

## Title

Good luck to the trustee who would endeavor to forge beneficiary-consensus as to ESG Investing objectives

## Text

Social investing (SRI/ESG Investing) of assets subject to an irrevocable trust implicates the trustee's duty of undivided loyalty unless the terms of the trust expressly direct/authorize the trustee to engage in such activity. It is no wonder that default fiduciary social investing has been practiced almost exclusively in the charitable space. To the extent that there are adverse economic consequences to the estate of a charitable trust that are attributable to a particular social-investing program, it is likely that the attorney general of the state in which the trust is principally being administered is either too busy frying other fish to get involved or actually supportive politically of the virtues that are being signaled by the social-investing trustee. In either case, the trustee is likely to have nothing to fear economically from his politically driven maladministration of the charity's assets.

Social investing assets held in irrevocable private trusts for "widows and orphans" whose terms lack express direction to engage in such activity, however, is quite another matter. After all, the beneficiaries and their surrogates in the first instance would have the requisite standing to sue the trustee personally for any economic loss to the entrusted portfolio that is attributable to the social investing.

Maybe trustees of private irrevocable trusts should be authorized by statute to "take into account" when making investment decisions the socio-political predilections of their beneficiaries. Easier said than done. Delaware has such a default statute. It provides that "when considering the needs of the beneficiaries, the fiduciary may take into account...the beneficiaries' personal values, including the beneficiaries' desire to engage in sustainable investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs of the beneficiaries." See Del. Code Ann. Tit. 12 §3302(a). Oregon and New Hampshire have statutes that are sort of similar.

But, as we note in §5.1 of *Loring and Rounds: A Trustee's Handbook* (2022), which section is reproduced in its entirety in the appendix immediately below, the typical private irrevocable trust will serve multiple categories of beneficiary at various times and under various circumstances. Beneficiaries come in all shapes and sizes. There are minors; there are the mentally incapacitated; there are multiple permissible beneficiaries under discretionary trusts the equitable property interests of whom are perforce contingent; there are yet-to-be-conceived persons ultimately entitled to take outright and free of trust remainders in corpus whose equitable property interests also are perforce contingent. One can go on and on. How on earth is a trustee *charged with the duty of impartiality* to discern each and every beneficiary's particular "values or beliefs," let alone forge a unanimous working socio-political consensus as to how the entrusted portfolio should be invested? And what if that consensus were to conflict with what the settlor would have wanted? And if the

consensus portfolio were to turn out to be objectively imprudent and underperforming as a consequence, what then? If anyone is to be held personally liable for the economic loss to the trust estate, it is with the trustee that the buck would stop. It is a fundamental principle of trust jurisprudence that the trustee of an irrevocable trust, though a fiduciary, is a principal vested with legal title to the entrusted property. He is not the beneficiaries' agent. And, of course, the beneficiaries, *qua* beneficiaries, owe no fiduciary duties to one another, let alone to the trustee.

The 2022 Edition of *Loring and Rounds: A Trustee's Handbook* is available at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

## Appendix

### **§5.1 Who/What May Be a Trust Beneficiary Generally; Who/What Are the Beneficiaries in a Given Situation** [from *Loring and Rounds: A Trustee's Handbook* (2022), available at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

*The term beneficiary includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust.*<sup>1</sup>

**Human beings and corporations.** A human being may be the beneficiary of a trust. An artificial legal entity, such as a corporation, may be as well.<sup>2</sup>

A trust may have one,<sup>3</sup> or more than one,<sup>4</sup> beneficiary. "If the terms of a trust require payment to one person of both the income for a period of time, and, thereafter, the principal, that person is the trust's sole beneficiary, unless there is a contingent gift to another or a resulting trust upon the designated person's failure to survive the stated period."<sup>5</sup> Generally for someone to qualify as the *sole beneficiary* of a trust, the underlying property must pass to that person's probate estate in the event of his or her death before final distribution.

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<sup>1</sup>UTC §103 cmt.

<sup>2</sup>Bogert §1.

<sup>3</sup>2 Scott & Ascher §12.2.1.

<sup>4</sup>2 Scott & Ascher §12.2.

