

Title

Is the associated pour-over will superfluous if the settlor of a revocable inter vivos trust and the trustee hold all the settlor's property jointly with right of survivorship?

Text

Could re-titling an item of one's property into joint name with the trustee of one's revocable inter vivos trust render the pour-over will superfluous as to that item? In a good Property text, not the Uniform Trust Code, is where one should look for answers. It is drilled into every first-year law student that a valid joint tenancy with right of survivorship has four unities: Unity of time, unity of possession, unity of title, and unity of interest. Unity of interest means that a cotenant has exactly the same rights in his proportional interest as the other cotenants have in theirs. In other words, all interests are doctrinally *equal*, that is the cotenants have estates of the same type and duration. Could a non-trustee settlor, then, hold property jointly with a trustee where the interest is coupled with a right of survivorship? Probably not. The two parties by default would hold the subject property as tenants in common. Too bad, at least as a practical matter, as such an arrangement might have made an interesting substitute for the pour-over will. The problem is that the interests of the individual and the trustee, while concurrent, would not be doctrinally *equal* in that the duration of the modern trust tends not to be tied to the lifespan of the trustee. Recall that a trust shall not fail for want of a trustee.

At common law, a corporation and an individual could not hold property as joint tenants but only as tenants in common. This is because a corporation might have a life of unlimited duration that would defeat the individual's right to survivorship. *See generally* 2 Scott on Trusts §103.1 n.1 and accompanying text [Fratcher ed.]. By analogy, this principle ought to apply to the trust as well. On the other hand, it is settled law that a corporation and an individual may serve together as co-trustees, and *in their fiduciary capacities* hold legal title jointly. In this regard, see §3.4.4.1 of *Loring and Rounds: A Trustee's Handbook* (2024), which section is reproduced in the appendix below.

In *Grout as Trustee of Helen Schardein 2018 Rev. Trust*, 985 N.W.2d 144, 149 (Iowa 2023), an elderly settlor transferred all her real and personal property to the trustee of her revocable trust, to include a parcel of real estate that she had owned jointly with right of survivorship “with a man who...[had been]... providing various services for her.” Upon her death the parcel was sold. The man asserted that he was entitled by right of survivorship to all the sale proceeds. The trustee disagreed. The Court held that given the inter vivos conveyance to the trustee, “it makes no sense to suggest that the Trust could now hold a property as a joint tenant with right of survivorship. The trust is not a natural person and doesn't ‘die.’” The transfer of the interests in the joint tenancy to the trustee was held to have effected at the time of transfer a termination of the joint tenancy and an equal partitioning of the subject property.

Appendix

§3.4.4.1 Multiple Trustees (Cotrustees) [from *Loring and Rounds: A Trustee's Handbook* (2024)].

The office of cotrustee. There is no requirement in the default law that a trust have more than one trustee.¹⁹¹ On the other hand, subject to the obvious constraints of feasibility and practicality, there is no

¹⁹¹Lewin ¶12-01 (England).

limitation *per se* on the number of cotrustees a trust may have,¹⁹² or how many additional trustees the court may appoint in the exercise of its inherent equitable powers.¹⁹³ The number of trustees is generally dictated by the terms of the trust and, on occasion, by the court.¹⁹⁴ “If the settlor transfers property to multiple trustees, one of whom is dead or otherwise incapable of taking title, title vests in the others.”¹⁹⁵ If a cotrustee ceases for whatever reason to serve, the terms of the trust will generally dictate whether or not a replacement needs to be found.¹⁹⁶ Subject to the terms of the trust providing otherwise, a cotrustee not only has a right to participate in the administration of the trust,¹⁹⁷ he has a duty to do so,¹⁹⁸ unless the cotrustee is unavailable¹⁹⁹ to perform the function because of absence, illness, disqualification under law, or other temporary incapacity, or the cotrustee has properly delegated the performance of the function to another trustee.²⁰⁰ A trustee, however, may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly.²⁰¹ Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.²⁰² The Restatement (Third) of Trusts is in accord.²⁰³ An action taken by one trustee with the consent or subsequent ratification of the other trustee(s) is valid.²⁰⁴

For more on the subject of the delegation of fiduciary functions between and among cotrustees, the reader is referred to §6.1.4 of this handbook. For a general discussion of cofiduciary liability, see §7.2.4 of this handbook.

