

## Title

When adjudicating trust disputes, the equity courts are duty-bound to act, *sua sponte* if necessary, in vindication of the lawful intentions of settlors

## Text

In a trust dispute, the court, apart from functioning judicially, is “administratively” tasked with defending settlor intent, an affirmative duty that is derived not from the pleadings but from general principles of equity. A trust dispute in litigation is not an action at law. It is an action in equity. That being the case, the court has an affirmative duty, acting *sua sponte* when necessary, “to see to it that the trust is faithfully executed,” the institution of the trust itself being a creature of equity. See *Rock Springs Land and Timber, Inc. v. Lore*, 75 P.3d 614 (2003). That a particular equitable remedy has not been requested in any of the pleadings, for example, is no excuse for the court’s failing to mete it out *sua sponte*, provided to do so will further the trust’s “faithful execution.” *Id.* The court is duty-bound to do so. Counsel incompetency is no excuse for not doing so. In many cases the settlor will have been long dead and thus be in no position to advocate for the lawful purposes manifested in the trust’s terms.

One commentator has explained the “administrative” function of the equity court in the trust context this way: “There is, however, a tendency in the United States for a court that has supervision over the administration of a trust to enforce the trustee’s duties even though the beneficiaries have not asked it to do so.” He goes on, “The notion, although rarely articulated, seems to be that it is the function of the court to see that the settlor’s directions are carried out, even though no one complains to the court; that the court has administrative powers, not just judicial powers; and that once the court acquires jurisdiction over the administration of a trust, it is the court’s function to see that the trust is administered in accordance with the settlor’s directions.” *Scott and Ascher on Trusts* §24.4.4.

Now for a case in which the judiciary treated a trust dispute as if it were a mere action at law. Ex-wife deeds a parcel of real estate to ex-husband with the present intention that ex-husband take the legal title, as trustee, not outright. No mention, however, is made of that intention in any property-transfer documentation. Is the trust enforceable or does the property belong to the transferee outright and free of trust? On similar facts, one Washington appellate court, looking only to the state’s statutory trust law, answered outright and free of trust in that the ex-wife had not formally memorialized her entrustment intentions at the time of transfer, nor had the ex-husband formally declared himself an express trustee of the property. See *K & W Children’s Trust v. Estate of Fay*, 503 P.3d 569 (Washington 2022), discussed in another context in one of my prior JDSUPRA postings. There, however, had been a transfer of legal title. There was/is credible extrinsic evidence that ex-wife had had a present intention to have a trust impressed on the real estate at the time of transfer. By taking title to the real estate as if it were free of trust in contravention of what the ex-wife had intended, the ex-husband had been unjustly enriched. The regimes of constructive trust and resulting trust, each a creature of equity, not statute, have traditionally been exempt from the statute of frauds’ application to land entrustments, specifically its requirement that there be a memorializing writing. Ergo: With or without ex-husband’s consent,

by operation of law as enhanced by equity, he at the time of transfer had taken legal title to the real estate as a constructive trustee, and in so doing, had been saddled with a duty to transfer it on to a willing and able express trustee of the court's selection.

The appellate court could not be bothered with all this equity mumbo jumbo. It dismissively wrote: "Finally, the children's trust has not asserted in its pleadings or briefing that Kasi and Fay's conduct or separation agreement created a constructive or resulting trust." *Id* at 575. Moving on. O.K. But hadn't the trial court been sitting in equity? As explained above, the equity court, particularly in a trust matter, is duty-bound *not* to leave it to the litigants to decide what equitable remedies the court shall or shall not mete out in a given situation. To do so amounts to an improper delegation of the equity court's sacred "administrative" function.

Quaere: How about if the trial court had, *sua sponte*, ordered, or at least considered ordering, a Uniform Trust Code §415 reformation of the invalid trust? Here is §415 verbatim: "The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlors's (sic) intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."