<sup>5</sup>3 Scott & Ascher §13.2.2.

A sole trustee may be one of several beneficiaries and a cotrustee may be a sole beneficiary.<sup>6</sup> A settlor may establish a trust for the settlor's own benefit.<sup>7</sup> “A person is a beneficiary of a trust if the settlor manifests an intention to give the person a beneficial interest....”<sup>8</sup>

A trust beneficiary's interest is an equitable property interest.<sup>9</sup> It can be a present interest or a future interest, and, whether vested or contingent, the interest is property.<sup>10</sup> Thus, entities capable of owning property, *i.e.*, with the capacity to take and hold legal title to property,<sup>11</sup> are eligible to be trust beneficiaries; these are entities to whom enforceable personal rights with respect to tangible and intangible things may attach.<sup>12</sup> Such entities would include minors,<sup>13</sup> the insane,<sup>14</sup> certain corporations,<sup>15</sup> unincorporated

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<sup>6</sup>2 Scott & Ascher §12.4; Bogert §1. *See generally* §8.7 of this handbook (merger).

<sup>7</sup>2 Scott & Ascher §12.3.

<sup>8</sup>Restatement (Third) of Trusts §48.

<sup>9</sup>*See* Restatement of Property §6 cmt. a; Restatement (Second) of Trusts §2 cmt. f. *See generally* §3.5.1 of this handbook (nature and extent of the trustee's estate).

<sup>10</sup>*See* 2 Scott on Trusts §130 (The Property Subject to the Trust); 1 Restatement of Property at 3 (introduction to ch. 1) (the equitable interest); UPC §1-201(3) (providing that a beneficiary of a trust includes one who has any present or future interest, vested or contingent, under the trust); *In re Catherwood's Tr.*, 173 A.2d 86, 91 (Pa. 1961) (“A gift of an equitable life estate in income or of an estate in remainder does constitute a grant of a vested property right of which the recipients cannot be divested by legislative action.”), *overruled, in part, by In re Pew Tr.*, 411 Pa. 96, 103 (1963) (emphasizing that *Catherwood* did not intend to alter the right of a life tenant to *ordinary* stock dividends or ordinary cash dividends in pre-1945 trusts, and holding that stock dividends are considered income); Henry Hansmann and Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434, 469–473 (1998) (suggesting that a beneficiary's interest is property, at least to the extent of that beneficiary's interest under the trust); *see, e.g.*, *Barber v. Barber*, 837 P.2d 714 (Alaska 1992) (confirming that a contingent trust beneficiary has a constitutionally protected property interest). *See also* UTC §103(11) (“‘Property’ means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.”).

<sup>11</sup>Restatement (Third) of Trusts §43.

<sup>12</sup>*See generally* W. N. Hohfeld, *Fundamental Legal Conceptions* 23–124 (1923) (suggesting that property is a collection of rights, privileges, powers and immunities with respect to a thing rather than the thing itself); *see also* 1 Restatement of Property at 3 (introduction to ch. 1).

<sup>13</sup>*See* 2 Scott on Trusts §116; Restatement (Third) of Trusts §43 cmt. a (providing that a minor may be a trust beneficiary though he or she lacks the capacity to transfer property and enter into contracts).

<sup>14</sup>2 Scott on Trusts §116.

<sup>15</sup>*See* 2 Scott on Trusts §117.1. *See also* 2 Scott & Ascher §12.5.1. *But see* Restatement (Third) of Trusts §43 cmt. c (providing that if, by statute, a corporation cannot take title to land, or to land of more than a certain value or for other than certain purposes, it cannot become the beneficiary of a trust of land, or of land of more than the designated value or for other than the designated purposes).

associations,<sup>16</sup> noncitizens,<sup>17</sup> persons who are unborn<sup>18</sup> or unascertained,<sup>19</sup> the United States,<sup>20</sup> or a state<sup>21</sup> of the United States.

