

Title

The equity court is there for the trustee as well as the beneficiaries

Text

Since time immemorial the chancery court has been the safe harbor that equity has afforded the trustee who is in reasonable doubt as to his fiduciary rights, duties, and obligations, or who finds himself an innocent bystander in a dispute among beneficiaries that is compromising his ability to properly perform his fiduciary duties. The duties assumed by a trustee are myriad and onerous. Among them is the affirmative duty to carry out the terms of the trust. But what if a critical term is patently or latently ambiguous? A trustee who misdelivers trust-accounting income and/or principal, for example, violates that duty and may be held personally, even absolutely, liable for the consequences of the violation. What then is the innocent trustee who is reasonable doubt as to who is entitled to what to do? Get a legal opinion, distribute, and hope for the best? Not a good idea. Recall that even a trustee whose good faith reliance on faulty legal advice has led him to misdeliver the trust property is not necessarily immune from personal liability for the adverse economic consequences of that reliance, a topic that is taken up generally in §8.32 of *Loring and Rounds: A Trustee's Handbook* (2022). As between the innocent beneficiary and the innocent fiduciary, the latter should bear the burden of any consequential economic loss.

Equity vests in the trustee a constellation of fiduciary rights to lighten somewhat his fiduciary burdens, one of which is the right *at trust expense* to seek instructions or a declaratory judgment from the equity court when there is reasonable doubt. It is well-established that a trustee cannot be held liable for abiding by a court order, no matter how erroneous that order may be. (Whether there may be a duty to appeal the order is a wholly different matter. See §6.2.6 of the Handbook). That “well-established” special immunization from fiduciary liability is, in a nutshell, the “safe harbor” equity affords trustees. See *Bangert v. Northern Trust Co.*, 839 N.E.2d 640, 645-646 (Ill. 2005). The fiduciary duty is to carry out the true terms of the trust; the fiduciary right is to seek at trust expense the assistance of the court when there is reasonable doubt as to what those terms actually are. When there is reasonable doubt, a trustee who fails to exercise that right, again, a right that is exercisable at trust expense, has only himself to blame for the consequences.

The constellation of fiduciary rights that equity vests in trustees is taken up generally in §3.5.2 of *Loring and Rounds: A Trustee's Handbook* (2022), which section and its sub-sections are reproduced in their entirety in the appendix immediately below. The 2022 Edition of the Handbook is available for purchase at: <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

[see appendix next page]

Appendix

§3.5.2 *Rights of the Trustee* [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>.].

To the extent to which the trustee is entitled to indemnity, he has a security interest in the trust property. He will not be compelled to transfer the trust property to the beneficiary or to a transferee of the interest of the beneficiary or a successor trustee until he is paid or secured for the amount of expenses properly incurred by him in the administration of the trust.⁷⁰...

The trustee need not pay over income without deducting the compensation to which he is entitled with respect to the income, and need not pay over principal without deducting the compensation to which he is entitled with respect to the principal. To this extent the trustee has a security interest in the trust property for his compensation.⁷¹

In the tangle of legal relationships that is the trust, the trustee as well as the beneficiary has certain rights. The trustee's rights are incident to holding the title (*e.g.*, the right of possession and alienation) and the office (*e.g.*, the right to reimbursement and reasonable compensation).

§3.5.2.1 Right at Law to Possession

In the absence of statute, decision, or the settlor's contrary intention, the trustee, as holder of the legal title, is entitled to the possession of the real property; thus the trustee may eject the beneficiary.⁷² With the same qualifications, the trustee is entitled also to the possession of the personal property.

§3.5.2.2 Right at Law to Transfer Title

The trustee being as to the world the legal owner of the entrusted property may convey it to a third party. The third party then will stand at law entitled in place of the trustee.⁷³ Thus, a trustee may convey to a third party for fair market value an entrusted residence in furtherance of the trust's lawful purposes though a beneficiary has been occupying the residence.⁷⁴

⁷⁰Restatement (Second) of Trusts §244 cmt. c.

⁷¹Restatement (Second) of Trusts §242 cmt. e.

⁷²See generally 2A Scott on Trusts §175. But see generally V. Woerner, Annot., *Right of appeal from order on application for removal of personal representative, guardian, or trustee*, 37 A.L.R.2d 751 (1954).

⁷³See generally 4 Scott on Trusts §283.

⁷⁴See, *e.g.*, *Cavagnaro v. Sapone*, Nos. A139250 & A139990, 2014 WL 4808828 (Cal. Ct. App. Sept. 29, 2014) (unpublished) ("Although the trustors of the trust undoubtedly were concerned with the welfare of their daughter, a contingent remainder beneficiary of the trust, the evidence confirms that the sale is necessitated by current financial conditions and transgresses neither the terms nor purpose of the trust.").

If, however, the terms of the trust purport to deprive the trustee of this default power to convey, any transferee with notice of the restriction takes the property subject to the trust, receiving no larger title than the trustee is authorized to convey.⁷⁵ In other words, the transferee is not a BFP.⁷⁶ Under these circumstances, the sale is voidable at the option of the beneficiary.⁷⁷ While it is preferable that the trustee sign a deed to real estate “as trustee” rather than individually, disclosing on the deed the trusteeship should not be a prerequisite to passing good title.⁷⁸

Because of the trustee's right to transfer title, it is said that the trust is not a restraint on the alienability of property.⁷⁹ This is because “if the trustee makes a transfer under powers conferred by law or the terms of the trust, the transferee acquires the whole title, free of trust; if he makes a transfer in breach of trust to a bona fide purchaser, the transferee also acquires the whole title, free of trust; [e]ven a transfer in breach of trust to a donee, or to a purchaser with notice of the breach, carries the title, subject to the trust, which is all the trustee ever owned.”⁸⁰

For more on the concept of the good-faith purchaser for value or BFP, the reader is referred to §8.15.63 of this handbook.

§3.5.2.3 Right in Equity to Exoneration and Reimbursement, *i.e.*, Indemnity; Payment of Attorneys’ Fees

Exoneration and reimbursement. An agent generally incurs no liability for acting within the scope of the agency. It is the principal who is on the hook. By contrast, it is the trustee who acts as principal in connection with the administration of the trust. It is the trustee, not the beneficiary, who is personally liable

⁷⁵See generally 4 Scott on Trusts §284.