When the time comes to make an internal victim of a breach of trust whole, the equity court may mix and administer, *sua sponte* if necessary, a cocktail of procedural and substantive equitable remedies. The difference between the procedural equitable remedy and the substantive equitable remedy is considered in §7.2.3 of *Loring and Rounds: A Trustee's Handbook* (2022), which section is reproduced in its entirety in the appendix immediately below. The Handbook's 2022 Edition is currently available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

## Appendix

*§7.2.3 Types of Relief (Equitable Remedies for Breaches of Trust)*[from *Loring and Rounds: A Trustee's Handbook* (2022), available at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

**Trust beneficiary traditionally was not entitled to legal relief.** The types of relief available to a trust beneficiary for breaches of fiduciary duty have traditionally been exclusively equitable.<sup>21</sup> Thus, *the beneficiary* was traditionally foreclosed from bringing a legal action against the trustee, such as an action of trespass, trover, detinue, replevin, or case.<sup>22</sup> Nor could *the beneficiary* bring a

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<sup>21</sup>See *Hunter v. United States*, 30 U.S. 173, 188 (1831) ("It is the peculiar province of equity, to compel the execution of trusts."); *CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011).

<sup>22</sup>4 Scott & Ascher §24.1.1 (Action at Law in Tort).

legal action in tort or contract against the trustee for an internal breach of fiduciary duty.<sup>23</sup>

**Equitable remedies for breaches of trust.** It is said that the “plastic remedies of the chancery” were “moulded to the needs of justice.”<sup>24</sup> If the trustee committed an intentional breach or fell below the required standard of care, it was equity that sought to place the beneficiary at least in the position that he, she, or it would have been in had there not been a breach of trust.<sup>25</sup> “Nor did equity courts insist upon a showing of detrimental reliance in cases where they ordered ‘surcharge.’ Rather, they simply ordered a trust or beneficiary made whole following a trustee’s breach of trust.”<sup>26</sup> Little has changed, at least in principle.<sup>27</sup> The equitable liabilities that may be imposed upon today’s defaulting trustee, *i.e.*, the tools the court has at its disposal for making the beneficiary whole,<sup>28</sup> have changed little over the centuries.<sup>29</sup> The court in the exercise of its inherent equitable powers<sup>30</sup> may grant the beneficiary a single remedy or mix for him a cocktail of remedies should a single remedy afford less than full relief.<sup>31</sup> Absent special facts, what is being “made whole” in the trust context is the beneficiary’s equitable property interest in the trust estate.<sup>32</sup> Thus, the court may grant one or more of the following *substantive* equitable remedies in order to make the beneficiaries whole:

- Compel the trustee to redress a breach of fiduciary duty by paying money, restoring property

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<sup>23</sup>4 Scott & Ascher §§24.1.1 (Action at Law in Tort), 24.1.2 (Action at Law for Breach of Contract).

<sup>24</sup>Foreman v. Foreman, 167 N.E. 428, 429 (N.Y. 1929).

<sup>25</sup>See CIGNA Corp. v. Amara, 563 U.S. 421, 443 (2011).

<sup>26</sup>See CIGNA Corp. v. Amara, 563 U.S. 421, 443 (2011).

<sup>27</sup>See *generally* Restatement (Third) of Trusts §95 (“With limited exceptions, the remedies of trust beneficiaries are equitable in character and enforceable against trustees in a court exercising equity powers.”).

<sup>28</sup>4 Scott & Ascher §24.3 (The Beneficiary’s Equitable Remedies).

<sup>29</sup>See CIGNA Corp. v. Amara, 563 U.S. 421 (2011) (an ERISA case).

<sup>30</sup>It should be noted that the court also has inherent equitable powers to excuse when appropriate good faith breaches of trust. See *generally* 4 Scott & Ascher §24.9.2 (Power of Court to Excuse Breach of Trust).

<sup>31</sup>See, *e.g.*, Miller v. Bank of Am., N.A., 326 P.3d 20, 30 (N.M. 2013) (holding that in light of the particular facts and circumstances of this case, which involves the mismanagement of an item of entrusted real estate, “[t]he award of prejudgment interest and the inflation adjustment are not duplicative.”)