At common law, a child in gestation, *i.e.*, a child *en ventre sa mere*, who was born alive was deemed to have been alive at gestation.<sup>22</sup> Thus, “the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation when needed.”<sup>23</sup> Although neither period of the Uniform Statutory Rule Against Perpetuities (USRAP) has a gestation extension,<sup>24</sup> the act makes no effort to interfere with whatever common law or statutory equitable property rights one born alive might possess by virtue of having been *in utero* at a given time.<sup>25</sup> In other words, someone *in utero* may be a provisional trust beneficiary. “As to the legal status of conceived-after-death children, that question has not yet been resolved.”<sup>26</sup>

One whose equitable interest under a trust has extinguished<sup>27</sup> or whose interest is an expectancy (not to be confused with a contingent equitable interest)<sup>28</sup> is not a beneficiary and thus lacks the standing to

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<sup>16</sup>Restatement (Third) of Trusts §43 cmt. d; 2 Scott & Ascher §12.6.

<sup>17</sup>Restatement (Third) of Trusts §43 cmt. b; 2 Scott & Ascher §12.5.2 (Aliens).

<sup>18</sup>2 Scott & Ascher §12.1.1.

<sup>19</sup>Scott on Trusts §112.1. See Restatement (Third) of Trusts §44 cmt. c. In Louisiana, however, with the exception of the “class trust,” a beneficiary must be in being and ascertainable on the date of the creation of the trust. La. Rev. Stat. Ann. §9:1803. An unborn child is deemed a person in being and ascertainable, if he is born alive. La. Rev. Stat. Ann. §9:18.03. In Louisiana, a “class trust” is enforceable even though some members of the class are not yet in being at the time of the creation of the trust, *provided at least one member of the class is then in being*. La. Rev. Stat. Ann. §9:1891(A). Under Louisiana law, a “class trust” is an inter vivos or testamentary trust in favor of a class consisting of some or all of the settlor's children, grandchildren, nieces, nephews, grandnieces, or grandnephews, or any combination thereof.

<sup>20</sup>Restatement (Third) of Trusts §43 cmt. a.

<sup>21</sup>Restatement (Third) of Trusts §43 cmt. a.

<sup>22</sup>UPC §2-901 cmt.

<sup>23</sup>UPC §2-901 cmt.

<sup>24</sup>See UPC §2-901. See also §8.2.1.7 of this handbook (the two USRAP periods).

<sup>25</sup>UPC §2-901 cmt.

<sup>26</sup>UPC §2-901 cmt.

<sup>27</sup>See, *e.g.*, *In re McDonough Living Tr.*, No. A08-2176, 2009 WL 2447481 (Minn. Ct. App. Aug. 11, 2009) (unpublished) (denying standing to the personal representative of the probate estate of a deceased trust beneficiary whose interest under the trust terminated at death to petition for the removal of the trustee, the decedent's status as a trust beneficiary having terminated at death).

<sup>28</sup>See generally *Roth v. Jelley*, 45 Cal. App. 5th 655, 259 Cal. Rptr. 3d 9 (2020) (confirming that a contingent equitable interest incident to a trust relationship is not an expectancy).

maintain a suit against the trustee.<sup>29</sup> That having been said, the personal representative of a deceased trust beneficiary would have the requisite standing to seek an equitable accounting from the trustee *for the period when the decedent had been a beneficiary of the trust*.<sup>30</sup> A beneficiary designation in the will of a living person is an example of an expectancy, assuming no contractual overlay. This is because the will does not speak until the testator's death. Until such time the will is said to be ambulatory. A warning: "In an effort to strengthen the protection trusts provide from creditors' claims, a few states have enacted legislation in recent years providing that if the beneficiary's receipt of distributions from the trust is subject to the exercise of discretion by the trustee, the beneficiary does not have a property interest with respect to the trust... Some such statutes go further and define the beneficiary's interest in a discretionary trust as a mere expectancy."<sup>31</sup> If taken literally, this statutory downgrade of a trust-beneficiary's contingent equitable property interest to a mere expectancy could deprive the beneficiary of standing to seek to hold the trustee accountable. "Accordingly, statutes that purport to negate the property interests of discretionary trust beneficiaries should not be construed to eliminate or even reduce the rights of such beneficiaries to hold trustees accountable."<sup>32</sup> Or, to put it another way, the courts should construe this legislation narrowly, namely, as a mere *deeming* of such contingent equitable property interests to be expectancies for asset-protection purposes. The trustee's critical duty to account is taken up in §6.1 of this handbook.