⁷⁶See generally 5 Scott & Ascher §29.1.1 (Bona Fide Purchaser); §§5.4.2 of this handbook (rights of the beneficiary as against BFPs and other transferees of the underlying trust property), 8.3.2 of this handbook (bona fide purchase for value of trust property, specifically what constitutes notice that a transfer is in breach of trust?), and 8.15.63 of this handbook (doctrine of bona fide purchase and the BFP). For a comparison of the BFP, a creature of equity, with the holder in due course, a creature of law, see §8.15.68 of this handbook (the holder in due course in the trust context).

⁷⁷See generally 4 Scott on Trusts §291.

⁷⁸See, e.g., *W. 17th Res., LLC v. Pawelek*, 482 S.W.3d 690 (Tex. 2015) (“Appellants have cited no authority and we have found none that a grantor’s failure to specify her capacity either ‘individually’ or ‘as trustee’ nullifies a deed’s purported conveyance of property that the grantor holds in trust.”); *Galdjie v. Darwish*, 113 Cal. App. 4th 1331, 7 Cal. Rptr. 3d 178 (2003) (involving a conveyance of real estate by the trustee-beneficiaries of a revocable inter vivos trust).

⁷⁹See generally *Broadway Nat’l Bank v. Adams*, 133 Mass. 170 (1882).

⁸⁰W. F. Fratcher, Trust §95, in *VI Intl. Encyclopedia of Comp. Law* §108 at 89 (F. H. Lawson ed., 1973). See also §5.4.2 of this handbook (rights of the beneficiary as against transferees, including BFPs). See also 5 Scott & Ascher §29.1.1 (Bona Fide Purchaser).

to third parties in contract⁸¹ and tort,⁸² “whether or not he is acting in accordance with his powers and duties as trustee.”⁸³ Again, a trustee is a principal. He is neither an agent nor, absent special facts, an employee of the trust.⁸⁴

Inasmuch as there is a rigid restriction against personal participation by the trustee in any of the profits and gains resulting from the administration of the trust estate,⁸⁵ equity takes pains to hold the trustee harmless from personal liability for obligations *properly incurred*.⁸⁶ English law is in accord.⁸⁷ Thus, unless the terms of the trust provide otherwise,⁸⁸ a trustee is entitled to indemnity out of the trust estate, either by exoneration or reimbursement, for expenses properly incurred in the administration and management of the trust,⁸⁹ whether or not the trust contains a spendthrift provision.⁹⁰ In England, so too is an outgoing trustee, even after he has parted with the trust property,⁹¹ as is the trustee of a voidable trust.⁹² “A trustee has a first charge or lien upon the trust fund in respect of the liabilities, costs and expenses covered by his right of indemnity.”⁹³ In some jurisdictions, this equitable right of indemnity has been codified by statute.⁹⁴ The

⁸¹See generally §7.3.1 of this handbook (trustee’s liability as legal owner in contract to nonbeneficiaries); Lewin ¶121-05 through ¶121-07 (England).

⁸²See generally §7.3.3 of this handbook (trustee’s liability as legal owner in tort to nonbeneficiaries); Lewin ¶121-08 (England).

⁸³Lewin ¶121-04.

⁸⁴See generally *Loring v. United States*, 80 F. Supp. 781 (D. Mass. 1948).

⁸⁵See generally §6.1.3 of this handbook (the trustee’s duty of loyalty).

⁸⁶See generally 4 Scott & Ascher §221.1; Bogert §718. “Under the general law a trustee is in general not entitled to indemnity out of the trust property in respect of liabilities to third parties and costs and expenses incurred in consequence of unauthorised acts.” Lewin ¶139-94 (England).

⁸⁷See *In re Beddoe* (*Downes v. Cottam*) [1893] 1 Ch. 547 (Eng.).

⁸⁸4 Scott & Ascher §22.1.4 (Terms of the Trust).

⁸⁹Restatement (Third) of Trusts §38(2); Lewin ch. 21 (England); 3 Scott & Ascher §§18.1.2 (Power to Incur Expenses) (U.S.), 18.1.2.5 (Expenses of Management) (U.S.); 4 Scott & Ascher §22.1 (Expenses Properly Incurred).

⁹⁰4 Scott & Ascher §22.1.2 (Spendthrift Trusts).

⁹¹Lewin ¶14-50.

⁹²Lewin ¶121-23. The purported trustee of a purported trust that is held void ab initio, however, may well not be entitled to indemnity out of the trust estate. Lewin ¶121-23.

⁹³Lewin ¶121-26 (England); 4 Scott & Ascher §§22.1 (Expenses Properly Incurred) (U.S.), 22.1.1 (Lien for Indemnity) (U.S.).

⁹⁴See, e.g., §31(1) of the English Trustee Act 2000; §47(2) of the Cayman Islands Trust Law (2001 revision); §59(4) NSW Trustee Act 1924; Article 22(2) of the Trusts Jersey Law (1984) (as substituted by Trusts (Amendment) (Jersey) Law (1989)).

trustee may even be entitled to interest on personal funds reasonably and appropriately advanced.⁹⁵ The trustee, of course, has no fiduciary duty to make advances out of his own pocket, absent special facts, but to the extent he chooses to do so, he is entitled to take “security for indemnification.”⁹⁶ A trustee who has made good any loss occasioned by his breach of trust is entitled to be indemnified for expenses reasonably incurred to the extent the trust estate is benefited thereby.⁹⁷ A beneficiary who seeks equity must do equity.⁹⁸

A right of exoneration is a right in the trustee to pay creditors directly from the trust estate⁹⁹ all of the expenses “reasonably and appropriately”¹⁰⁰ incurred by him as its owner,¹⁰¹ including taxes,¹⁰² repair costs,¹⁰³ brokers' commissions,¹⁰⁴ expenses of running a trade or business on behalf of the trust,¹⁰⁵ premiums for insuring against liability in contract and tort to nonbeneficiaries,¹⁰⁶ and other legitimate expenses of prudently collecting, managing, preserving,¹⁰⁷ and protecting the trust property,¹⁰⁸ including those properly

⁹⁵4 Scott & Ascher §22.1.

⁹⁶4 Scott & Ascher §22.1.1 (Lien for Indemnity).

⁹⁷4 Scott & Ascher §§22.1.3 (Trustee in Default), 22.2.1 (Benefit to Trust Estate).

⁹⁸See §8.12 of this handbook (where the trust is recognized outside the United States) (containing a catalog of equity maxims).