Vacancies. If a vacancy occurs in a cotrusteeship, title vests in the remaining cotrustees²⁰⁵ who may act for the trust.²⁰⁶ Moreover, “[i]f several persons are named as cotrustees and one of them dies, becomes incapacitated, or otherwise ceases to serve as trustee, a replacement trustee is required only if the settlor manifested that intention or it is found conducive to the proper administration of the trust.”²⁰⁷ In other words, there is a default presumption that all trustee powers pass to and/or are exercisable by the remaining cotrustees.²⁰⁸

Title held jointly. As noted, at common law and by statute, trustees take title to trust property jointly.²⁰⁹ Where there are several trustees, the powers, like the title, vest jointly.²¹⁰ Thus, with the exception of the

¹⁹²Lewin ¶12-01 (England).

¹⁹³*In re Ikuta's Est.*, 64 Haw. 236, 247, 639 P.2d 400, 408 (1981).

¹⁹⁴*See, e.g., Andris v. Biehl*, 27 Ill. App. 2d 393, 169 N.E.2d 692 (1960) (number of trustees determined by trust's terms). As to the court's power to appoint additional trustees over number specified in instrument, see 59 A.L.R.3d 1129.

¹⁹⁵1 Scott & Ascher §5.4.

¹⁹⁶2 Scott & Ascher §11.11.1.

¹⁹⁷Rest. (Third) of Trusts §81(1).

¹⁹⁸Rest. (Third) of Trusts §81(1).

¹⁹⁹Rest. (Third) of Trusts §81, cmt. c.

²⁰⁰UTC §703(c).

²⁰¹UTC §703(e).

²⁰²UTC §703(e).

²⁰³Rest. (Third) of Trusts §81 cmt. c.

²⁰⁴Rest. (Third) of Trusts §39 cmt. b.

²⁰⁵3 Scott & Ascher §18.4; 1 Scott & Ascher §5.4.

²⁰⁶UTC §703(b).

²⁰⁷Rest. (Third) of Trusts §85 cmt. e.

²⁰⁸Rest. (Third) of Trusts §85 cmt. e.

²⁰⁹Cornelius J. Moynihan, *Introduction to the Law of Real Property* 209 (2d ed. 1988). Lewin ¶13-01 (England).

²¹⁰*See* Rest. (Second) of Trusts §194.

charitable trust,²¹¹ the traditional default law has been that trust powers may only be executed by the joint action of all trustees; an action by fewer than all, even though a majority, is void unless permitted by the instrument or by statute or by the court.²¹² In England, it is said that “[w]here the administration of the trust is vested in cotrustees, they all form as it were but one collective trustee and therefore must execute the duties of the office in their joint capacity.”²¹³

When there is deadlock. A theoretical result of this principle would be that refusal to concur on the part of one of several trustees would block all action. It has long been settled, however, that if a trustee unreasonably refuses to concur in the joint exercise of a power, the court may remove the trustee.²¹⁴ “If multiple trustees are deadlocked with regard to the exercise of a power, on application of a cotrustee or beneficiary a proper court may direct exercise of the power or take other action to break the deadlock.”²¹⁵ If failure to exercise a power would constitute a breach of trust, the stymied trustees cannot just sit on their hands.²¹⁶ At minimum they would have a fiduciary duty to do what needs to be done to put the matter of the deadlock before the court, such as by a complaint or petition for instructions.²¹⁷ One trustee can, and may have a duty to, maintain a suit against a cotrustee to compel him to execute the trust, to enjoin him from committing a breach of trust, and/or to compel him to redress a breach of trust,²¹⁸ nor is he precluded from doing so because of unclean hands.²¹⁹ In an *emergency* one trustee may exercise joint powers without the concurrence of the others, and may have a duty to do so.²²⁰

²¹¹Prof. Bogert suggests why trustees of charitable trusts traditionally have been allowed to act by majority vote: “In the case of charitable trusts numerous cotrustees are often used and the difficulties of getting all to unite in a decision ... are greater than in the instance of the usual private trust where the employment of more than three trustees is rare.” George T. Bogert, *Trusts* §91 (Hornbook, 6th ed. 1987). *See also* 5 Scott & Ascher §37.3.5 (Cotrustees of a Charitable Trustee Have Long Been Permitted to Act by Majority Vote).