As noted, a settlor or trustee of a trust may also be its beneficiary, provided the same person is not the sole trustee and sole beneficiary.<sup>33</sup> When the same person possesses the entire legal and the entire equitable interest, there is no trust. The interests are said to be merged. Under the doctrine of merger, a topic we take up in §8.7 of this handbook, that person owns the subject property outright and free of trust.

In the noncharitable context, the equitable interests of the unborn<sup>34</sup> and unascertained are represented by the guardian ad litem,<sup>35</sup> unless a living and identified beneficiary is allowed to represent their interests

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<sup>29</sup>4 Scott & Ascher §24.19. For an example of what an expectancy interest would look like in the context of an inter vivos trust, consider Carolyn's interest in *Moon v. Lesikar*, 230 S.W.3d 800 (Tex. App. 2007) ("We conclude that because Mr. Lesikar was the settlor of the trust with the power to revoke the trust, the sole beneficiary of the trust while alive, and co-trustee of the trust, Carolyn...[, though designated in the terms of the trust as a successor beneficiary,]...has no standing to complain of Mr. Lesikar's...[inter vivos]...disposition of Family Trust assets, including the Airport Stock."). Under classic principles of trust and property law, Carolyn's equitable property interest, though ultra-contingent, would still be a property interest. The Texas court, by depriving her of standing to seek the trust's enforcement, effectively downgraded that interest to a mere expectancy.

<sup>30</sup>See, e.g., *Dunlap v. Mayer*, \_\_\_ Cal. Rptr. 3d \_\_\_, No. D077561 (Cal. Ct. App. Apr. 23, 2021).

<sup>31</sup>Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 *Quinnipiac Prob. L.J.* 261, 280–281 (2016).

<sup>32</sup>Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 *Quinnipiac Prob. L.J.* 261, 285 (2016).

<sup>33</sup>Restatement (Third) of Trusts §43 cmt. a.

<sup>34</sup>2 Scott & Ascher §12.1.1.

<sup>35</sup>See Restatement (Second) of Trusts §214 cmt. a. See generally Martin D. Begleiter, *The Guardian Ad Litem in Estate Proceedings*, 20 *Willamette L. Rev.* 643, 651–653 (1984). See generally §8.14 of this

under the doctrine of virtual representation.<sup>36</sup>

**Charities.** In the charitable context, future unascertained recipients of charity are entitled to beneficiary status because the attorney general is charged with enforcing trusts established on their behalf.<sup>37</sup> Even a charitable corporation yet to be formed may be the beneficiary of a trust.<sup>38</sup> As the beneficiaries are indefinite, the attorney general is charged with the duty of informing the court of any breach of duty by the trustee.<sup>39</sup> Under the UTC, the settlor and any person with a special interest in the charitable trust also may maintain an enforcement proceeding.<sup>40</sup> For purposes of the UPC, however, the beneficiary of a charitable trust is limited to anyone who has standing to seek its enforcement in the courts.<sup>41</sup>

**Tombs and gravesites.** The dead, who are without any status whatsoever under the common law, are entitled to beneficiary status, provided the legislature authorizes trusts for the perpetual care of gravesites and legal mechanisms for their enforcement.<sup>42</sup> Otherwise, a person who has already died before a trust is established cannot be a beneficiary.<sup>43</sup>

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handbook (when a guardian ad litem or special representative is needed and when virtual representation will suffice).

<sup>36</sup>See §§8.15.34 of this handbook (virtual representation doctrine) and 8.14 of this handbook (when a guardian ad litem or special representative is needed and when virtual representation will suffice).

<sup>37</sup>See 4A Scott on Trusts §§364, 391. *See generally* §9.4.2 of this handbook (standing to enforce charitable trusts).

<sup>38</sup>2 Scott & Ascher §12.1.2 (noting that a trust for the benefit of a yet-to-be-organized noncharitable corporation might well violate the rule against perpetuities). *See generally* §8.2.1 of this handbook (rule against perpetuities).

