

Title

When the terms of a trust grant one co-trustee the power to remove the other, is exercise of the power subject to fiduciary constraints?

Text

In England, a power of removal is a “fiduciary power,” which “must be exercised for the benefit of the beneficiaries, not for the benefit of the person upon whom the power is conferred.” Lewin ¶ 13-41. In the U.S., a removal power in someone other than the trustee is generally not a fiduciary power, unless the terms of the trust provide otherwise. See 2 Scott & Ascher §11.10.2 (The private trust); 5 Scott & Ascher §37.3.6 (The Charitable Trust); Uniform Directed Trust Act §5(b)(2). But what if the holder of the removal power is also a co-trustee? Must any exercise be for the benefit of the beneficiaries such that the power is just one of the trustee’s myriad express and implied fiduciary powers? On this side of the Atlantic it is generally the terms of the trust that will determine whether the co-trustee with a removal power is constrained by the fiduciary principle in its exercise. In other words, it is all about what the settlor had intended. A court should ascertain settlor intent by construing the trust instrument in its entirety. One Minnesota court wrestled with the fiduciary issue in a matter involving a co-trustee with a power to remove his fellow co-trustees. See *Matter of Trust Agreement of Genevieve M. Rossow*, 2023 WL 7293812 [Court of Appeals of Minnesota]. The co-trustee had been married to the now-deceased settlor. The provision granting the co-trustee the removal power referred to the grantee as the settlor’s “spouse.” That the reference was to a specific person, that is to say that it was not a generic reference to the occupant of the office of the co-trustee at any given time, suggests that the power was a personal power, not a fiduciary power. The court did not see it that way. That the grantee was also a co-trustee rendered the removal power a fiduciary power per se. Certainly it would be unsettling to extend this logic to the exercise of personal powers of appointment held by trustees. As a general rule, a holder of a personal power of appointment, even if he happens to be the trustee, does not hold the power in a fiduciary capacity; has no duty to exercise it; and may disclaim it, release it, or allow it to lapse. See Restatement (Third) of Trusts §46 cmt. c.

Cross reference. The difference between a fiduciary power of appointment and a nonfiduciary/personal power of appointment is taken up in §8.1.1 of *Loring and Rounds: A Trustee’s Handbook* (2024), the relevant portion of which section is excerpted in the appendix below.

Appendix

§8.1.1 *Power of Appointment Doctrine* [from *Loring and Rounds: A Trustee’s Handbook* (2024)].

Fiduciary and nonfiduciary powers. A power of appointment, as it is generally understood

in the nontax context, is not a discretionary power *in* a trustee to invade principal for the benefit of the beneficiary or to select remaindermen.²⁷ For purposes of this handbook, a power of appointment is not a power *in the trustee*; it is a power *to give directions to* the trustee.

A power held by a trustee in his fiduciary capacity, sometimes referred to as a power in trust,²⁸ a fiduciary power,²⁹ a power annexed to the office,³⁰ a power coupled with an interest,³¹ or a fiduciary distributive power³² is taken up in §3.5.3.2(a) of this handbook, which covers the power to make discretionary payments of income and principal under a discretionary trust.³³ The Restatement (Third) of Property generally defers to the Restatement (Third) of Trusts for the law governing such nongeneral fiduciary powers.³⁴

It should be noted that the UTC contemplates that a power of appointment may be held in either a fiduciary³⁵ or nonfiduciary capacity, as does the Restatement of Property.³⁶ The UTC's definition of "beneficiary," however, excludes powers held by a trustee, though not powers held by others in a fiduciary capacity.³⁷ The Restatement (Third) of Trusts has carved out altogether a trustee's discretionary power with respect to trust benefits from the definition of a power of appointment.³⁸ A trustee's power to disclaim a fiduciary power is covered in §4.5.3.4 of this handbook.³⁹

As a general rule, a holder of a personal power of appointment, even if he happens to be the trustee, does not hold the power in a fiduciary capacity; has no duty to exercise it; and may disclaim it, release it, or allow it to lapse.⁴⁰ Such discretionary nonfiduciary powers may be exercised

²⁷*But see* Rest. (Second) of Property (Wills and Other Donative Transfers) §11.1 cmt. d. Under UTC §402(c) cmt. a power in a trustee to select a beneficiary from an indefinite class is valid, even if the class from whom the selection may be made cannot be ascertained. "Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement." UTC §402(c) cmt. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass to the settlor or his estate by resulting trust. UTC §402(c) cmt. *See also* Rest. (Third) of Property §46(2) (providing for the establishment of an "adapted trust" in the event a trustee is directed to distribute trust property to those members of an indefinite class of beneficiaries whom he shall select). *See generally* §9.29 of this handbook (the adapted trust).

²⁸*But see* Rest. (Second) of Property (Wills and Other Donative Transfers) §11.1 cmt. a (providing that the power-holder may hold the power in a fiduciary or nonfiduciary capacity).

²⁹Lewin ¶29-07 (England).

³⁰Lewin ¶29-18 (England).

³¹Lewin ¶29-18 (England).

³²Rest. (Third) of Property (Wills and Other Donative Transfers) §17.1 cmt. g.

³³*See also* Lewin ¶29-09 (England).

³⁴Rest. (Third) of Property (Wills and Other Donative Transfers) §17.1 cmt. g.

³⁵*See generally* 1 Scott on Trusts §27 (1939) (discussing the academic debate between Professors Gray and Ames over whether powers can be held in trust).

³⁶UTC §103 cmt.; Rest. (Second) of Property (Wills and Other Donative Transfers) §11.1 cmt. a; Rest. (Third) of Property (Wills and Other Donative Transfers) §17.1 cmt. g.

³⁷UTC §103 cmt. *See also* Rest. (Second) of Property (Wills and Other Donative Transfers) §11.1 cmt. a.

³⁸Rest. (Third) of Trusts §50 cmt. a.

³⁹*See also* UPC §2-1105(b) (the power to disclaim a fiduciary power); UPC §2-1111 (the consequences of disclaiming a fiduciary power).

⁴⁰Rest. (Third) of Trusts §46 cmt. c.

arbitrarily, provided that the exercise is within the scope of the power.⁴¹

Uniform Directed Trust Act. The nonfiduciary power of appointment, the subject of this sub-section, is expressly excluded from regulation under the Uniform Directed Trust Act (UDTA).⁴² The Act, which is discussed generally in §3.2.6 of this handbook, and again in §6.1.4 of this handbook, would impose fiduciary status on a nontrustee trust director. Thus, a power of direction incident to an UDTA nontrustee trust directorship is not the type of power that is the subject of this sub-section.

⁴¹Rest. (Third) of Property (Wills and Other Donative Transfers) §17.1 cmt. g. *See, e.g.*, Est. of Zucker, 122 A.3d 1112 (Pa. Super. Ct. 2015) (nonfiduciary powers of appointment need not be exercised in good faith); *Brown v. Miller*, 2 So. 3d 321 (Fla. Dist. Ct. App. 2008) (the holder of a nonfiduciary inter vivos power of appointment, such as an absolute right to withdraw trust principal, “cannot be found to have acted in bad faith by exercising that right.”).

⁴²*See* Unif. Directed Trust Act §5(b)(1).