⁹⁹4 Scott & Ascher §22.1 (defining exoneration as “the power to use trust funds to discharge obligations that have arisen out of trust administration”).

¹⁰⁰Restatement (Third) of Trusts §88 cmt. b.

¹⁰¹Restatement (Third) of Trusts §38 cmt. b; 4 Scott & Ascher §22.1.

¹⁰²See generally §7.3.4.1 of this handbook (trustee’s liability for taxes and shareholder assessments); 4 Scott & Ascher §22.1.

¹⁰³Restatement (Third) of Trusts §88, cmt. b; 3 Scott & Ascher §18.1.2.2 (Repairs and Improvements); 4 Scott & Ascher §22.1 (Expenses Properly Incurred).

¹⁰⁴4 Scott & Ascher §22.1.

¹⁰⁵Lewin ¶121-14 (England).

¹⁰⁶Restatement (Third) of Trusts §88, cmt. b. See generally §§7.3.1 of this handbook (trustee’s liability as legal owner in contract to nonbeneficiaries) and 7.3.3 of this handbook (trustee’s liability as legal owner in tort to nonbeneficiaries); Lewin ¶121-17 (England); 3 Scott & Ascher §18.1.2.1 (U.S.).

¹⁰⁷See generally 3 Scott & Ascher §18.1.2.1 (Preservation of the Trust Property).

¹⁰⁸Restatement (Third) of Trusts §88 cmt. b.

incurred in hiring agents,¹⁰⁹ traveling,¹¹⁰ leasing,¹¹¹ investing,¹¹² borrowing,¹¹³ and bringing, defending, and settling litigation, including attorneys' fees, and expenses of consulting counsel when there is reasonable cause.¹¹⁴ The expenditures must be in furtherance of the trust's purposes.¹¹⁵ "Improvements may serve to make the property more productive,¹¹⁶ or to make the premises safe and tenantable; therefore a trustee can properly incur improvement costs if and as the property's retention and improvement are prudent and suitable to the purposes of the trust."¹¹⁷ *This right of exoneration is coupled with a right of reimbursement for sums paid from the trustee's own pocket for expenses properly incurred.*¹¹⁸ The trustee, however, still

¹⁰⁹Restatement (Third) of Trusts §88 cmt. c; UTC §709 cmt.; 3 Scott & Ascher §18.1.2.3 (Employment of Agents) (noting, however, that unless the terms of the trust or a statute provides otherwise, the trustee ordinarily cannot properly at trust expense employ agents to perform services that the trustee is being compensated to perform, e.g., keeping proper accounts or making the trust property productive, at least without an appropriate reduction of the trustee's own compensation). It goes without saying that a trustee may not retain an agent at trust expense to perform a nondelegable function, such as administering the dispositive provisions of a discretionary trust. 3 Scott & Ascher §18.1.2.3. *See also* 4 Scott & Ascher §22.1 (Expenses Properly Incurred).

¹¹⁰Lewin ¶21-13 (England).

¹¹¹Restatement (Third) of Trusts §88 cmt. b.

¹¹²Restatement (Third) of Trusts §88 cmt. b.

¹¹³Restatement (Third) of Trusts §88 cmt. b. "[I]f a trustee borrows funds from a third party for use in the administration of the trust, the interest on the loan is payable (or reimbursable) from the trust estate, provided the rate of interest is reasonable and borrowing serves an appropriate trust purpose and is otherwise consistent with the trustee's fiduciary duties." Restatement (Third) of Trusts §88 cmt. b.

¹¹⁴Restatement (Third) of Trusts §88 cmt. b; UTC §§709(a)(1), 1004. *See generally* Bogert §718; 4 Scott & Ascher §22.1; 3 Scott on Trusts §188; Lewin ¶21-16 (England); Lee R. Russ, J.D., Annot., *Award of attorneys' fees out of trust estate in action by trustee against cotrustee*, 24 A.L.R.4th 624 (1983). *See also* F.M. English, Annot., *Right of coexecutor or cotrustee to retain independent legal counsel*, 66 A.L.R.2d 1169 (1959). *But see* Barber v. Barber, 915 P.2d 1204 (Alaska 1996) (trustee who brought complaint for instructions is a neutral party, not a "prevailing" party and therefore not entitled to legal fees); Malachowski v. Bank One, Indianapolis, 682 N.E.2d 530 (Ind. 1997) (though trustee prevailed, not awarded trustee fees because litigation not reasonably necessary). *See generally* §3.4.4.1 of this handbook (multiple trustees (cotrustees)) (discussing in part when a cotrustee is entitled to reimbursement from the trust estate for the costs of separate representation).

¹¹⁵(Third) of Trusts §88 cmt. b; 3 Scott & Ascher §18.1.2.4.

¹¹⁶4 Scott & Ascher §22.2.2 (Separable Transactions).

¹¹⁷Restatement (Third) of Trusts §88 cmt. b; 3 Scott & Ascher §18.1.2.4. *See also* 3 Scott & Ascher §18.1.2.2 (Repairs and Improvements); 4 Scott & Ascher §22.1 (Expenses Properly Incurred).

¹¹⁸*See generally* Bogert §718; Hollaway v. Edwards, 68 Cal. App. 4th Supp. 94, 80 Cal. Rptr. 2d 166 (1998) (awarding trustee attorneys' fees incurred in defending a removal action brought by the

needs to be “cost-conscious.”¹¹⁹ Unreasonable expenditures are not reimbursable.¹²⁰

Premiums for internal fiduciary liability insurance are generally not chargeable to the trust estate. English default law is in accord,¹²¹ although there is an exception for trustees of charitable trusts.¹²²

What if the trustee without authority incurs an expense that confers a benefit on the trust estate? In that case, the trustee is ordinarily entitled to indemnity to the extent of the value of the benefit conferred.¹²³ The Restatement (Third) of Trusts is generally in accord.¹²⁴ Under the Uniform Trust Code, a trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, expenses that were not properly incurred in the administration of the trust to the extent necessary to prevent unjust enrichment of the trust.¹²⁵ “Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefited the trust.”¹²⁶ Also, if a trustee improperly incurs an expense the benefit of which the beneficiary can accept or reject, the trustee is not entitled to indemnity if the right of rejection is, in fact, exercised. Thus, if a trustee improperly purchases with his own funds an automobile for the trust, the trustee is not entitled to indemnity if the beneficiary declines to ratify the transaction. The trustee, however, may keep the automobile for himself.

