

Title

The fiduciary conundrum inherent in the Uniform Trust Code's version of the purpose trust

Text

In Atty. Matthew Erskine's article in Forbes, dated Oct. 5, 2022, several sentences from §9.27 of *Loring and Rounds: A Trustee's Handbook* (2022) are quoted verbatim with due attribution. See <https://www.forbes.com/sites/matthewerskine/2022/10/05/how-will-the-patagonia-perpetual-purpose-trust-terms-be-enforced/?sh=106620642508>. The article is entitled "How Will the Patagonia's Perpetual Purpose Trust Be Enforced?" The subject of both the article and the referenced section of the Handbook is the so-called purpose trust, a noncharitable property-management arrangement that has no beneficiaries. It is hard to see how an arrangement that fails to adhere to the "beneficiary principle" can be a true trust, there being no one who would have standing to seek enforcement of its terms. As for the state attorney general's division of public charities, it is neither in the business of, nor equipped to, oversee such noncharitable undertakings. How about if the governing instrument were to designate a third-party enforcer as per §409 of the UTC? Assuming the enforcer is a fiduciary to whom then would his or her duties run? The UTC has no good answer to that critical question. If the enforcer is not a fiduciary then the terms of the "trust," as a practical matter, are perversely unenforceable. A trust whose terms are unenforceable is not a true trust. In a nutshell this is the fiduciary conundrum inherent in the Uniform Trust Code's version of the purpose trust. The above-referenced section of the Handbook, specifically §9.27, is reproduced in its entirety in the appendix below. The Handbook is available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

Appendix

§9.27 The Noncharitable Purpose Trust [from *Loring and Rounds: A Trustee's Handbook* (2022), available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

Charitable purpose trusts and trusts for individuals have long been recognized, the attorney general having standing to seek enforcement of the former and beneficiaries having standing to seek enforcement of the latter.¹ "In the past,...[noncharitable]...purpose trusts often ran afoul of two important legal doctrines: the Rule Against Perpetuities and the beneficiary principle."² The Restatement (Third) of Trusts suggests that a noncharitable "purpose" trust is not necessarily void *ab initio*, though it has no beneficiaries (other than the reversionary interests which it refers to as "reversionary beneficiaries")³ that are ascertainable within the period of the rule against perpetuities, and though it has no charitable purpose.⁴ It

¹See generally §9.4.2 of this handbook (standing to enforce charitable trusts).

²Richard C. Ausness, *Non-Charitable Purpose Trusts: Past, Present, and Future*, 51 Real Prop., Tr. & Est. L.J. 321, 328 (Fall 2016).

³2 Scott & Ascher §12.10.

⁴See also 6 Scott & Ascher §41.8 (Testamentary Disposition for Specific Noncharitable Purposes).

could be administered as an adapted trust⁵ in lieu of imposition of a resulting trust.⁶ Thus, “[i]n the case of an inter vivos transfer for a specific noncharitable purpose, the settlor may be thought of as a beneficiary.”⁷ The trustee of a viable purpose trust holds the trust property for the benefit of the reversionary interests;⁸ subject, however, to a *nonmandatory power* in the trustee, pursuant to the terms of the trust, to apply the property for the benefit of definite or indefinite noncharitable purposes of his selection.⁹ During the settlor’s lifetime, the trust would be revocable.¹⁰ Thus, principles of agency law would essentially govern the inter vivos purpose trust, the trustee being a constructive agent of the settlor under such an arrangement.¹¹ In other words, the trustee would owe fiduciary duties exclusively to the “settlor.” In the case of a testamentary purpose trust, however, even agency principles are inapplicable as a will speaks at death. Since at least 1917, courts have been sustaining such imperfect trusts as powers.¹²

As suggested above, courts have traditionally looked askance at such “benevolent”¹³ trusts because it has been thought that there is no one who could maintain proceedings to enforce them.¹⁴ This is because a noncharitable purpose trust has no definite or ascertainable beneficiaries, other than those who would take upon the imposition of a resulting trust, and the attorney general’s writ covers only charitable trusts.¹⁵ The Restatement would sustain such arrangements, other than those intended to be created by declaration,¹⁶ as adapted trusts,¹⁷ bestowing standing on one or more of the following to bring an action to prevent or redress a breach of trust:

⁵See §9.29 of this handbook (adapted trusts).

