories. The statute of uses also was held not to apply to a so-called *use upon a use*³⁹ a concept much loved by academics⁴⁰ but beyond the scope of this handbook and of little or no practical concern for today's trustee⁴¹—and not to apply to a use *raised on a term for years*,⁴² to be distinguished from “a use for a term of years raised on a freehold estate.”⁴³ Oral trusts, resulting trusts,⁴⁴ and constructive trusts⁴⁵ also managed to slip through the net.⁴⁶ In 1924 Parliament repealed the statute.⁴⁷

The Statute of Uses also spawned the *legal* executory interest, which is “a legal future interest created by means of an executed springing or shifting use.”⁴⁸ Shifting and springing interests in land are covered

³³1 Scott & Ascher §3.4.1; Bogert, *Trusts and Trustees* §5 (“The three-fold task of construing the Statute of Uses, determining when the Statute executed the use, and when it gave to the cestui que use the legal estate fell to the common law judges who had to deal with legal estates.”).

³⁴Bogert, *Trusts and Trustees* §5.

³⁵Bogert, *Trusts and Trustees* §5.

³⁶1 Scott & Ascher §§1.6, 1.7; Bogert, *Trusts and Trustees* §5 (“Duties of administration required the legal title in the trustee.”).

³⁷1 Scott & Ascher §§1.6, 1.7; Moynihan at 203; 1 Scott & Ascher §3.4.2 (noting that under the Restatement (Third) of Trusts, a trust is active if the trustee has *any* affirmative duties to perform).

³⁸1 Scott on Trusts §1.6; Restatement (Second) of Trusts §70; Bogert, *Trusts and Trustees* §5 (“The express words of the Statute made clear that uses in personalty were excluded.”). *See, however*, 1 Scott & Ascher §3.4.4 (noting that more recent cases tend to hold that a passive trust of personal property is subject to execution or terminable by the beneficiary, by analogy to the Statute of Uses or under a counterpart rule).

³⁹1 Scott on Trusts §1.6; Restatement (Second) of Trusts §71; Bogert, *Trusts and Trustees* §5. (“Thus if lands were conveyed to A, and his heirs, to the use of B and his heirs, to the use of C and his heirs, the Statute was held to transfer the use of B into possession and give him the legal estate but not to convert the use of C into possession and destroy B's legal estate.... About 100 years after the passage of the Statute of Uses, chancery recognized the second use in the case of the use upon a use and held it enforceable as a trust against the person in whom the court of law had vested the legal estate.”).

⁴⁰1 Scott on Trusts §1.6; Restatement (Second) of Trusts §71; 1 Scott & Ascher §1.7.

⁴¹*See generally* 1 Scott & Ascher §3.4.5 (suggesting that “it is doubtful whether a court today would be willing to decide a case by reference to such an odd and hoary principle”). In any case, today it is quite permissible to fund a trust with an equitable interest in another trust. *See* 2 Scott & Ascher §10.7.

⁴²1 Scott & Ascher §1.7; 1 Scott on Trusts §1.6; Restatement (Second) of Trusts §70 cmt. b; Bogert, *Trusts and Trustees* §5 (“Furthermore...[the Statute]...referred only to instances in which the feoffee to uses was ‘seized,’ so it was readily held that the Statute had no application to interests in real property other than freehold estates. Therefore a gift to A of a term for five years, to the use of B, was not affected by the Statute.”).

⁴³*See* 1 Scott & Ascher §1.7.

⁴⁴1 Scott & Ascher §3.4.6.

⁴⁵1 Scott & Ascher §3.4.7.

⁴⁶1 Scott & Ascher §3.4.1. *See generally* §§3.3 of this handbook (the constructive trust) and 4.1.1.1 of this handbook (the resulting trust).

⁴⁷*See* Percy Bordwell, *The Repeal of the Statute of Uses*, 39 Harv. L. Rev. 466 (1926).

⁴⁸Cornelius J. Moynihan, *Introduction to the Law of Real Property* 187 (2d ed. 1988).

in Section 8.15.80 of this handbook.

The statute of uses was a critical component of a global compromise that had been struck after extensive negotiations between the Crown and the common law lawyers on behalf of their clients, the realm's equitable landowners. “Part of this negotiation also included *The Statute of Enrolments* (1536), 27 Hen. VIII, c. 16, which provided for registration of most executed uses that affected land and, after a great outcry from gentry concerned about their lost ability to leave land by will, *The Statute of Wills* (1540), 32 Hen. VIII, c. 16, which permitted free devise of all fee simple socage interests in land, and two-thirds of the land held by knight service. The result was more legal freedoms for landowners, subject to the enrolment of land interests to protect the fiscal interests of the Crown.”⁴⁹ The land registration system of the typical common law jurisdiction to this day, however, remains something of a sieve. In twenty-first-century Massachusetts, shares of beneficial interest in a nominee trust of land still need not be recorded, a topic we take up in Section 9.6 of this handbook.