<sup>39</sup>See §9.4.2 of this handbook (standing to enforce charitable trusts).

<sup>40</sup>UTC §405 cmt.

<sup>41</sup>UPC §1-201(3).

<sup>42</sup>*See, e.g.,* Bolton v. Stillwagon, 410 Pa. 618, 190 A.2d 105 (1963) (holding the trustees of a perpetual care trust personally liable for self-dealing with the trust property, a trust that was operating pursuant to statutory authority). *See generally* P. Jackson, The Law of Cadavers and of Burial and Burial Places (2d ed. 1950); G. Newhall, Settlement of Estates and Fiduciary Law in Massachusetts §10 (4th ed. 1958); 4A Scott on Trusts §374.9. *See generally* §9.9.5 of this handbook (honorary trusts), which discusses the extent to which the UTC and the UPC would recognize and provide for the enforcement of this type of honorary trust; 6 Scott & Ascher §39.7.5 (confirming that a trust for the perpetual maintenance of a grave or a tomb is noncharitable unless a statute provides otherwise, or unless, perhaps, the interred was a well-known public figure, such as a president or war-time general).

<sup>43</sup>2 Scott & Ascher §12.1.3. *See generally* §§8.2.1 of this handbook (the rule against perpetuities) (discussing the concept of vesting) and 8.15.55 of this handbook (antilapse [the trust application]) (discussing antilapse principles applicable to trusts).

In the absence of statutory authority, the relatives<sup>44</sup> of the dead should have common law standing to enforce gravesite protection trusts during the period permitted by the rule against perpetuities.<sup>45</sup> Essentially, such trusts exist for the benefit of the relatives who themselves possess the common law right to visit, honor, and protect gravesites of their deceased relatives.<sup>46</sup>

One court has suggested that a “sort of trust” attaches to a burial plot, the trust being for the benefit of the “family” of the interred.<sup>47</sup> The Restatement (Third) of Trusts suggests that an honorary or adapted purpose trust that grants the trustee a “power to maintain a grave should be allowed for the lifetime of the decedent's spouse and children, or of other concerned individuals designated in the will..., all lives in being at the testator's death.”<sup>48</sup>

At common law, a bequest for the purpose of maintaining an individual tomb or monument did not give rise to a charitable trust,<sup>49</sup> and thus violated the rule against perpetuities.<sup>50</sup> For Prof. John Chipman Gray, however, the vice was not “that the interests of the *cestui que trust* are too remote, but that there is no *cestui que trust* at all.”<sup>51</sup>

Today, in most jurisdictions, a trust for the perpetual care of someone's gravesite is by statute enforceable.<sup>52</sup> “Some of the statutes clearly treat such a trust as charitable for all purposes, some do not.”<sup>53</sup>

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<sup>44</sup>See, however, §8.2.1.9 of this handbook (abolition of the rule against perpetuities) (suggesting how expansive the term *relatives* can be).

<sup>45</sup>*But see* 2 Scott on Trusts §124.2; *Lucker v. Bayside Cemetery*, 114 A.D.3d 162, 979 N.Y.S.2d 8 (App. Div. 2013). In New York, a trust for the perpetual care of a grave is by statute deemed a charitable trust. Thus, it is generally the New York Attorney General who is vested with the standing to seek enforcement of such trusts in the courts. “We hold that the *Lucker* plaintiffs and their class as they define it—indeed, whatever group categorization is used—are neither sufficiently ‘sharply defined’ nor sufficiently ‘limited in number’ to be eligible for standing to sue the cemetery as beneficiaries. To the contrary, aside from the use of the vague term ‘near relatives,’ plaintiffs can offer no rational limiting principle that would distinguish children from grandchildren—or, indeed, great-grandchildren—or from nieces or nephews or cousins and their children.” *Lucker v. Bayside Cemetery*, 114 A.D.3d 162, 979 N.Y.S.2d 8, 14–15 (App. Div. 2013).

