Title

When the trustee also is the beneficiary's priest, professor, adult child, or physician: The loyalty considerations

Text

An agent with discretionary authority, that is a non-ministerial one, owes the principal fiduciary duties. All trustees, on the other hand, are fiduciaries. A trustee has a duty to act solely in the interest of the beneficiary in matters involving the trust property. The trustee, however, may have occasion to deal with the beneficiary in matters unrelated to the trust property, such as acquiring for himself the beneficiary's personal residence, which is not in trust. While such dealings are not forbidden *per se*, they can carry with them a rebuttable presumption of undue influence. "Even though not within the fiduciary relation inherent in trust administration, the trustee's *personal* dealings with beneficiaries of the trust may involve a confidential relationship that is sufficiently natural to the parties' roles in the trust relationship to be recognized by the trust law as an incident or extension of the intense duty of loyalty applicable to trustees." Rest. (Third) of Trusts §78, cmt. *g.*

A trustee-beneficiary transaction is particularly vulnerable to voidance if the parties also were in a separate *fiduciary* relationship of confidence at the time of the transaction and the trustee abused that relationship, such as when the trustee also was the beneficiary's attorney-at-law, an attorney-at-law being a non-ministerial agent.

There can be vulnerability, as well, in the separate non-fiduciary confidential context, such as when the trustee also is the beneficiary's priest, professor, adult child, or physician. Being neither non-ministerial agencies nor trusteeships, they are not *ipso facto* fiduciary relationships. A confidential non-fiduciary relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. For a non-fiduciary confidential relationship to arise, however, there must be reliance on the part of the one reposing the confidence. A fiduciary relationship, on the other hand, brings with it a duty of undivided loyalty reliance or no reliance.

Assume trustee wishes to purchase for his own benefit beneficiary's personal residence, which is not a trust asset. The trustee also is dominant in some separate non-fiduciary confidential relationship with beneficiary. Trustee by chance while on vacation learns from a third party that a proposed zoning change is likely to increase the property's market value. Beneficiary is self-evidently unaware of proposed zoning change. Trustee keeps quiet. Instead, he induces beneficiary not to seek independent advice and proceeds to exploit beneficiary's ignorance to the trustee's advantage. Both relationships have been abused, the one of trust and the one of confidence. Sale is voidable. Had there been no separate confidential relationship, then sale would not be voidable. See Rest. (Third) of Trusts §2 cmt. b(1), illus. 1. Even in the absence of a separate confidential relationship, the trustee would need the beneficiary's informed consent to exploit confidential information acquired by trustee *in the course of administering trust*. As trustee will have burden of showing that no advantage of position or influence had been taken, trustee would benefit if beneficiary were represented by independent counsel in matter.

The non-fiduciary "dominant-subservient" relationship, particularly the abusive hired caregiver and the enfeebled care recipient, is not really one of confidence. *But see* Rest. (Third) of

Property (Wills & Don. Trans.) §8.3, cmt. *g.* No matter. A transaction consummated under duress is voidable *per se*. As to the liabilities of disloyal agent-fiduciaries, see §9.9.2 of *Loring and Rounds: A Trustee's Handbook* (2023). Section reproduced in appendix below. Handbook available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-trustees-hanbook-2023e/01t4R00000Ojr97QAB.

Appendix

§9.9.2 *Simple Agencies, Such as Powers of Attorney, and Complex Agencies, Such as Partnerships, Are Not Trusts* [from *Loring and Rounds: A Trustee's Handbook* (2023), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-trustees-hanbook-2023e/01t4R00000Ojr97QAB].

> *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.*[51]

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.)),[52] investment management agency accounts, and escrow agency accounts are not trusts.[53] And they certainly are not powers of appointment.[54] They are all agencies. So are custodial accounts.[55] So also is an escrow holder an agent. See §8.2.3 of this handbook. With some common law and statutory exceptions,[56] under none of these arrangements does title to the subject property pass to the agent,[57] although agents may be vested with the power to pass title.[58] That is not to say that a trust may not masquerade as an agency, but it is hard to see how a ministerial agent could justifiably be deemed in equity to be an express trustee, the critical element of discretion being lacking. Conversely, an agency coupled with an interest is not a true

[51] 5 Scott & Ascher §35.1.9 (Trust for Particular Creditor).