²¹²Rest. (Third) of Trusts §81 cmt. c; Rest. (Second) of Trusts §194. *See also* 3 Scott & Ascher §18.3 (containing at note 4 a catalog of statutes authorizing action by a majority of a trust's cotrustees); 3 Scott on Trusts §194 (containing at notes 21 and 22 a catalog of statutes authorizing action by a majority of a trust's cotrustees). UTC §703(a) provides that “[c]otrustees who are unable to reach a unanimous decision may act by majority decision.” Rest. (Third) of Trusts §39 provides: “Unless otherwise provided by the terms of the trust, if there are two trustees their powers may be exercised only by concurrence of both of them, absent an emergency or a proper delegation; but if there are three or more trustees their powers may be exercised by a majority.” It should be noted that traditionally the unanimity requirement has not applied to coexecutors. *See generally* 1 Scott & Ascher §2.3.2.3; 3 Scott & Ascher §18.3 (When Powers are Exercisable by Several Trustees).

²¹³Lewin 29-24 (England).

²¹⁴*See generally* 3 Scott & Ascher §18.3; 3 Scott on Trusts §194. *See also* Rest. (Second) of Trusts §107(a) cmt. b.

²¹⁵Rest. (Third) of Trusts §39, cmt. e. *See also* 3 Scott & Ascher §18.3.

²¹⁶3 Scott & Ascher §18.3.

²¹⁷3 Scott & Ascher §18.3.

²¹⁸4 Scott & Ascher §24.29 (Liability for Cotrustee's Breach of Trust) and 24.4.2 (The Settlor and the Settlor's Successors in Interest).

²¹⁹4 Scott & Ascher §24.4.2 (the purpose of the action being to protect the interests of the beneficiaries, not those of the trustee). *See generally* §8.12 of this handbook (where the trust is recognized outside the United States) (containing a catalog of equity maxims).

²²⁰*See* 3 Scott & Ascher §18.3; 3 Scott on Trusts §194. “If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.” UTC §703(d). *See also* Rest. (Third) of Trusts §81 cmt. c.

When unanimity is not required. The law, however, has been trending for some time in the direction of majority action for charitable and noncharitable trusts alike.²²¹ The Uniform Trust Code, for example, provides that cotrustees who are unable to reach a unanimous decision may act by majority decision.²²² The Restatement (Third) of Trusts provides as follows: “Unless otherwise provided by the terms of the trust, if there are two trustees their powers may be exercised only by concurrence of both of them, absent an emergency or a proper delegation; but if there are three or more trustees their powers may be exercised by a majority.”²²³

Cotrustee removal. The unreasonable failure on the part of a cotrustee to cooperate with his fellow cotrustees may be grounds for his judicial removal.²²⁴ Under the UTC, grounds for judicial removal of a trustee would include lack of cooperation among cotrustees that substantially impairs the administration of the trust.²²⁵ Each trustee, as well as the settlor and each beneficiary, would have standing to petition the court to remove a cotrustee.²²⁶

Suits against third parties. All trustees must join or be joined in any suit against third parties because trustees are joint tenants. It may well be, however, that there is a statute in effect that would authorize a majority of trustees to initiate such an action.²²⁷ And if there are only two cotrustees? “Whenever a cotrustee determines that actions of the other trustee are dangerous to the interest of the trust beneficiary, the cotrustee must act to protect the beneficiary.”²²⁸ From the perspective of the third party, it is always safer to insist that receipts and other papers be signed by all of the trustees for, although payment received by one of them may amount to a good discharge at law, the validity of the receipt may well remain open to question in equity.²²⁹

²²¹See generally 3 Scott & Ascher §18.3. See generally 5 Scott & Ascher §37.3.5 (“... [I]n the case of charitable trusts, trustees have long been permitted to act by majority vote, unless the terms of the trust provide otherwise”).

²²²UTC §703(a).

²²³Rest. (Third) of Trusts §39. See also 3 Scott & Ascher §18.3 (When Powers are Exercisable by Several Trustees.). See, e.g., *In re Fund for Encouragement of Self Reliance*, 440 P.3d 30 (Nev. 2019) (there being only two trustees of charitable trust, the discretion to decant must be unanimous). Decanting is taken up generally in §3.5.3.2(a) of this handbook.