<sup>46</sup>See generally Charles Rounds, *Protections Afforded to Massachusetts' Ancient Burial Grounds*, 73 Mass. L. Rev. 176 (1988).

<sup>47</sup>*Sanford v. Vinal*, 28 Mass. App. Ct. 476, 485–486, 552 N.E.2d 579, 584 (1990).

<sup>48</sup>Restatement (Third) of Trusts §47 cmt. d(2). See generally §§9.27 of this handbook (the purpose trust) and 9.29 of this handbook (the adapted trust).

<sup>49</sup>See generally 6 Scott & Ascher §§38.7.10, 39.7.5; *In re Mary R. Latimer Tr.*, 2013 WL 4463388 (Del. Ch. Aug. 2, 2013).

<sup>50</sup>See John Chipman Gray, *The Rule Against Perpetuities*, Appendix H §898 (4th ed. 1942).

<sup>51</sup>John Chipman Gray, *The Rule Against Perpetuities*, Appendix H §898 (4th ed. 1942).

<sup>52</sup>6 Scott & Ascher §38.7.10.

<sup>53</sup>6 Scott & Ascher §38.7.10.

Presumably, the state attorney general has some role to play in the supervision of a perpetual care trust that qualifies as charitable or quasi-charitable, along with the relatives of the interred.<sup>54</sup>

**Holders (donees) of powers of appointment; appointees; takers in default of exercise.** Under the definition of property adopted by the Restatement of Property, the holder (donee) of a general inter vivos power of appointment would be a beneficiary because the holder would possess an enforceable equitable personal right relating to a tangible or intangible thing.<sup>55</sup> The UTC is in accord.<sup>56</sup> So also is the Restatement (Third) of Trusts.<sup>57</sup> In the pre-Restatement world, when personal rights and property rights were considered mutually exclusive, a powerholder had only a personal right.<sup>58</sup> The UPC considers the holder (donee), permissible appointee, or taker in default of an exercise of a power of appointment to be a “beneficiary designated in a governing instrument.”<sup>59</sup> In any case, even apart from the UPC and even while a power is exercisable, the taker in default possesses a contingent equitable property right that would entitle him or her under the Due Process Clause of the Fourteenth Amendment to advance notice and an opportunity to be heard in a judicial proceeding that could adversely affect that property right.<sup>60</sup>

**Beneficiary designations must be definite.** Where there is no beneficiary, there is no trust.<sup>61</sup> In the case of private trusts (as opposed to charitable or public trusts), the beneficiary must be definite.<sup>62</sup> This does not mean that the beneficiary specifically must be named—a designation by description is sufficient,<sup>63</sup> *e.g.*, future issue or descendants.<sup>64</sup> The beneficiary is sufficiently definite, however, only if it is certain at the time when the trust takes effect that the beneficiary will be identified before the expiration of the period allowed by the Rule against Perpetuities.<sup>65</sup>

**Class designations.** It commonly is held that a trust for the benefit of the members of a class of persons

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<sup>54</sup>See generally §9.4.2 of this handbook (standing to enforce charitable trusts).

<sup>55</sup>W. N. Hohfeld, *Fundamental Legal Conceptions* 23-124 (1923). See generally 1 Restatement of Property at 43 (introduction to ch. 1).

<sup>56</sup>UTC §103(2)(B).

<sup>57</sup>Restatement (Third) of Trusts, ch. 9, Introductory Note.

<sup>58</sup>See generally *Nat’l Shawmut Bank v. Joy*, 315 Mass. 457, 472, 53 N.E.2d 113, 123 (1944) (suggesting that power of appointment is not property).

<sup>59</sup>UPC §1-201(3).

<sup>60</sup>See generally *Roth v. Jelley*, 45 Cal. App. 5th 655, 259 Cal. Rptr. 3d 9 (2020).

<sup>61</sup>Restatement (Second) of Trusts §66. See, however, §9.9.5 of this handbook (honorary trusts).

<sup>62</sup>Restatement (Third) of Trusts §44; Restatement (Second) of Trusts §112; 2 Scott & Ascher §12.1.