<sup>32</sup>See *generally* AIB Group (UK) Plc v. Mark Redler & Co. Solicitors [2014] 3 W.L.R. 1367 (SC) (Eng.) (comparing equity’s conceptual approach to the calculation of a compensation award (equitable “damages”) for a breach of trust and the law’s approach to the calculation of damages for a breach of contract or a liability in tort).

(restitution and reparation), or other means.<sup>33</sup>

- Void an act of the trustee.<sup>34</sup>
- Permanently enjoin the trustee from committing a breach of trust duty (injunction).<sup>35</sup>
- Compel the trustee to perform a specific duty (specific enforcement).<sup>36</sup>

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<sup>33</sup>UTC §1001(b)(3); 4 Scott & Ascher §24.3.3 (Damages). *See, e.g.*, *Est. of Wilde*, 708 A.2d 273 (Me. 1978) (having found the trustee liable for imprudently investing the trust estate, the court adopted the following formula for calculating damages: the value of the trust as if it had been managed by a prudent professional trustee in Portland, Maine, less the value of the assets actually delivered to the trustee, rejecting a more mechanical method based upon the value of the trust as if it been invested in an S & P index fund); *In re Will of Janes*, 643 N.Y.S.2d 972 (App. Div. 1996) (rejecting a hypothetical market value appreciation measure of damages in the case of a trustee's negligent retention of Kodak stock in favor of the following measure: the value of the 12,087 shares of Kodak stock on August 9, 1973, the date on which they should have been sold, minus the value of the shares when they were ultimately sold or transferred, minus any income attributable to the stock retained, plus interest at the legal rate compounded from August 9, 1973); *First Ala. Bank v. Spragins*, 515 So. 2d 962 (Ala. 1987) (using as a benchmark for the measure of damages the S & P 500 Index). *Restoration of the Trust Property (Specific Reparation)*. *See generally* 4 Scott & Ascher §24.11.3. *See, e.g.*, *Staley v. Kreinbihl*, 152 Ohio St. 315, 89 N.E.2d 593 (1949) (holding that where a beneficiary has traced trust property into hands of the deceased trustee, the income on the property is subject to the short statute of limitations for claims against decedent while an action to recover property itself is not).

<sup>34</sup>UTC §1001(b)(9). *See, e.g.*, *In re Est. of Rothko*, 43 N.Y.2d 305, 372 N.E.2d 291 (1977) (the court in part voiding and setting aside a contract made by the coexecutors of an estate with a corporation, this because a coexecutor had a personal interest in the corporation and because the contract favored the coexecutor at the expense of the estate).

<sup>35</sup>UTC §1001(b)(2); 4 Scott & Ascher §24.3.2 (Injunction). *See, e.g.*, *In re Gould's Will*, 234 N.Y.S.2d 825 (App. Div. 1962) (enjoining trustee at request of beneficiary from performing on a contract to sell stock comprising the trust estate when disposing of the stock would be imprudent); *Ohio Oil Co. v. Daughetee*, 88 N.E. 818 (Ill. 1909) (enjoining trustee at request of beneficiary from entering into an oil and gas lease in that to do so would impair the interest of the remainderman; *McHenry v. Jewett*, 90 N.Y. 58 (1882) (enjoining trustee at request of beneficiary from voting stock in a particular way).

<sup>36</sup>UTC §1001(b)(1); 4 Scott & Ascher §24.3.1 (Specific Enforcement of Trust). *See, e.g.*, *In re Koffend's Will*, 218 Minn. 206, 15 N.W.2d 590 (1944) (holding that the court may direct the trustee to vote for directors of a corporation comprising the trust estate who would vote dividends for the benefit of the trust beneficiary); *Nash v. Sutton*, 117 N.C. 231, 23 S.E. 178 (1895) (holding that trustees may be compelled by the court to convey real estate to a successor); *Merkel v. Long*, 368 Mich. 1, 117 N.W.2d 130 (1962) (in a matter involving the settlement of a controversy as to the effect of provisions of will creating trust, the court may order the trustees to sign the agreement reached by the parties unless they resign).