We close with a discussion of the status of the statute of uses generally on this side of the Atlantic. “Prior to the Revolution, the Statute of Uses was deemed to be in force in the American colonies and upon the formation of the states it was incorporated into their legal systems as part of the common law.”⁵⁰ Today, there are remnants of the statute scattered throughout the United States,⁵¹ although in England, the statute of uses itself was repealed in 1925 by the Law of Property Act.⁵² What are the practical implications for the modern trustee? Simply this: In the unlikely event that a trust of real estate is truly passive, if the trustee's responsibilities are little more than to refrain from interfering with the beneficiary's enjoyment of the property,⁵³ there may be no trust. The beneficiary would have the entire legal and equitable interest. “In the modern trust context, the sometimes archaic concepts of these statutes and decisions are strictly interpreted and narrowly applied to avoid interfering with the proper implementation of trust provisions and purposes.”⁵⁴ Thus, for example, it is the “prevailing view” that the statute of uses did not execute resulting trusts.⁵⁵

Today, however, a trustee is unlikely to find himself involved in such a “passive” arrangement.⁵⁶ But in the rare case when the statute of uses or a counterpart rule is applicable, *e.g.*, a simple “to B in trust for C” without more,⁵⁷ the rights of creditors, bona fide purchasers, and others may be affected, as well as the duties of the purported trustee (*e.g.*, there may be no obligation or need to make conveyance upon the death of the purported beneficiary).⁵⁸

⁴⁹Daniel R. Coquillette, Francis Bacon 51 (1992).

⁵⁰Moynihan at 204; *see generally* Bogert, Trusts and Trustees §6.

⁵¹Moynihan at 204.

⁵²15 Geo. V, c.20, §1.

⁵³Restatement (Second) of Trusts §69 cmt. a.

⁵⁴Restatement (Third) of Trusts §6 cmt. b(1).

⁵⁵6 Scott & Ascher §43.1.4.

⁵⁶It should be noted, however, that “[a]s a result of the Statute of Uses, . . . [the words ‘to the use of’] . . . have long been used in some conveyancing practices, and sometimes continue to be used even if unnecessarily, in order that the transferee might retain *legal* title.” Restatement (Third) of Trusts §21 cmt. c.

⁵⁷1 Scott & Ascher §3.4.2.

⁵⁸Restatement (Second) of Trusts §69 cmt. a. *See generally* §3.5.1 of this handbook (nature and extent of the trustee's estate). *See* *In re Estate of Richards*, Territories Court of the Virgin Islands, St. Thomas and St. John, Probate No. 3/1979, 1996 V.I. Lexis 14 (because trust was passive, it was executed by the statute of uses with the result that legal title was in purported “Beneficiaries”). Even if the statute of uses were to eliminate any obligation or need on the part of the trustee to make conveyance to a beneficiary, the beneficiary's title would still be subject to the trustee's powers and duties so far as necessary to satisfy obligations and wind up administration. *See* Restatement (Third) of Trusts §89 cmt. g. “The trustee's duty

§8.7 Merger [from *Loring and Rounds: A Trustee's Handbook*]

*Because one cannot be under an obligation to oneself, the same individual cannot be settlor, trustee, and sole beneficiary, and the trust parties can never be fewer than two.*¹

*[E]ven² where the legal and equitable titles are both vested in the same person, equity will under certain conditions refuse to recognize a merger which might exist in law, as where such result would be contrary to the intention of the trustor and would destroy a valid trust.*³

The doctrine of merger is occasionally a trap for the unwary; more often it is invoked in situations where it is inapplicable.⁴ Thus, the trustee needs to understand the concept if only to recognize when the doctrine is not a concern.⁵

Merger occurs when one person possesses the entire legal interest and the entire beneficial interest in property.⁶ In such a case, there is no trust;⁷ the person simply owns the property outright and free of trust,

of distribution is performed by surrendering possession of the subject matter of the trust within a reasonable time and taking steps that may be necessary to enable the beneficiaries readily to establish ownership.” Restatement (Third) of Trusts §89 cmt. g. *See also* 1 Scott & Ascher §3.4.3 (suggesting that a conveyance may not be necessary at the point when an active trust goes passive, but cautioning that a trust in the process of terminating is unlikely to be a passive one, the trustee having residual affirmative duties to wind-up the affairs of the trust).