[52] 1 Scott on Trusts §§8–8.1.

[53] *See generally* 1 Scott & Ascher §2.3.4; Bogert §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 §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)).

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

[55] *See generally* Bogert §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*.

[56] *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.

[57] 1 Scott on Trusts §8.

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

agency; nor, absent special facts, should equity deem the relationship to be a trust in disguise.[59] Under classic agency doctrine, an "irrevocable" agency is either something other than a true agency or revocable notwithstanding the "irrevocable" label.[60] A trustee, *qua* trustee, is not the beneficiary's agent,[1] except perhaps constructively should the beneficiary possess a general inter vivos power of appointment.[2]

Money exception. One important exception to the principle that legal title is in the principal, not the agent, 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."[61] That is not to say that the agent might not also be a trustee of the funds for the benefit of the principal.[62] 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.[63] 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.[64] Absent special facts, an insurance agent who undertakes to collect insurance premiums on behalf of the home office is a trustee of those premiums.[65] So also is a property management agent who undertakes to collect the rents on behalf of the property owner a trustee of the funds collected.[66] One who solicits and receives cash contributions on behalf of a charity takes title to the funds, but as a trustee.[67]

Agency versus contract. Nor is an agency relationship in and of itself a contractual relationship, though the consent of the parties is a critical element of each.[68] 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."[69]

Control. The element of control is a critical difference between the agency and the trust.[70] An agent is

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[59]*See* Warren A. Seavey, Law of Agency 21 (1964) ("Holders of powers for their own benefit … are not agents … The powers they hold may be termed proprietary, the language and forms of agency being used to create them and hence have to some extent been included in treatises on agency ….They are frequently described as 'powers coupled with an interest.'").

[60]"The principal can revoke the authority of an agent at any time, irrespective of an agreement not to do so." Warren A. Seavey, Law of Agency 87 (1964).

[1] *See* Taylor v. Mayo, 110 U.S. 330, 334-335 (1884).

[2] *See generally* §8.11 of this handbook.

[61]1 Scott & Ascher §2.3.4.

[62]Bogert §§15 & 22.

[63]Bogert §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).

[64]Bogert §22.

[65]Bogert §22.

[66]Bogert §22.

[67]Bogert §22.

[68]"[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 §15.

[69]Bogert §15.

[70]*See, e.g.*, Banks v. N. Tr. Corp., 929 F.3d 1046 (9th Cir. 2019).

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.

Termination other than by death. An agency is terminable at the will of either the principal or the agent. "The principal can revoke the authority of an agent at any time, irrespective of an agreement not to do so."[71] In the case of a trust, its terms will determine whether it is revocable, and if so, by whom.[72] Unless the agency is regulated by a durable power of attorney statute, the mental incapacity of the principal terminates the agency, while the mental incapacity of the beneficiary does not necessarily terminate the trust. While insanity of the agent terminates the agency, the insanity of the trustee does not necessarily terminate the trust: A trust shall not fail for want of a trustee; if all else fails the court shall appoint a suitable successor trustee.[73]

Death. An agency terminates upon the death of either the principal or the agent. Thus, for example, a duly-appointed executor (personal representative) cannot be the deceased testator's agent.[74] 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.[75] 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.[76] Thus while an agency may not function as a will substitute absent statutory authority,[77] a revocable inter vivos trust may.[78]

Duty to act. 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.

Personal liabilities. An agent may subject the principal to personal liability to third persons, whereas a trustee as such cannot subject the beneficiary to such liability.[79] The trustee in his dealings with third parties with respect to the trust property is a principal.[80] He is not acting as an agent of the beneficiaries.[81]

The agent-fiduciary. An agent with discretion is a fiduciary, a topic we take up in Chapter 1 of this handbook. All trustees are fiduciaries. Thus, the core fiduciary relationships of agency and trust can overlap functionally at times.[82] "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."[83] Still, unless the parties agree otherwise, the investment manager or agent should make the

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[71]Warren A. Seavey, Law of Agency 87 (1964).

[72]*See generally* §8.2.2.2 of this handbook (trusts that are revocable).

[73]Note, however, that the terms of the typical durable power of attorney provide for nonjudicial agent succession.

[74]*Cf.* Ajemian v. Yahoo, Inc., 84 N.E.3d 766 (Mass. 2017).