If a trustee properly enters into a contract on behalf of the trust and thereby incurs personal liability, he is entitled to be indemnified from the trust estate.¹²⁷ “Although the trustee breaks a contract properly made by him in the administration of the trust and thereby incurs a liability for breach of contract, he is entitled

cotrustee); *Franzen v. Norwest Bank Colo.*, 955 P.2d 1018 (Colo. 1998) (holding that trustee was entitled to reimbursement of attorney's fees incurred in litigation initiated by beneficiary's agent seeking revocation of trust).

¹¹⁹3 Scott & Ascher §18.1.2.6.

¹²⁰3 Scott & Ascher §18.1.2.6 (When Trustee Improperly Incurs Expense).

¹²¹*Kemble v. Hicks*, [1999] P.L.R. 287 (Eng.).

¹²²Charities Act 1993 §73F (England).

¹²³Restatement (Second) of Trusts §245 cmt. d. *See also* Lewin ¶121-25 (England); 3 Scott & Ascher §18.1.2.6 (When Trustee Improperly Incurs Expense) (U.S.); 4 Scott & Ascher §22.2.1 (Benefit to Trust Estate) (U.S.).

¹²⁴Restatement (Third) of Trusts §88 cmt. a.

¹²⁵UTC §709(a)(2). *See generally* 4 Scott & Ascher §22.2.1 (Benefit to Trust Estate).

¹²⁶UTC §709 cmt. “Appropriate grounds...[for delay or even denying reimbursement for expenses which benefited the trust]...include: (a) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust.” UTC §709 cmt.

¹²⁷4 Scott & Ascher §22.3 (Contractual Liability). *See generally* §7.3.1 of this handbook (trustee's contractual liability as the legal owner to nonbeneficiaries).

to indemnity to the extent to which he thereby benefited the trust estate.”¹²⁸ Also, “[w]here a tort to a third person results from the negligence of an agent or servant properly employed by the trustee in the administration of the trust, and the trustee is not personally at fault, although the trustee is liable to the third person, he is entitled to indemnity out of the trust estate.”¹²⁹

If the trustee in breach of trust satisfies from the trust estate a liability to a third person that was incurred in the course of administering the trust, the third person would not be obliged to make the trust estate whole if the third person were a BFP.¹³⁰ To qualify as a BFP, the third person would have to have given full value, taken legal title to the payment, and been reasonably unaware of the breach.¹³¹ The beneficiary always has recourse against the wrongdoing trustee personally, whether or not the third person is a BFP:

The Chancellors, when appealed to by the beneficiaries, felt that there was no reason in equity or conscience why a person who had acquired property in good faith and for value should be disturbed. They therefore kept their hands off. As between the two innocent parties, they let the loss that resulted from the breach of trust lie where it fell. They left the beneficiaries to seek redress against the wrongdoing trustee.¹³²

Attorneys' fees. A trustee is entitled to exoneration or reimbursement from the trust estate for attorneys' fees, provided the services rendered are appropriate for handling by an attorney-at-law.¹³³ Legal fees incurred by a trustee in obtaining allowance of his accounts come to mind;¹³⁴ or in bringing a complaint for

¹²⁸Restatement (Second) of Trusts §246 cmt. c. “Thus, if the trustee in the proper exercise of a power makes a contract to sell trust property, and subsequently receives a better offer for the property and sells it, he is entitled to indemnity for his liability on the contract to the extent which the breach of contract resulted in his obtaining a higher price.” Restatement (Second) of Trusts §246 cmt. c.

¹²⁹Restatement (Second) of Trusts §247 cmt. b. *See generally* 4 Scott & Ascher §22.4 (Tort Liability). *See generally* §7.3.3 of this handbook (trustee’s liability as legal owner in tort to nonbeneficiaries).

¹³⁰*See generally* §5.4.2 of this handbook (rights of the beneficiary as against BFPs and other transferees of the underlying trust property), 8.3.2 of this handbook (bona fide purchase for value of trust property, specifically what constitutes notice that a transfer is in breach of trust?), and §8.15.63 of this handbook (doctrine of bona fide purchase; the BFP). *See also* §8.3.6 of this handbook (negotiable instruments and the duty of third parties to inquire into the trustee's authority). For a comparison of the BFP, a creature of equity, with the holder in due course, a creature of law, *see* §8.15.68 of this handbook (holders in due course in the trust context).

¹³¹5 Scott & Ascher §29.2.7 (Debts Incurred During Trust Administration).

¹³²5 Scott & Ascher §29.1.1 (Bona Fide Purchaser).

¹³³4 Scott & Ascher §22.1. *See, e.g., In re McQueary*, 125 N.E.3d 664 (Ind. Ct. App. 2019) (while predecessor trustee, who is also a beneficiary, was not required to pay out of his own pocket the successor trustee’s attorney’s fees, the successor trustee “is authorized to pay his attorney’s fees out of the Trust.”).

¹³⁴4 Scott & Ascher §22.1.

instructions or declaratory judgment;¹³⁵ or an action to collect or protect the trust property.¹³⁶ “A trustee is also entitled to indemnity for the reasonable expenses of obtaining advice of counsel as to trust administration, at least when the need for such advice arises out of circumstances that are not the trustee's fault.”¹³⁷ One court has even ordered the beneficiaries of a terminated trust to return a portion of the final distribution so that the judicially removed trustee could mount a legal defense of his final accounts, accounts that were under attack by those very same beneficiaries.¹³⁸

Functions that should not be delegated to counsel at trust expense. On the other hand, if the attorney-at-law is performing services that the trustee personally or through ministerial agents ought to be performing, such as collecting and keeping track of dividends, keeping the trust's records, or preparing accountings, then those legal costs are probably not reimbursable from the trust estate absent special facts.¹³⁹ The trustee will most likely have to pay those costs out of his own pocket.¹⁴⁰

When the trustee is entitled to have counsel fees paid from the trust estate. What about nonroutine legal matters? Attorneys' fees reasonably incurred by the trustee in connection with the preservation, protection, administration, and distribution of the trust property are generally reimbursable from the trust estate, such as legal fees and costs incurred by a trustee in successfully defending allegations that the trustee had

¹³⁵See generally 3 Scott & Ascher §16.8 (Application for Instructions); 4 Scott & Ascher §22.1 (Expenses Properly Incurred); Chapter 1 of this handbook (in part discussing the right of trustees and beneficiaries to seek instructions from the court); §8.42 of this handbook (the complaint for instructions versus the complaint for declaratory judgment). See also §8.13 of this handbook (when a beneficiary is entitled to have his or her legal fees paid from the trust estate).