¹Bogert, Trusts and Trustees §1.

²For a discussion of the concept of merger in Roman law, *see* §8.15.36 of this handbook.

³90 C.J.S. §283 (citing to *Dennis v. Omaha Nat'l Bank*, 153 Neb. 865, 46 N.W.2d 606 (1951); *Mesce v. Gradone*, 1 N.J. 159, 62 A.2d 394 (1948); *Quinn v. Pullman Trust & Sav. Bank*, 98 Ill. App. 2d 402, 240 N.E.2d 791 (1st Dist. 1968); *In re Haskell's Trust*, 59 Misc. 2d 797, 300 N.Y.S.2d 711 (Sup. 1969)). *See also* *Tretola v. Tretola*, 2004 WL 1586999 (Mass. App. Ct.) (footnote 10 and accompanying text).

⁴As a general rule, a trust may be created solely for the benefit of the settlor, provided the settlor is not also the sole trustee. *See* Uniform Trust Code §402 cmt., specifically the commentary on §402(a)(5). The Bogert treatise, however, appears to have fallen into the false merger trap by suggesting that one of the three “requirements” for the establishment of a valid private trust is “an expression of intent that property be held, at least in part, for the benefit of one other than the settlor.” *See* Bogert, Trusts and Trustees §1, in which Uniform Trust Code §402(a)(3) is cited as authority for the proposition. It does not appear, however, that §402(a)(3) even addresses the settlor-as-sole-beneficiary question. Some courts also have inappropriately invoked the doctrine of merger, such as to invalidate self-declarations of trust in which the settlor is the sole current beneficiary but other persons are designated as beneficiaries of the remainder. *See* Uniform Trust Code §402 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>). Presumably a so-called adapted trust would not fall prey to this particular misapplication of the merger doctrine as an adapted trust may not arise by declaration. *See* Restatement (Third) of Trusts, Reporter's Notes on §46, specifically on cmt. f thereto. The adapted trust is generally discussed in §9.29 of this handbook.

⁵*See, e.g., Hansen v. Bothe*, 10 So. 3d 213 (Fla. App. 2009) (reversing the Circuit Court's finding that a trust had terminated by merger, the Circuit Court having failed to appreciate the fact that the continued existence of remainder beneficiaries under the trust meant that the legal and beneficial interests thereunder were not “completely coextensive,” which they would have to be for a termination by merger to occur).

⁶*See generally* Restatement (Third) of Trusts §69; 5 Scott & Ascher §34.5; 2 Scott on Trusts §99; Restatement (Second) of Trusts §99; Bogert, Trusts and Trustees §§129, 1003.

all interests having “merged” in that person.⁸ Thus, the creditors, the spouse, and the taxing authorities might well have greater access to the property than would be the case were the property the subject of a viable trust.⁹ If merger has occurred, at death the property passes in accordance with the terms of the person’s will or by intestate succession, not in accordance with the terms of the instrument governing the purported trust.¹⁰ Obviously, if those who are mentioned in the trust instrument are different from those mentioned in the will, merger will benefit the latter. Merger may have consequences as well in the welfare eligibility and recoupment area.

Merger would trigger a termination of a valid trust, for example, if a beneficiary with the entire equitable interest transfers that interest to the trustee, provided there is no cotrustee.¹¹ The equitable interest, however, would have to be transferable; the beneficiary would have to be of full age and legal capacity and fully understand the applicable law and facts; and there could not be any undue influence on the part of the trustee.¹² Assuming the trustee managed to get over these hurdles, the trustee would then have the full ownership interest with rights of personal consumption, even if all the trust purposes had not been accomplished.¹³ Under the Restatement (Third) of Trusts, this would be the case even if there had been a spendthrift restraint in place.¹⁴ The property is said to be “at home,” the equitable interest having been “swallowed up” in the full ownership.¹⁵ Of course, merger could be avoided if the trustee were to resign in a timely fashion, or to execute a timely disclaimer of the equitable interest.¹⁶

Going the other way, there would be a merger in the beneficiary of a single-beneficiary trust if the legal title were to pass from the trustee to the beneficiary and to no other,¹⁷ whether or not this was done at the instigation of the beneficiary and whether or not the purposes of the trust had been fulfilled.¹⁸ Under the Restatement (Third) of Trusts, any spendthrift protections would extinguish.¹⁹ Thus, if that is not the desired result, the beneficiary should either disclaim the trusteeship or see to it that there is a cotrustee in

⁷2 Scott on Trusts §99. *See also* Uniform Trust Code §402(a)(5) (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

⁸Bogert, Trusts and Trustees §129; 5 Scott & Ascher §34.5. *See generally* Larry D. Scheafer, Annot., *Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries*, 7 A.L.R.4th 621 (1996).