[75]The death of either the principal or the agent will terminate the agency. *See generally* 2 Scott & Ascher §12.13.1; Bogert §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 §15.

[76]*See generally* 1 Scott & Ascher §2.3.4.

[77]The typical custodial IRAs by state statute is an effective will substitute.

[78]*See generally* Nat'l Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944).

[79]Restatement (Third) of Trusts §5 cmt. e.

[80]Bogert §15.

[81]Bogert §15.

[82]*See, e.g.*, *In re* Blaszak, 397 F.3d 386 (6th Cir. 2005) ("The agency agreement demonstrates the pre-incorporation intent to create a trust ….").

[83]Restatement (Second) of Agency §425 cmt. a.

investments in the name of the principal.[84] 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 §8.11 of this handbook in our discussion of the duties of the trustee of a revocable trust.[85] 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.[86]

Remedies. Such functional overlaps have implications as well when it comes to remedies, a topic we take up generally in §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."[87]

When duties of trustee and agent intersect. 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.[88] 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."[89]

Constructive trust doctrine. A breach of fiduciary duty in the agency context can give rise to a constructive trust.[90] 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*.[91] *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.[92] Were the parties in neither a confidential nor a fiduciary relationship, *Y* might well be allowed to keep the land, unless the arrangement had somehow been incident to an enforceable contract.[93] 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 §3.3 of this handbook.[94] 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 §9.32 of this handbook.

Officers of a corporation. Officers of a corporation, such as its president and its secretary, are not trustees of the corporate assets.[95] They are agents of the entity who have undertaken contractual

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[84]Restatement (Second) of Agency §425 cmt. e.

[85]*See also* §9.27 of this handbook (the inter vivos purpose trust) and §9.29 of this handbook (the inter vivos adapted trust).

[86]*See 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).

[87]Bogert §15.

[88]UPC §5-503(a).

[89]UPC §5-503(a).

[90]*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); 6 Scott & Ascher §43.1.1.

[91]*See generally* §9.9.11 of this handbook (a contract to convey land).

[92]6 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).

[93]*See 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).

[94]*See also* 6 Scott & Ascher §43.1.1.

[95]Bogert §16.

obligations.[96] "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."[97]

Majority stockholders. It is said that majority stockholders of a corporation owe certain fiduciary duties to the minority stockholders.[98] They are not, however, trustees of corporate assets, nor are they, absent special facts, agents of either the corporation or the minority stockholders.[99] 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.[100]

A general partnership is not a trust. Though each is a fiduciary relationship, and though neither, absent statute, is a juristic person, a general partnership and a trust are not one and the same. A general partnership is a contract of mutual agency; a trust is not. A trustee of an irrevocable trust, *qua* trustee, is not the agent of the beneficiary; nor is the beneficiary, *qua* beneficiary, the agent of the trustee. While the trustee owes the beneficiary fiduciary duties; the beneficiary owes the trustee no such duties. "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."[101]

In the case of a tenancy in partnership, each partner has full coownership 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 §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.[102] With some exceptions, which are discussed in §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.[103]

As explained in §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."[104]

The statute of frauds, which is covered in §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."[105]

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.[106] The resulting trust and the constructive trust are covered in §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

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[96]Bogert §16.

[97]Bogert §16.

[98]Bogert §16.

[99]Bogert §16 ("A shareholder's property interest is absolute and subject to no equitable interest in another").

[100]*See* 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").

[101]Warren A. Seavey, Handbook of the Law of Agency 18 (1964).

[102]Bogert §36.

[103]*See generally* §5.6 of this handbook (liabilities of the trust beneficiary).

[104]Bogert §36.

[105]Bogert §36.

[106]*See generally* Bogert §36.

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."[107]

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

Israel. In Israel, it appears that legal title to entrusted property may be in someone other than the trustee. The Israeli Trust Act (1979) broadly defines a trust as "a relationship to any property by virtue of which a trustee is bound to hold the same, or to act in respect thereof, in the interest of the beneficiary or for some other purpose."[108] The definition would seem to capture even a discretionary agency the subject of which is property.

[107]Section 3.3 of this handbook.

[108]Trust Law, 5739-1979, 33 LSI 41, §1 (1966–1967) (Isr.).