¹³⁶4 Scott & Ascher §22.1 (Expenses Properly Incurred); Restatement (Third) of Trusts §88 cmt. d. “The right of indemnification applies even though the trustee is unsuccessful in the action, as long as the trustee's conduct was not imprudent or otherwise in violation of a fiduciary duty.” Restatement (Third) of Trusts §88 cmt. d.

¹³⁷4 Scott & Ascher §22.1 (Expenses Properly Incurred).

¹³⁸See *Kasperbauer v. Fairfield*, 170 Cal. App. 4th 785 (2009).

¹³⁹See generally Restatement (Third) of Trusts §88 cmt. c. See, e.g., *Mears v. Addonizio*, 336 N.J. Super. 474, 765 A.2d 260 (App. Div. 2001) (providing that fees of attorney for trustee not payable from trust when the trustee was merely a nominal party in litigation). Attorneys' fees in bringing trustee's account before the court, however, would be allowable. See, e.g., *Mears v. Addonizio*, 336 N.J. Super. 474, 765 A.2d 260 (App. Div. 2001).

¹⁴⁰4 Scott & Ascher §22.2 (Expenses Improperly Incurred).

breached his trust.¹⁴¹ Indenture trustees are no exception.¹⁴² In Nebraska, the standard is “substantially successful”; the trustee’s defense need not be “100 percent successful” in order for the trustee to be entitled to recover costs, including attorneys’ fees.¹⁴³ “Ultimately, however, the issue of the trustee's entitlement to indemnification for litigation expenses lies in the sound discretion of the court.”¹⁴⁴

As to whether the vindicated-trustee’s personal claim against the trust estate for defense costs should be offset by payments made to defense counsel and others by the trustee’s own liability-insurance carrier, at least one court has answered that it depends: “On remand,...the judge should take the trustees’ insurance coverage into account, giving it as much or as little weight as the judge deems appropriate, in arriving at a just and equitable award.”¹⁴⁵ One policy argument against setoff is that one who contracts for insurance with personal funds, not some third party, should receive the “benefit of the bargain.”¹⁴⁶ But does this not effectively constitute an equitable double-dipping by (or windfall for) the vindicated-trustee? Arguably it would not. The trustee had with personal funds paid for the legal services in advance as a “component” of the insurance premiums.¹⁴⁷ Also, the nexus between the liability-insurance contract (law) and the trust’s administration (equity) is not so close as to warrant setoff.¹⁴⁸

As to the fees that the trustee's attorneys are earning in ongoing litigation between the trustee and the beneficiaries, the trustee should seek permission from the court before making payment from the trust

¹⁴¹Restatement (Third) of Trusts §88 cmt. d; 3 Scott & Ascher §18.1.2.4 (Expenses of Judicial Proceedings); 4 Scott & Ascher §22.1 (Expenses Properly Incurred). See *Spencer v. Di Cola*, 16 N.E.3d 1 (Ill. App. Ct. 2014) (the appellate court not agreeing with the beneficiary that the defendant-trustee’s successful defense of her position as trustee was inappropriately “self-serving,” an office which, after all, had been authorized by the very terms of the trust, it affirmed the lower court’s decision to award the defendant-trustee her legal defense costs and to allow her to satisfy those obligations with entrusted funds); *Regions Bank v. Lowrey*, 101 So. 3d 210 (Ala. 2012) (confirming that a trustee may be reimbursed from the trust estate for expenses, including attorneys’ fees, incurred by the trustee in defending a breach-of-trust action, provided the trustee had not been found to have committed a material breach of trust); *Nat’l City Bank, N.E. v. Beyer*, No. H-99-017, 2001 WL 1664079 (Ohio Ct. App. Dec. 31, 2001) (holding that a successful judicial defense against breach-of-trust allegations benefits the trust estate such that the trustee is entitled to reimbursement of his legal fees). *But see* *Boatmen's Tr. Co. of Ark. v. Buchbinder*, 343 Ark. 1, 32 S.W.3d 466 (2000) (denying the trustee a right of indemnity from the trust estate for its attorneys' fees though it was the prevailing party in the breach-of-trust action).

¹⁴²See Bogert §250, n. 44. See *generally* §9.31 of this handbook (corporate trusts; trusts to secure creditors; the Trust Indenture Act of 1939; Protecting bondholders).

¹⁴³See *In re Est. of Stuchlik*, 289 Neb. 673 (2014).

¹⁴⁴4 Scott & Ascher §22.1.

¹⁴⁵*Brady v. Citizens Union Sav. Bank*, 88 Mass. App. Ct. 416, 38 N.E.3d 301 (2015). See also *Brady v. Citizens Union Sav. Bank*, 91 Mass. App. Ct. 160 (2017).

¹⁴⁶*Brady v. Citizens Union Sav. Bank*, 88 Mass. App. Ct. 416, 38 N.E.3d 301 (2015).

¹⁴⁷*Brady v. Citizens Union Sav. Bank*, 88 Mass. App. Ct. 416, 38 N.E.3d 301 (2015).

¹⁴⁸See *Gary Fearn's v. Anglo-Dutch Paint & Chem. Ltd.*, [2010] EWHC (Ch.) 2366 (Eng.).

estate.¹⁴⁹ This is because the litigation has placed the trustee's interests in conflict with those of the beneficiaries, thus requiring the trust to “report to the court for guidance.”¹⁵⁰ Assume that after some delay authority-to-pay is judicially granted. Reasonable finance/interest charges attributable to the delay are themselves payable to the attorneys from the trust estate, provided, the slow motion of the judicial process itself is what caused the delay, not some malfeasance or nonfeasance on the part of the trustee.¹ In England, if the trustee has suspended income payments in the face of sufficient principal to cover any litigation costs that the court might eventually award the trustee, the court may order that the payments be resumed.¹⁵¹

The trustee's legal costs are not reimbursable from the trust estate when the trustee is personally at fault. All bets are off when the trustee is personally at fault.¹⁵² The costs of mounting an unsuccessful defense to an allegation of breach of fiduciary duty are generally not reimbursable from the trust estate.¹⁵³ Certainly the obligation to pay any attorneys' fees that were incurred by a trustee in the unsuccessful defense of a breach of fiduciary duty action ought not to be directly or indirectly imposed on those to whom the duty ran.¹⁵⁴ Attorneys' fees incurred by the trustee in correcting a trustee error—such as misdelivery of the trust property—also are not reimbursable.¹⁵⁵ Likewise fees incurred in correcting serious accounting

¹⁴⁹See *J.P. Morgan Tr. Co., N.A. v. Siegel*, 965 So. 2d 1193 (Fla. Dist. Ct. App. 2007).