²²⁴See, e.g., *Ramirez v. Rodriguez*, No. 04-19-00618-CV, 2020 Tex. App. LEXIS 1340 (Tex. Ct. App. Feb. 19, 2020) (cotrustee’s hostility towards his cotrustees has been impeding his performance and the performance of the trust due to his lack of cooperation, and thus, may be grounds for his removal).

²²⁵UTC §706(b)(2).

²²⁶UTC §706(a). See generally Lee R. Russ, *Award of Attorneys’ Fees Out of Trust Estate in Action by Trustee Against Cotrustee*, 24 A.L.R.4th 624 (1983).

²²⁷See, e.g., *Berry v. Berry*, 646 S.W.3d 516 (Tex. 2022).

²²⁸See generally 4 Scott & Ascher §24.29 (Liability for Cotrustee’s Breach of Trust); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Nora-Johnson*, TTE, 797 A.2d 226, 230 (N.J. Super. Ct. 2002).

²²⁹As we have noted elsewhere, a third party who knowingly participates with a trustee in a breach of trust shares with the trustee liability for any loss caused by the breach. See §7.2.9 of this handbook (personal liability of third parties, including the trustee’s agents, to the beneficiary; investment managers; directors and officers of trust companies; lawyers; brokers). Thus, if the trustee transfers trust property in breach of trust to a third-party purchaser who is aware of the breach, the third-party purchaser holds the trust property subject to the terms of the trust. Otherwise, “such a purchaser is liable only if the trustee commits a breach of trust in making the transfer and the purchaser has notice that the trustee is doing so.” 5 Scott & Ascher §30.1. At common law, however, it was doctrine that even the innocent third-party purchaser had a continuing obligation running to the trust beneficiaries to see to it that the trustee properly applied the purchase price. 5 Scott & Ascher §30.1. See also §8.15.69 of this handbook (third-party liability for trustee’s misapplication of payments to trustee; the purchaser’s duty to monitor the trustee’s application of the purchase price). In the U.S., such an innocent third party either by case law or by statute

Disputes between/among cotrustees. Though cotrustees are expected to act jointly in their dealings with others, in their dealings with one another, unilateral action may be appropriate under certain circumstances. Each, for example, has a duty to use reasonable care to prevent the others from committing a breach of trust,²³⁰ and to obtain redress if they do.²³¹ Thus, a cotrustee may have a duty to bring suit against his fellow cotrustees to remedy their breaches of trust.²³² This means that the cotrustee will have the requisite standing to maintain such an action. The cotrustee of a charitable trust is no exception.²³³

If he prevails, most likely his legal fees will be absorbed by the trust estate or by the defendants.²³⁴ If he does not, it is in the discretion of the court whether reimbursement will be allowed.²³⁵ Much will depend upon whether filing suit was a reasonable²³⁶ thing to do at the time and whether the trust itself was in some way benefited by the action the minority or dissenting trustee took.²³⁷

A cotrustee's right to reimbursement for independent counsel fees. A cotrustee, of course, is entitled to retain independent counsel in a nonlitigation context, *e.g.*, to seek advice regarding his cofiduciary responsibilities.²³⁸ Whether he will be entitled to reimbursement from the trust estate is another matter, *especially if there is already trust counsel in place receiving compensation from the trust estate.* He will most likely be called upon to demonstrate to the satisfaction of his cotrustees and/or the court that the involvement of another lawyer has somehow furthered the interests of the trust beneficiaries.²³⁹

A cotrustee's right to contribution (breach-of-trust damages). The Uniform Trust Code provides (as does the Restatement of Trusts²⁴⁰) that if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees.²⁴¹ A trustee is not entitled to

has been relieved of such an obligation. *See* 5 Scott & Ascher §30.1. “In England, the old rule has been repudiated by statute.” *See* 5 Scott & Ascher §30.1. Even today, however, paying the purchase price to a cotrustee without the consent of the other cotrustees would not be without its risks. If the cotrustee were then to misapply the purchase price, there is the remote chance that the purchaser might have to pay up a second time. *See* 5 Scott & Ascher §30.1.2.

²³⁰Rest. (Third) of Trusts §81(2); 4 Scott & Ascher §24.29 (Liability for Cotrustee's Breach of Trust).

