Title

A trust may well be unenforceable and thus illusory if its trustee is the United States or a U.S. state

Text

The U.S. as common-law trustee. At common law as enhanced by equity, a "use," the trust's ancient doctrinal predecessor, could not be enforced against the Crown. Today, jurisdiction over any suit against the U.S., as trustee or otherwise, requires a clear statement from the U.S. waiving sovereign immunity, together with a claim falling within the terms of the waiver. The same goes for third-party actions against the U.S. as trustee. *See, e.g.*, Grondal v. United States, 21 F.4th 1140, 1164 (9th Cir. 2021). While the U. S., in theory, may have common-law, statutory, or constitutional authority to hold property in trust, the absence of the critical element of credible enforceability makes such trusteeships all but illusory. Moreover, a sovereign's trusteeship of an item of property cannot constrain the sovereign's power to de-entrust it by eminent domain. Nor is it helpful that a court of equity, understandably, will not issue an unenforceable specific-performance order, such as to a legislature. Consider the interminable litigation over the U.S.'s incompetent trusteeship of Native American properties. *See* Jalonick, *Federal Judge Says Interior Dept. Delayed Indian Trust Accounting*, Boston Globe, Jan. 31, 2008, at A16 ("The federal agency 'has not, and cannot, remedy … [its breach of fiduciary duty]… to account for the Indian money,' US District Judge James Robertson said in a 165-page decision …," the judge also blaming Congress for failing to appropriate enough money for a proper forensic accounting). That trust law is primarily state-specific further complicates matters when it comes to federal trusteeships. Too bad those properties belonging to the Native Americans had not long ago been entrusted to private entities, entities that could easily be compelled to carry out specific-performance orders issuing from the equity courts.

The state as common-law trustee. In 2021, a matter came before the Sup. Ct. of Washington involving the State's trusteeship of a common-law charitable trust that had been settled by the U. S., effective Nov. 11, 1889. The subject property was several hundreds of thousands of acres of land that initially had been granted to the State by the U.S. pursuant to the Omnibus Enabling Act of 1889. Their entrustment had been a pre-condition for statehood. Third parties, unhappy with how the trust is now being administered, had brought a declaratory-judgment action. The Sup. Ct. of Washington affirmed the trial court's dismissal of the action. See *Conservation Northwest v. Comm'r of Public Lands*, 199 Wash.2d 813 (2022). No fault was found with the State's administration of the trust. Had the court found fault with how, say, the State's legislature had been involving itself, or not involving itself, in the trust's administration, the doctrine of separation powers could well have prevented the Court from doing much about it, a situation reminiscent of the ongoing maladministration by the U.S. of the properties of the Native-Americans.

The municipality as a common-law trustee. True, in the case of property entrusted to a municipal corporation, the state's attorney general would have standing to seek judicial enforcement. The practical, political, and legal realities are, however, that an AG, even if so inclined, would find it challenging, say, getting the municipality judicially fired and replaced as trustee. Political influence and press oversight are generally the only practical means of getting a municipality to cease maladministering its trusteeships. That having been said, the Rest. (Third) of Restitution and Unjust Enrichment proffers an optimistic illustration of a municipality successfully being judicially compelled in a taxpayer suit to honor its fiduciary responsibilities as a charitable trustee. See §17, illus. 1. The illustration is based on *Cohen v. City of Lynn*, 33 Mass. App. Ct. 271(1992). *See also The Woodward Sch. for Girls, Inc. v. City of Quincy*, 469 Mass. 151, 177 (2014) ("[W]hen Quincy agreed to serve as trustee, it assumed the fiduciary duties of that role, including the consequences for not fulfilling these duties. The policy purposes of sovereign immunity are not served where, as here, a municipality takes on a responsibility beyond its inherent or core government functions and therefore serves in a capacity that could just as easily be accomplished by a nongovernmental entity."). Enforcing a trust against a municipality as trustee is one thing, against a sovereign state as trustee

is quite another.

Faux public trusts. Some public-sector initiatives are falsely advertised as true trusteeships. Social Security is a prime example. SS is nothing more than two autonomous government schemes: A welfare scheme and a taxation scheme. Neither involves actual entrustment of segregated enforceable contractual property rights. This is settled law. See §9.9.3 of *Loring and Rounds: A Trustee's Handbook* (2023), which section is reproduced in the appendix below. Handbook is available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-trustees-hanbook-2023e/01t4R00000Ojr97QAB.

Appendix

§9.9.3 *Social Security and Other Legislative Budget Items Couched in Trust Terminology* [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].

> *A deep root of this predicament is a crucial but under-examined aspect of Social Security: the misleading manner in which the program has been depicted to the public from 1935 on. Specifically, Social Security is retirement insurance under which taxpayers pay insurance premiums or contributions to buy protection from destitution in old age, with their contributions being held in a trust fund which will pay guaranteed benefits which, being paid for, will be theirs as a matter of earned right, as America keeps its compact (or contract) between generations. The entire previous sentence is demonstrably, documentably false*.[109]

It was said that following the execution of Charles I of England (1600–1649), his lands, as well as those of Queen Henrietta Maria and Prince Charles, were "vested with trustees and the profits from them … used to pay off army arrears."[110] The sales were "governed" by Parliament.[111] One thing is for sure: This "trust" bore no resemblance to the trust that is the subject of this handbook, all interests in said lands essentially having been merged by conquest and expropriation into the Commonwealth.