¹⁵⁰*J.P. Morgan Tr. Co., N.A. v. Siegel*, 965 So. 2d 1193, 1195 (Fla. Dist. Ct. App. 2007).

¹ See, e.g., *Kumble v. Voccola*, 253 A.3d 1248, 1256-1257 (R.I. 2021).

¹⁵¹Lewin ¶138-09.

¹⁵²See generally 3 Scott & Ascher §18.1.2.4 (Expenses of Judicial Proceedings); 4 Scott & Ascher §22.2 (Expenses Improperly Incurred). See, e.g., *Yanilos v. Hunter*, No. D066333, 2015 Cal. App. Unpub. LEXIS 8461 (Cal. Ct. App. Nov. 23, 2015) (unpublished) (cotrustee surcharged for the fiduciary litigation defense costs that she had paid directly from entrusted funds, the court having found that she had committed multiple breaches of trust). For a definition of the term surcharge, see §7.2.3.2 of this handbook.

¹⁵³Restatement (Third) of Trusts §88 cmt. d; 3 Scott & Ascher §18.1.2.4 (Expenses of Judicial Proceedings); 4 Scott & Ascher §22.1 (Expenses Properly Incurred), 22.2 (Expenses Improperly Incurred). See, e.g., *Grate v. Grzetch*, 373 Ill. App. 3d 228, 867 N.E.2d 577 (2007) (attorneys' fees incurred by a trustee in the unsuccessful defense of an action for conversion of trust assets brought by the guardian of the disabled beneficiary were not reimbursable from the trust estate as the fees had not been incurred in protecting the trust estate).

¹⁵⁴See Restatement (Third) of Trusts §88 cmt. d; UTC §709 cmt. (Reimbursement of Expenses); 3 Scott & Ascher §18.1.2.4 (Expenses of Judicial Proceedings); 4 Scott & Ascher §22.1 (Expenses Properly Incurred), 22.2 (Expenses Improperly Incurred); *Hodges v. Johnson*, 244 A.3d 245, 254 (N.H. 2020) (trustees having no fiduciary duty to defend their misconduct, they are not entitled to be reimbursed from the trust estate for fees and costs they personally incurred in so doing); *In re Est. of Stowell*, 595 A.2d 1022 (Me. 1991) (denying reimbursement of attorneys' fees to trustee where litigation was result of his breach of fiduciary duties).

¹⁵⁵4 Scott & Ascher §22.2 (Expenses Improperly Incurred). See, e.g., *May v. Okla. Bank & Tr. Co.*, 261 P.3d 1138 (Okla. 2011) (bank not entitled to legal fees it incurred in correcting its own negligence).

errors.¹⁵⁶ That the fiduciary malfeasance or nonfeasance was not “willful” is generally not a defense.¹⁵⁷ That having been said, if the culpable fiduciary had acted in good faith and not egregiously outside the bounds of his legitimate discretionary authority, then equity may cut him some slack—at least one court has done just that for a culpable fiduciary-protector.¹⁵⁸ In any case, counsel would be well advised to personally bind the trustee in contract to pay his or her fees out of the trustee's own pocket to the extent those fees are held not to be an obligation of the trust estate.

The costs of a legal malpractice action against trust counsel are generally not reimbursable from the trust estate. Costs incurred by the trustee in bringing an action against trust counsel for rendering faulty legal advice that led to the trustee's breaching a fiduciary duty also would not be reimbursable from the trust estate. In principle, the trustee is personally obliged to make the beneficiaries whole for his breaches of fiduciary duty. Moreover, the beneficiaries are not obliged to fund a legal malpractice action the outcome of which could only inure to the benefit of the trustee. On the other hand, if the trustee is both impecunious and dilatory, the beneficiaries themselves, under principles of subrogation, may be entitled to initiate the malpractice action against counsel in order that they can be made whole.¹⁵⁹

The trustee's legal defense costs are chargeable to the beneficiaries if it is found that the litigation was pursued in bad faith. In most states and under federal law, “when a baseless claim is maintained vexatiously, obdurately or in bad faith, an exception to the American Rule applies and allows the recovery of counsel fees against the opposing party.”¹⁶⁰ When a beneficiary engages in frivolous litigation against the trustee, or against the trust relationship itself, the beneficiary's equitable interest under the trust may be charged with the attendant costs.¹⁶¹ Thus, if a beneficiary engages in vexatious and burdensome litigation against the trustee and the other beneficiaries, the court may order that the attorneys' fees of all the defendants be charged against the plaintiff-beneficiary's equitable interest, to the extent the interest is identifiable, discrete, and severable.¹⁶² To the extent the interest is not, the court may have the equitable power to impose

¹⁵⁶See, e.g., *In re Wilson Revocable Tr.*, 956 N.W.2d 36 (Neb. 2021).

¹⁵⁷See, e.g., *In re Wilson Revocable Tr.*, 956 N.W.2d 36 (Neb. 2021).

¹⁵⁸See *In re Piedmont Tr. & Riviera Tr.*, [2016] JRC 016 (R.C. Jersey).

¹⁵⁹Cf. §8.15.50 of this handbook (subrogation doctrine) (discussing the subrogation rights of third parties *against* the trust estate).

¹⁶⁰Martin A. Heckscher, *Fees, Fees, Fees: A Blessing and a Bane, How to Charge, Collect and Defend Them*, 31 ACTEC L.J. 21, 30 (2005).

¹⁶¹See 3 Scott on Trusts §188.4 n.13 and accompanying text. See generally §8.13 of this handbook (in litigation pertaining to a trust, when is the beneficiary entitled to reimbursement from the trust estate for legal fees).