⁹*See generally* 2 Scott on Trusts §99.

¹⁰2 Scott on Trusts §99.

¹¹Restatement (Second) of Trusts §343 cmt. a; 5 Scott & Ascher §§34.7 (Conveyance by Beneficiary to Trustee), 34.5.2 (When Sole Beneficiary Does Not Become Sole Trustee). *See generally* 5 Scott & Ascher §34.5 (Merger).

¹²*See generally* 5 Scott & Ascher §34.7 (Conveyance by Beneficiary to Trustee) (a spendthrift restraint could render ineffective the transfer itself); Restatement (Third) of Trusts §69 cmt. d (an effective merger will extinguish spendthrift restraints). *See generally* §§6.1.3.5 of this handbook (acquisition by trustee of equitable interest: the loyalty issues) and 7.1.1 (the beneficiary’s informed consent to a trustee’s act of self dealing).

¹³*See generally* 5 Scott & Ascher §34.7 (Conveyance by Beneficiary to Trustee).

¹⁴Restatement (Third) of Trusts §69 cmt. d.

¹⁵Lewin on Trusts ¶1-09 (England). *See also* 5 Scott & Ascher §34.5 (U.S.) (“The equitable interest is said to merge into the legal title”).

¹⁶Restatement (Third) of Trusts §69 cmt. d. *See generally* §5.5 of this handbook (voluntary or involuntary loss of the beneficiary’s rights) (in part discussing the subject of disclaimers of equitable interests under trusts).

¹⁷5 Scott & Ascher §34.5 (Merger).

¹⁸5 Scott & Ascher §34.6 (Conveyance by Trustee to or at the Direction of the Beneficiaries).

¹⁹Restatement (Third) of Trusts §69 cmt. d. *See generally* 5 Scott & Ascher §34.5.1 (Acquisition of Legal Title by Beneficiary of Spendthrift Trust).

place.²⁰ The Restatement (Second) of Trusts took the position that “when the sole beneficiary of a spendthrift trust, without his or her consent, became the sole trustee, he or she should be able to procure the appointment of a new trustee and have the trust reconstituted as a spendthrift trust.”²¹ One learned commentator finds the position of the Third Restatement plainly “more consonant with the surrounding doctrine”).²²

A state of merger also could exist *ab initio*. If, for example, *X* purports to declare himself trustee of certain property for a period of ten years after which the property is to pass outright and free of trust to *X*, there is no trust. All interests, both legal and equitable, remain merged in *X*.²³ A trust was never created.²⁴

But more often than not there is no merger. Let us assume a trust, *A* to *B* for *C* for life, then to *D*. If the same person is the sole trustee and the sole income beneficiary, and if upon death the property passes to the person’s executor or administrator—in other words to the estate—then there is a merger.²⁵ In other words, if *B*, *C*, and *D* are the same person, there is no trust—in fact there never was one. *A* simply made a gift to the person that was outright and free of trust. Nowadays one seldom runs across trust instruments where the one who possesses the equitable life estate also possesses the equitable remainder interest (*i.e.*, where the trust property ultimately passes into the probate estate of the life tenant), with the possible exception of nominee or realty trusts.²⁶ The property usually passes directly by purchase to someone’s relatives.²⁷

Where the group of trustees and the group of beneficiaries are identical, the fact that the trustees hold the legal title jointly with right of survivorship and the beneficiaries hold the equitable interest as tenants in common ought to prevent the destruction of the trust through merger.²⁸ One learned commentator is of the view that on policy grounds alone, namely, the policy of effectuating settlor intent whenever possible, there should be no merger in such cases.²⁹

As one can see, not much need be done to prevent a merger of interests. The simple introduction of a cotrustee into the formula should avoid such a result.³⁰ Or if upon the death of *C* the property passes to the then-living issue of *C* rather than to *C*’s estate there is no merger.³¹ “...[A]...trust is created even though the only interests of other beneficiaries are contingent, subject to revocation, or otherwise uncertain.”³² In this day and age, one has to work hard to back into a merger.