On this side of the Atlantic politicians have been and are employing trust terminology when promoting certain governmental schemes that in no way implicate the law of trusts.[112] The so-called social security trust fund is a good example. The social security trust fund is a budget item; it is not a common law trust of the type that is the subject of this handbook. Nor is a "trustee" of the social security "trust fund" a fiduciary.[113] If a "trustee" is not a fiduciary, then he is not a real trustee; the trust, by definition, being a fiduciary relationship. Nor are the social security "bonds" in the social security "trust fund" property, property being another key element in any trust relationship. This is because they are not real bonds. A real bond creates enforceable contractual rights in someone. These "bonds" do not. They are in the nature of

[109]John Attarian, Social Security: False Consciousness and Crisis (2002).

[110]Ruth Scurr, *John Aubrey: my own life* 82 (2015).

[111]Ruth Scurr, *John Aubrey: my own life* 82 (2015).

[112]*See, e.g.*, Bd. of Trs. of Tobacco Use Prevention & Control Found. v. Boyce, 941 N.E.2d 745 (Ohio 2010) (Ohio's Tobacco Use Prevention and Cessation Trust Fund, a creature of statute, being a trust in name only, its assets were subject to re-appropriation by the legislature); Goldston v. State, 683 S.E.2d 237 (N.C. Ct. App. 2009) (the North Carolina Highway Trust Fund being merely a special account created within the state's treasury, it lacks the indicia of a true trust), *aff'd* 700 S.E.2d 223 (N.C. 2010).

[113]*See* 42 U.S.C.A. §401(c) (providing that a person serving on the Board of Trustees shall not be considered to be a fiduciary and shall not be personally liable for actions taken in such capacity with respect to the "Trust Funds").

internal memoranda to the file,[114] nothing more. A taxpayer thus could not successfully in a judicial forum invoke principles of trust law to prevent a congressional raid on the fund.

For some time it has been settled law that the Social Security Act is constitutional and that employees have no property rights in their FICA payments. *Helvering v. Davis*,[115] decided in 1937, stands for the proposition that Social Security does not violate Article I, §8 of the U.S. Constitution, which provides that Congress may spend money in aid of the "general welfare." "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states,"[116] and not the courts. FICA receipts are tax receipts. Congress may expend such receipts for the general welfare. Congress has determined that Social Security is a scheme that promotes the general welfare. Ergo, Social Security is constitutional.

Flemming v. Nestor,[117] decided in 1960, stands for the proposition that Social Security is an umbrella term for two schemes that, for all intents and purposes, are legally unrelated. One is a taxation scheme and the other is a welfare scheme.[118] Ergo, workers and their families have no legal or equitable claim on the tax payments that they make into the U.S. Treasury or that are made on their behalf. Those funds are gone, commingled with the general assets of the U.S. government. "Anticipated Social Security old age benefits are indefinite because Congress may alter, amend, or repeal any provision of the Social Security Act at any time."[119] For more on the inappropriate use of trust and contract terminology by those making the case for and against the privatization of Social Security, the reader is referred to Property Rights: The Hidden Issue of Social Security Reform, by the author.[120]

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[114]They are not real bonds because they are unissued. *See* 41 U.S.C.A. §401(e). And even if they were, they would constitute economic value to the purchasers, not to the United States or the phantom trust fund. Because they may not be issued, these "bonds" are a legal nullity: The United States may not contract with itself and, by so doing, bind future congresses. *See* Fletcher v. Peck, 10 U.S. 87 (1810) (in which Chief Justice Marshall enunciated the constitutional principle that one legislature cannot abridge the powers of a succeeding legislature). *See also* Marbury v. Madison, 5 U.S. 137 177 (1803) (unlike the Constitution, a legislative Act is "alterable when the legislature shall please to alter it").

[115]301 U.S. 619 (1937).

[116]Helvering v. Davis, 301 U.S. 619, 645 (1937).

[117]363 U.S. 603 (1960).

[118]*See* Mahoney v. Mahoney, 425 Mass. 441, 681 N.E.2d 852 (1997) ("Social Security old age benefits, however, 'are not deferred compensation for services rendered but rather a governmental safety net for the retired ….'").

[119]Mahoney v. Mahoney, 425 Mass. 441, 681 N.E.2d 852 (1997).

[120]Charles E. Rounds, Jr., *Property Rights: The Hidden Issue of Social Security Reform*, SSP No. 19, Apr. 19, 2000, Cato Institute. *See also* Karl J. Borden & Charles E. Rounds, Jr., *A Proposed Legal, Regulatory, and Operational Structure for an Investment-Based Social Security System*, SSP No. 25, Feb. 19, 2002, Cato Institute.