¹⁶²See, e.g., *Larkin v. Wells Fargo Bank, N.A.*, No. A13-1839, 2014 Minn. App. Unpub. LEXIS 1077 (Minn. Ct. App. Oct. 6, 2014) (unpublished) (“[The plaintiff-beneficiary's] ...continuing attempt to undermine the settlement was not beneficial, particularly after the settlement agreement was confirmed in binding arbitration, by the district court, and by this court on appeal, and his alternate proposed settlement agreement was nonsensical and included ad hominem attacks on other trust beneficiaries. The evidence supports the district court's finding that...[he]...engaged in vexatious and burdensome litigation.”). It is interesting to note that the district court had ordered the plaintiff-

on the plaintiff-beneficiary personal liability for the fees.¹⁶³

When a trustee has prevailed in a suit for breach of trust brought vexatiously, obdurately, or in bad faith by a beneficiary, he may have a fiduciary duty to the other beneficiaries to bring an action against the beneficiary to compel the beneficiary to bear the burden of the trustees' attorneys' fees, rather than have the trust estate (and the other beneficiaries to the extent of their interest in the trust estate) bear that burden.¹⁶⁴ Circumstances may even warrant that the trustee also bring an action on behalf of the trust estate against the nuisance beneficiary's counsel.¹⁶⁵ As noted above, an advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.¹⁶⁶

Whether expenses incurred by trust counsel in collecting his or legal fees are reimbursable from the trust estate. There is little law on the question of whether an attorney who has represented a trustee is entitled to be paid from the trust estate for time spent and costs incurred by the attorney in collecting or defending the attorney's reasonable legal fees.¹⁶⁷ If the attorney can demonstrate that his or her efforts to get paid have somehow benefited the trust estate, then a court should have no problem awarding "fees on fees" from the trust estate.¹⁶⁸ Absent a showing that the trust estate has received a benefit from the attorney's collection efforts, if the attorney has acted reasonably and in good faith in seeking to have his or her fees paid from the trust estate and the beneficiaries have acted unreasonably and in bad faith in opposing those efforts, then the equitable exception to the "fees-on-fees" or "fees-for-fees" prohibition should apply.¹⁶⁹ If the trustee has unreasonably or in bad faith been frustrating the attorney's efforts to get paid, it would seem

beneficiary to pay the trustee's attorneys' fees "either personally or as a deduction from his share of the trust."

¹⁶³See generally §5.6 of this handbook (in part discussing the potential personal liability of the litigious beneficiary).

¹⁶⁴See generally 3 Scott & Ascher §18.1.2.4 (noting that "[i]f one beneficiary unsuccessfully tries, through litigation, to advance his or her own beneficial interest, the trustee may properly charge the resulting litigation expenses against the beneficiary's share").

¹⁶⁵See, e.g., Pederson Tr., 757 N.W.2d 740 (N.D. 2008) (nuisance beneficiary and his counsel jointly and severally liable for trustee's litigation costs).

¹⁶⁶4 Scott & Ascher §22.1.1 (Lien for Indemnity); UTC §709(b). Cf. Nickerson v. Fiduciary Tr. Co., 6 Mass. App. Ct. 317, 375 N.E.2d 357 (1978) (holding that probate court had not abused its discretion under Mass. Gen. Laws Ann. 215 §39A in awarding the trustee of an irrevocable trust the counsel fees it had incurred as a result of the settlor's unsuccessful action to invalidate or reform the trust).

¹⁶⁷See Martin A. Heckscher, *Fees, Fees, Fees: A Blessing and a Bane, How to Charge, Collect and Defend Them*, 31 ACTEC L.J. 21, 32–36 (2005) (discussing the "fee on fees" issue in the context of attorneys representing fiduciaries of probate estates).

¹⁶⁸*In re O'Neill Tr.*, No. 319546, 2015 Mich. App. LEXIS 1053 (Mich. Ct. App. May 19, 2015) (unpublished).

¹⁶⁹See *In re O'Neill Tr.*, No. 319546, 2015 Mich. App. LEXIS 1053 (Mich. Ct. App. May 19, 2015) (unpublished) (the fees-for-fees prohibition would not be applicable if the beneficiaries unjustifiably and in bad faith were to litigate in opposition to trust counsel's legitimate efforts to be compensated with entrusted funds).

that the trustee should be ordered to pay the “fees on fees” out of personal funds without recourse to the trust estate.

§3.5.2.4 Right in Equity to Compensation

*Local custom is a factor to be considered in determining compensation. Other relevant factors are: the trustee's skill, experience and facilities, and the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility, and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance.*¹⁷⁰

The English rule is that the trustee is not entitled to compensation unless the instrument expressly provides for it,¹⁷¹ though there are now some statutory exceptions applicable to corporate and professional trustees.¹⁷² In the United States and some parts of the British Commonwealth, however, a trustee is entitled in equity to reasonable compensation, even when the instrument is silent upon the subject,¹⁷³ “unless the terms of the trust provide otherwise or the trustee agrees to forgo compensation.”¹⁷⁴ In some jurisdictions, a trustee's compensation is set by statute.¹⁷⁵ For a more detailed discussion of trustee compensation, see §8.4 of this handbook.

To the extent of his reasonable compensation, the trustee has a “security interest” in¹⁷⁶ or lien on¹⁷⁷ the trust property. “The trustee need not pay over income without deducting the compensation to which he is entitled with respect to the income, and need not pay over principal without deducting the compensation to which he is entitled with respect to the principal.”¹⁷⁸ On the other hand, “[t]he trustee has no charge on the trust property to secure a beneficiary's indebtedness that is unconnected with the trust.”¹⁷⁹ With respect to a debt that the beneficiary owes to the trustee personally, the trustee is in no better position than the beneficiary's other general creditors.¹⁸⁰ That is not to say that under certain circumstances the beneficiary and the trustee could not enter into a binding agreement to secure a beneficiary's debt to the trustee with the

¹⁷⁰Restatement (Third) of Trusts §38 cmt. c(1). *See generally* §8.4 of this handbook (trustee compensation).

¹⁷¹*See generally* 4 Scott & Ascher §21.1; 3A Scott on Trusts §242.

¹⁷²Lewin ¶120-132 through ¶120-158.

¹⁷³*See generally* 4 Scott & Ascher §21.1; 3A Scott on Trusts §242. *See also* §8.4 of this handbook (trustee compensation).

¹⁷⁴Restatement (Third) of Trusts §38(1).

¹⁷⁵*See generally* Bogert §975; 4 Scott & Ascher §21.1.

¹⁷⁶*See generally* Bogert §975.

¹⁷⁷Restatement (Third) of Trusts §38 cmt. b.

¹⁷⁸Restatement (Second) of Trusts §242 cmt. e; 4 Scott & Ascher §21.1.