²³¹Rest. (Third) of Trusts §81(2); 4 Scott & Ascher §24.29 (Liability for Cotrustee's Breach of Trust).

²³²Rest. (Third) of Trusts §81 cmt. e; 4 Scott & Ascher §24.29 (Liability for Cotrustee's Breach of Trust). *See generally* §6.1.4 of this handbook (trustee's duty not to delegate critical functions) and §7.2.4 of this handbook (cofiduciary and predecessor liability and contribution in the trust context). *See also* UTC §703(g) (providing that each trustee shall exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and compel a cotrustee to redress a serious breach of trust).

²³³*See* Rest. (Third) of Trusts §94 cmt. f.

²³⁴*See generally* 76 Am. Jur. 2d Trusts §738 (1992). *See, e.g.,* Bullard v. Hoffman (*In re* Mayette E. Hoffman Living Tr. U/A Dated Aug. 4, 1997), 812 S.E.2d 401 (N.C. Ct. App. 2018) (nonprevailing cotrustee whose “egregious” and “obstructionist” behavior had jeopardized the “health” of the trust held personally liable for the attorneys’ fees that the prevailing cotrustee had incurred during the “time frame” of, and as a consequence of, that behavior).

²³⁵*See generally* 76 Am. Jur. 2d Trusts §738 (1992).

²³⁶Rest. (Third) of Trusts §81 cmt. e.

²³⁷Rest. (Third) of Trusts §81cmt. c. *See, e.g.,* Endres v. Endres, 984 N.W2d 139 (S.D. 2022) (cotrustee entitled to be reimbursed from trust estate for his attorney fees, the litigation he had instigated against his cotrustees being “productive of actual benefit to the trust.”).

²³⁸*See generally* §7.2.4 of this handbook (cofiduciary and predecessor liability and contribution in the trust context).

²³⁹*See generally* 76 Am. Jur. 2d Trusts §349 (1992); Rest. (Third) of Trusts §81 cmt. c.

²⁴⁰Rest. (Third) of Trusts §102; Rest. (Second) of Trusts §258.

²⁴¹UTC §1002(b); Lewin ¶39-39 through ¶39-51 (England); 4 Scott & Ascher §24.32 (Contribution or Indemnity from Cotrustee) (U.S.).

contribution if the trustee was substantially more at fault than another trustee; or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or if only the trustee benefited from the breach.²⁴² Joint and several liability may be imposed when there is joint participation.²⁴³ It also may be imposed when a cotrustee acts alone, particularly in cases where the nonparticipating trustee fails to exercise reasonable care to prevent the active cotrustee from committing a serious breach of trust or to compel the active cotrustee to redress a serious breach of trust.²⁴⁴ For more on cofiduciary liability in the trust context, see §7.2.4 of this handbook.

Uniform Directed Trust Act. Most of the Uniform Directed Trust Act deals with the rights, duties, obligations, and liabilities of *nontrustee* trust directors and the trustees to whom directives are issued. §12 of the Act, however, would address the liability of a directed trustee when it is a *cotrustee* who is issuing the directives, not a third party to the trust relationship. For liability purposes, the directed trustee would be treated as if the directives were issuing from a *nontrustee* trust director. How the Act would regulate nontrustee trust directorships is taken up in §3.2.6 of this handbook, and again in §6.1.4 of this handbook.

²⁴²UTC §1002(b). *See generally* 4 Scott & Ascher §§24.32.1 (Trustees Not Equally at Fault) (other trustees also entitled to be indemnified by the trustee), 24.32.3 (Breach of Trust Committed in Bad Faith) (trustee entitled to neither contribution nor indemnity under the equitable clean hands doctrine), and 24.32.2 (Benefit to One Trustee) (other trustees also entitled to be indemnified by trustee to the extent he has been benefited); Rest. (Third) of Trusts §102(2) (“A trustee who committed a breach in bad faith is not entitled to contribution unless the trustee or trustees from whom contribution is sought also acted in bad faith.”).

²⁴³*See generally* 4 Scott & Ascher §24.29 (Liability for Cotrustee's Breach of Trust).

²⁴⁴4 Scott & Ascher §24.29 (Liability for Cotrustee's Breach of Trust); UTC §1002 cmt.