⁶See 6 Scott & Ascher §41.8 (Testamentary Disposition for Specific Noncharitable Purposes); §4.1.1.1 of this handbook (the resulting trust).

⁷2 Scott & Ascher §12.11.8.

⁸See *generally* §4.1.1 of this handbook (the reversionary interest).

⁹Restatement (Third) of Trusts §47; 6 Scott & Ascher §41.8 (Testamentary Disposition for Specific Noncharitable Purposes).

¹⁰Restatement (Third) of Trusts §47 cmt. g.

¹¹See *generally* 6 Scott & Ascher §41.9.

¹²John Chipman Gray, *The Rule Against Perpetuities*, Appendix H §909 n.1 (4th ed. 1942) (*see, e.g., In re Gibbons* [1917] 1 I.R. 448 (Eng.)).

¹³See §9.4.1 of this handbook (Charitable Purposes) (discussing in part the benevolent trust).

¹⁴See *generally* 6 Scott & Ascher §41.8 (Testamentary Disposition for Specific Noncharitable Purposes).

¹⁵See *generally* §9.4.1 of this handbook (charitable purposes).

¹⁶Restatement (Third) of Trusts §47 cmt. g. “If, however, the...declarant dies believing that a trust has been created that will be continued by a successor trustee, an adapted trust will then be given effect by constructive trust.” Restatement (Third) of Trusts §47 cmt. g. See *generally* §3.3 of this handbook (Involuntary Trustees).

¹⁷Restatement (Third) of Trusts §47 cmt. a.

- “the personal representative of the settlor or of a trustee who dies while in office,”¹⁸
- “any of the settlor’s successors in interest,”¹⁹ and
- “a person identifiably interested in the purpose of the power, such as the person caring for a pet or a member of the immediate family of a decedent for whom masses, grave care, or a monument is provided.”²⁰

The UTC, specifically §409(1), recognizes the noncharitable purpose trust, provided that such a trust may not be “enforced” for more than 21 years. Section 409(2) provides that a noncharitable purpose trust is enforceable by a person appointed in its terms. Would trust principles rather than agency principles constructively govern were such a private enforcer in the picture? If the enforcer is a true fiduciary, then the answer might well be yes. The problem, however, is that in the purpose-trust context the enforcer’s fiduciary duties would have to be owed externally to someone other than the “settlor,” otherwise we would have a redundancy. But to whom would they run? If the “enforcer” of a purpose trust effectively owes fiduciary duties to no one, then the enforcement mechanism is illusory; and if the enforcement mechanism is illusory, so also is the trust itself. In the words of Justice Roxburgh: “[H]aving regard to the historical origins of equity, it is difficult to visualize the growth of equitable obligations which nobody can enforce...[and] because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of State can control, or, in the case of maladministration, reform.”²¹

While trusts for the care of graves, the erection and maintenance of monuments, and the care and support of animals would be recognized,²² trusts whose purposes are capricious would not.²³ They would fail *ab initio*.²⁴ The Restatement advocates a flexible approach to duration when it comes to viable purpose adapted trusts:

The 21-year period is neither sacred nor necessarily suitable to all cases of adapted trust powers. If an adapted trust for the care of a pet is worth allowing at all..., it makes sense to allow it to continue for the life of the pet, although not a human “life in being” for perpetuities purposes....Also, a trust power to maintain a grave should be allowed for the lifetime of the decedent’s spouse and children, or of other concerned individuals designated in the will..., all lives in being at the testator’s death.²⁵

¹⁸Restatement (Third) of Trusts §47 cmt. f.

¹⁹Restatement (Third) of Trusts §47 cmt. f.

²⁰Restatement (Third) of Trusts §47 cmt. f.

²¹*In re Astor’s Settlement Trusts* [1952] 1 All E. R. 1067 (Eng.).

²²Restatement (Third) of Trusts §47 cmt. d(1).

²³See generally 6 Scott & Ascher §41.8 (Testamentary Disposition for Specific Noncharitable Purposes).

²⁴Restatement (Third) of Trusts §47 cmt. e. See generally §8.15.39 of this handbook (rule against capricious [trust] purposes).

²⁵Restatement (Third) of Trusts §47 cmt. d(2).

The related topic of honorary trusts, including trusts for pets,²⁶ is covered in §9.9.5 of this handbook. Benevolent trusts are covered in more detail in §9.4.1 of this handbook.

²⁶*See generally* 2 Scott & Ascher §12.11.3.