- Suspend the trustee.<sup>37</sup>
- Remove the trustee.<sup>38</sup>
- Reduce or deny compensation to the trustee.<sup>39</sup>
- Appoint a special fiduciary or receiver to take possession of and administer the trust property.<sup>40</sup>
- Order any other appropriate substantive relief.<sup>41</sup>

To assist it in fashioning an appropriate mix of *substantive* equitable remedies for a particular breach of trust, the court has at its disposal a variety of *procedural* equitable remedies. They include the following:

- Order the trustee to account.<sup>42</sup>

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<sup>37</sup>UTC §1001(b)(6).

<sup>38</sup>UTC §1001(b)(7). *See, e.g.,* Steele v. Kelley, 710 N.E.2d 973, 994 (Mass. App. Ct. 1999) (noting that the fundamental question in trustee removal cases is not the wishes of the beneficiaries, but rather whether the circumstances are such that the degree of the trustee’s discretion makes it detrimental to the trust for the trustee to continue in office); Shear v. Gabovitch, 685 N.E.2d 1168, 1194 (Mass. App. Ct. 1997) (ordering removal of trustee who possessed “almost plenary discretion over all distributions to a beneficiary” because he could not “be expected to exercise his power with desirable perspective and detachment when his motives and integrity” were constantly being “impugned by the beneficiary,” the parties having been “mired for years in a draining legal equivalent of total war”). *But see* Symmons v. O’Keefe, 419 Mass. 288, 644 N.E.2d 631 (1995) (the mere fact that there is friction or hostility between the trustee and beneficiaries would not necessarily be a sufficient ground for removal, the reason being that beneficiaries desiring a trustee’s removal would have an incentive to quarrel with the trustee).

<sup>39</sup>UTC §1001(b)(8). *See, e.g.,* Matter of Est. of Gump, 1 Cal. App. 4th 582, 2 Cal. Rptr. 2d 269 (1991) (holding that trial court had not abused its discretion in denying trustee compensation and costs that related to the negligent administration of a lease of trust real estate).

<sup>40</sup>UTC §1001(b)(5) (making explicit the court’s authority to appoint a special fiduciary, also sometimes referred to as a receiver); 4 Scott & Ascher §24.3.4 (Appointment of Receiver). *See also* Restatement (Second) of Trusts §199(d) (providing that a beneficiary of a trust can maintain a suit to appoint a receiver to take possession of the trust property and administer the trust). *See, e.g.,* Boyce v. Wendt, 305 Mich. 254, 9 N.W.2d 531 (1943) (holding that where trustees have failed to keep records, have mingled the trust funds with their own, and are insolvent, the court may appoint a receiver to conserve the property); Smith v. Fleetwood Bldg. Corp., 120 Fla. 481, 163 So. 293 (1935) (where trustee is seeking to enforce a lien on the trusts property for advances made by him and in so doing asserting an interest adverse to the trust, he may be removed and replaced by a receiver).

<sup>41</sup>UTC §1001(b)(10).

<sup>42</sup>UTC §1001(b)(4). *See, e.g.,* Corsi v. Corsi, 302 Ill. App. 3d 519, 706 N.E.2d 956 (1998) (holding that the plaintiffs’ allegations of breach of trust and inadequacy of accountings are sufficient to support a motion to compel an accounting); Est. of P.K.L. v. J.K.S., 189 Ariz. 487, 943 P.2d 847 (1997) (stating that a

- Follow the trust property wrongfully disposed of *in specie*.
- Trace the trust property wrongfully disposed of and recover the property or its proceeds (following the property into its product).<sup>43</sup>
- Issue temporary injunctions.
- Impose an equitable lien or constructive trust on property that belongs to the trust.<sup>44</sup>