The trustee should always keep in mind that, as we have alluded to above, a right to revoke or the

²⁰Restatement (Third) of Trusts §69 cmt. d; 5 Scott & Ascher §34.5.1.

²¹5 Scott & Ascher §34.5.1 (referring to Restatement (Second) of Trusts §341(2) cmt. c & illus. 4, 7).

²²5 Scott & Ascher §34.5.1.

²³See *Odom v. Morgan*, 99 S.E. 195 (1919).

²⁴Restatement (Third) of Trusts §69 cmt. e.

²⁵Uniform Trust Code §402 cmt. (available on the Internet at <<http://www.law.upenn.edu/library/archives>>).

²⁶See §9.6 of this handbook (trusts that resemble corporations or agencies) (discussing the nominee trust).

²⁷See generally *National Shawmut Bank v. Joy*, 315 Mass. 457, 462–467, 53 N.E.2d 113, 117–120 (1944).

²⁸See generally 2 Scott on Trusts §99.5; *First Ala. Bank of Tuscaloosa, N.A. v. Webb*, 373 So. 2d 631 (Ala. 1979).

²⁹2 Scott & Ascher §11.2.5.

³⁰Restatement (Third) of Trusts §69 cmt. c. See, e.g., *First Ala. Bank of Tuscaloosa, N.A. v. Webb*, 373 So. 2d 631 (Ala. 1979); *Smith v. Francis*, 221 Ga. 260, 144 S.E.2d 439 (1965).

³¹See generally 2 Scott on Trusts §99.3. See also *Fratcher, Trustor as Sole Trustee and Only Ascertainable Beneficiary*, 47 Mich. L. Rev. 907, 934 (1949).

³²Restatement (Third) of Trusts §69 cmt. e.

possession of a general inter vivos power of appointment is not what triggers a merger.³³ Thus, if *A*, *B*, and *C* are the same but *D* is the *issue* of *B/C* living at the termination of the trust, there is no merger even in the face of a reserved right of revocation or general inter vivos power of appointment in *B/C*.³⁴ It is when *D* is the estate of *B/C* and *B/C* are the same person that merger comes about. The existence of a reserved right of revocation or general inter vivos power of appointment does not affect the situation one way or the other.³⁵

With the revocable living trust now the core of most estate plans, it is important that the trustee separate issues relating to merger from issues relating to powers of revocation and general inter vivos powers of appointment. These powers are technically personal rights of disposition, not interests in property.³⁶

There is no merger even in a case where title to the entire beneficial interest in a nominee trust³⁷ is held by the trustee of some other trust and the same person is the sole trustee of each trust, unless that same person also possesses the entire beneficial interest in the other trust.

As suggested in the introductory quotation, the coalescing of all property interests, both legal and equitable, in one person may not effect a merger in every case. Nor would the chance merger of the legal interest away from the trustee necessarily mean that in equity the trust itself extinguishes.³⁸ It may be that the one in whom the legal interest merges holds the legal interest as constructive trustee for the benefit of the trust beneficiaries, unless that person is a BFP.³⁹ As constructive trustee, he or she would then have a duty to transfer title to the subject property to an appropriate successor trustee, presumably one appointed by the court.⁴⁰

The merger concept is not new. It was woven into the fabric of Roman law, as we have noted in Section 8.15.36 of this handbook.

³³See *National Shawmut Bank v. Joy*, 315 Mass. 457, 469–478, 53 N.E.2d 113, 124–126 (1944).

³⁴See Harrison, *Structuring Trusts to Permit the Donor to Act as Trustee*, 22(6) Est. Planning 331 (Nov./Dec. 1995).

³⁵See Restatement (Third) of Property (Wills and Other Donative Transfers) §7.1 cmt. b (Tentative Draft No. 3, Apr. 4, 2001) (providing that “the fact that the interest of the remainder beneficiary is subject to the settlor’s power to revoke or amend the trust...does not transform the inter vivos trust into a will”).

³⁶See *National Shawmut Bank v. Joy*, 315 Mass. 457, 474, 53 N.E.2d 113, 124 (1944). See also *In re Armstrong*, 17 Q.B.D. 521, 531 (1886).

³⁷See generally §9.6 of this handbook (trusts that resemble corporations or agencies) (discussing the nominee trust).

³⁸See generally 5 Scott & Ascher §33.2.

³⁹See generally 5 Scott & Ascher §33.2. See generally §8.15.63 of this handbook (doctrine of bona fide purchase and the BFP).

⁴⁰See generally 5 Scott & Ascher §33.2. See generally §3.3 of this handbook (the remedial constructive trust).