¹⁷⁹4 Scott & Ascher §25.1 (Liability of Beneficiary to Trustee Individually).

¹⁸⁰4 Scott & Ascher §25.1 (Liability of Beneficiary to Trustee Individually).

beneficiary's equitable interest.¹⁸¹ Due deference, however, would have to be given to the trustee's overarching duty of loyalty,¹⁸² the equitable interest could not be spendthrifted,¹⁸³ and the beneficiary would have to be of full age and legal capacity.¹⁸⁴

§3.5.2.5 Right in Equity to Rely on Trust Instrument

The UTC provides that a trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.¹⁸⁵ If a court may consider extrinsic evidence on the issue of a settlor's intent, then it is appropriate that the trustee be afforded this protection. Why? Because the court could, after the trustee has assumed office, determine that the “intended terms of the trust” are not the “expressed” terms of the trust.¹⁸⁶

§3.5.2.6 Right in Equity to Seek Instructions from Court

When the current rights, duties, and obligations of the trustee are uncertain due to problems with the governing instrument or the terms of the trust generally, the trustee is entitled, at trust expense,¹⁸⁷ to initiate an action for instructions or declaratory judgment¹⁸⁸ in a court that has jurisdiction over the trust.¹⁸⁹ So also

¹⁸¹4 Scott & Ascher §25.1 (Liability of Beneficiary to Trustee Individually).

¹⁸²*See generally* §6.1.3.5 of this handbook (acquisition by trustee of equitable interest and the trustee's duty of loyalty to the beneficiary in nontrust matters generally).

¹⁸³4 Scott & Ascher §25.1 (Liability of Beneficiary to Trustee Individually).

¹⁸⁴4 Scott & Ascher §25.1 (Liability of Beneficiary to Trustee Individually).

¹⁸⁵UTC §1006.

¹⁸⁶UTC §1006 cmt.

¹⁸⁷Restatement (Third) of Trusts §71 cmt. e; 3 Scott & Ascher §16.8.

¹⁸⁸*See generally* §8.42 of this handbook (the complaint for instructions versus the complaint for declaratory judgment).

¹⁸⁹*See* Restatement (Second) of Trusts §201 cmt. b (noting that if the trustee is in doubt as to the interpretation of the trust instrument, then he can protect himself by obtaining instructions from the court, the extent of his duties and powers being determined by the trust instrument and the rules of law which are applicable law, and not by his own interpretation of the instrument or his own belief as to the rules of law); UTC §201(c) (Role of Court in Administration of Trust). For a catalog of other types of judicial proceedings involving trust administration that might be brought by a trustee or beneficiary, see UTC §112 cmt. (borrowing from California Probate Code §17200). In England, the courts exclusively have *inter alia* the power to vary the terms of trusts where they think fit (on the application of interested parties); the power to appoint trustees (when no other way of appointment can be used); the power to remove a trustee; the power to vary administrative provisions including investment powers; the power to determine the true construction of the terms of the trust; the power to enforce the terms of the trust; and the power to consider and award damages for breach of trust. Martyn Frost, Overview of Trusts in England and Wales, in *Trusts in Prime Jurisdictions* 19–20 (Alon Kaplan ed., 2000). *See generally*

when there is reasonable uncertainty as to the proper application of the law to the facts.¹⁹⁰ He is not obliged to rationalize conflicting provisions, resolve ambiguities, or supply missing terms on his own authority and at his own risk.¹⁹¹ English law is in accord.¹⁹² The trustee of a business trust is no exception.¹⁹³ Nor is the trustee of a charitable trust.¹⁹⁴ “Beneficiaries, too, are entitled to seek judicial instructions regarding trust administration.”¹⁹⁵

There must be reasonable doubt, however.¹⁹⁶ “Decisions of questions which may arise upon the happening of events in the future...[, however,] ...must await those events.”¹⁹⁷ Also, courts are generally not in the business of advising trustees on how to exercise their discretionary powers.¹⁹⁸ Subject to the trustee's (or beneficiary's) right of appeal and provided all necessary parties¹⁹⁹ have properly been made parties to the proceeding, instructions issued by the court are binding on trustees and beneficiaries alike, unless the instructions were procured by fraud, duress, misrepresentation, concealment or, perhaps, as the result of manifest error.²⁰⁰ “The court's determination of the questions involved marks them as *res judicata*.”²⁰¹

§9.4.4 of this handbook (whether the legislature may alter the terms of a charitable trust without violating the doctrine of separation of powers).

¹⁹⁰*See, e.g.*, *Hodges v. Johnson*. 244 A.3d 245, 255–257 (N.H. 2020).

¹⁹¹*See generally* 3 Scott & Ascher §16.8 (noting that “[t]rustees have received instructions on a wide range of questions, including the extent of their powers and duties, the identity of the trust beneficiaries and the extent of their interests, the proper allocation and apportionment of receipts or expenditures between income and principal, and the identity of those entitled to the trust property upon the termination of the trust”); Thomas H. Belknap, *Newhall's Settlement of Estates and Fiduciary Law in Massachusetts* §2:15 (1994).

¹⁹²*See In re Beddoe* (*Downes v. Chatham*) [1893] 1 Ch. 547 (Eng.).

¹⁹³*See, e.g.*, *Hauser v. Catlett*, 197 Okla. 668, 173 P.2d 728 (1946) (a timely petition for instructions by the trustees of a business trust to resolve a trust termination issue).

¹⁹⁴*See generally* 5 Scott & Ascher §37.3.12.

¹⁹⁵3 Scott & Ascher §16.8.

¹⁹⁶Restatement (Third) of Trusts §71; 3 Scott & Ascher §16.8.

¹⁹⁷*Flye v. Jones*, 283 Mass. 136, 138, 186 N.E. 64 (1933). *See also In re Deed of Tr. of McCargo*, 652 A.2d 1330, 1337 (Pa. Super. Ct. 1994) (holding that an order of the lower court was improper because in part it purported to resolve a matter by declaratory judgment that was not based upon an event certain to occur); Restatement (Third) of Trusts §71 cmt. d.

¹⁹⁸*See generally* 3 Scott & Ascher §16.8.

¹⁹⁹*Cf.* §5.7 of this handbook (the necessary parties to a suit brought by a beneficiary).

²⁰⁰Restatement (Third) of Trusts §71 cmt. b.

²⁰¹3 Scott & Ascher §16.8.