**The procedural versus the substantive equitable remedy.** Equitable accounting; following; tracing (following property into its product); the imposition of an equitable lien; and the imposition of a constructive trust are not equitable remedies in the sense that a permanent injunction or a decree for specific performance or a restitution order is an equitable remedy. They are just “part of the process of establishing the substantive rights of the parties.”<sup>45</sup> The court, for example, having held that the beneficiary has a right to follow a particular item of property and that the transferee of that property has the duties of a constructive trustee with respect to it (in other words, the court having adjudicated the rights, duties, and obligations of the parties to the dispute) it can now fashion whatever substantive remedies are appropriate to make the beneficiary whole.<sup>46</sup> Perhaps it will issue a restitution order coupled with a permanent injunction. Still, the imposition of a constructive trust on identifiable property is a remedy in the sense that it freezes the status quo, *i.e.*, it prevents the transferee from consuming or alienating the subject property to third parties, and so we are treating it as a *procedural* remedy for purposes of this handbook. The least remedy-like of the procedural remedies is the equitable accounting, which is essentially little more than

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trust income beneficiary has a right to require the trustee to produce a copy of the trust terms describing or affecting the beneficiary’s interest, relevant information about the trust assets, and the annual statement of the accounts of the trust). *See, however, Johnson v. Kotyck*, 90 Cal. Rptr. 2d 99, 76 Cal. App. 4th 83 (1999) (holding contingent beneficiaries of a revocable inter vivos trust not entitled to an accounting though the settlor’s conservator had come into possession of the revocation power).

<sup>43</sup>UTC §1001(b)(9); 4 Scott & Ascher §24.6 (Following Trust Property into Its Product). *See, e.g., Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960) (providing that though the beneficiary acquiesced in the trustee taking control of the trust property and investing it in a nonlegal investment for his own benefit, the trust fund may be traced into such investment).

<sup>44</sup>UTC §1001(b)(9). *See, e.g., Nile v. Nile*, 432 Mass. 390, 734 N.E.2d 1153 (2000) (upholding the imposition of a constructive trust on the assets of the decedent’s revocable inter vivos trust in order to secure the decedent’s obligations under a postdivorce settlement agreement between the decedent and his former wife); *Lackey v. Lackey*, 691 So. 2d 990 (Miss. 1997) (trust beneficiary entitled to have constructive trust imposed on proceeds of life insurance policy purchased with property embezzled from trust).

<sup>45</sup>Snell’s Equity 314–315 (31st ed. 2005).

<sup>46</sup>*See Head v. Head*, 323 P.3d 505, 510 (Or. Ct. App. 2014) (“As a general rule, a court in equity has broad discretion in crafting relief, and the parties in equity are not necessarily limited to the relief that they seek in their complaint.”).

litigation discovery “in aid of a purely equitable right.”<sup>47</sup>

Allow us one final illustration of our simple taxonomy of equitable remedies. Take the imposition of a constructive trust to facilitate restitution for unjust enrichment.<sup>48</sup> Unjust enrichment is the wrong, restitution is the substantive remedy; and the imposition of a constructive trust is the procedural remedy.<sup>49</sup> It is unfortunate that Equity is no longer required in most American law schools, and now offered at all in only a few, a topic we address in §8.25 of this handbook.

**Choice of equitable remedies.** When a trust has multiple classes of beneficiary, *e.g.*, equitable life interests and equitable remainder interests, not all classes are likely to be equally advantaged by the equitable relief that the court fashions. If *all* beneficiaries cannot agree on what the court should do, “the court ordinarily elects the remedy that in its opinion is the most advantageous to the beneficiaries as a whole.”<sup>50</sup>

**When there is a right to a jury trial.** *See* §7.1 of this handbook.

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<sup>47</sup>Snell’s Equity ¶18-04 (31st ed. 2005).

<sup>48</sup>*See generally* §8.15.78 of this handbook (unjust enrichment).

<sup>49</sup>*See Nelson v. Nelson*, 288 Kan. 570, 205 P.3d 715 (2009) (“The [defendants] correctly assert that a constructive trust is an equitable remedy; and a request to impose such a trust is not a cause of action that will stand independent of some wrongdoing.”). For a general discussion of the constructive trust, see §3.3 of this handbook.

<sup>50</sup>4 Scott & Ascher §24.19.1 (Choice of Remedies).