<sup>63</sup>Restatement (Third) of Trusts §44 cmt. b; Restatement (Second) of Trusts §112 cmt. b. See generally §5.2 of this handbook (class designations such as children, issue, heirs, and, relatives). See, *e.g.*, *Zutavern v. Zutavern*, 961 N.W.2d 807, 818-819 (Neb. 2021).

<sup>64</sup>2 Scott & Ascher §12.7. See generally §5.2 of this handbook (class designations such as children, issue, heirs, and relatives).

<sup>65</sup>2 Scott & Ascher §12.7. See generally §8.2.1 of this handbook (rule against perpetuities) and UTC §402(b).



is valid.<sup>66</sup> “When a trust is created for members of a class, suit to redress or enjoin a breach of trust can be maintained by any member of the class.”<sup>67</sup> This would apply to declarations of trust as well.<sup>68</sup> Under the common law, however, a trust created for the benefit of an indefinite class of persons will fail, and a resulting trust will be imposed,<sup>69</sup> *e.g.*, a trust for all of X’s friends or for all of X’s relatives.<sup>70</sup> Note, however, that under the UTC, a trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary, or for a noncharitable but otherwise valid purpose to be selected by the trustee.<sup>71</sup> The trust, though, may not be enforced for more than twenty-one years.<sup>72</sup> The Restatement (Third) of Trusts is generally in accord.<sup>73</sup>

**Animals and inanimate objects.** Trusts for the benefit of animals or of inanimate objects have been sustained, even when not charitable.<sup>74</sup> These trusts, however, depend upon the honor of the trustee as there is no person who as beneficiary can apply to the court for enforcement.<sup>75</sup> If the named trustee does not carry out the trust, the property will be held upon a resulting trust.<sup>76</sup> The Restatement (Third) of Trusts would

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<sup>66</sup>See Restatement (Second) of Trusts §120. *See generally* §5.2 of this handbook (class designations such as children, issue, heirs, and relatives). *See, e.g.*, *Zutavern v. Zutavern*, 961 N.W.2d 807, 818-819 (Neb. 2021).

<sup>67</sup>Restatement (Third) of Trusts §45 cmt. f. “The fact that a member of the class may ultimately take nothing does not prevent that beneficiary from maintaining suit; each of the beneficiaries of such a trust is in this position, for if none could sue the trustee might commit a breach of trust with impunity.” Restatement (Third) of Trusts §45 cmt. f. *See, e.g.*, *Zutavern v. Zutavern*, 961 N.W.2d 807, 818-819 (Neb. 2021).

<sup>68</sup>Restatement (Third) of Trusts §45 cmt. g.

<sup>69</sup>See Restatement (Third) of Trusts §45; Restatement (Second) of Trusts §123. *See generally* 2 Scott on Trusts §123; *Nat’l Shawmut Bank v. Joy*, 315 Mass. 457, 463, 53 N.E.2d 113, 118 (1944).

<sup>70</sup>2 Scott & Ascher §12.9 (noting, however, that a limited or special nonfiduciary power of appointment in someone that may be exercised in favor of X’s friends or relatives would not fail for indefiniteness). *See generally* §8.1 of this handbook (powers of appointment).

<sup>71</sup>UTC §409(1). *See generally* §9.9.5 of this handbook (honorary trusts).

<sup>72</sup>UTC §409(1).

<sup>73</sup>Restatement (Third) of Trusts §§46 (Members of an Indefinite Class as Beneficiaries), 47 (Trusts for Noncharitable Purposes). *See generally* §9.29 of this handbook (the adapted trust) and §9.27 of this handbook (the purpose trust).

<sup>74</sup>*See generally* 2 Scott on Trusts §124. *See also* UTC §408 (trust for care of animal); §9.9.5 of this handbook (honorary trusts).

<sup>75</sup>*See generally* Restatement (Second) of Trusts §124 cmt. d. *But see* UTC §408(b) (authorizing enforcement of a trust for care of animal by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court).

<sup>76</sup>*See generally* Restatement (Second) of Trusts §404. *But see* UTC §408(b) (providing that a person having an interest in the welfare of the animal may request the court to appoint a person to enforce the

grant the person caring for a pet standing to enforce an “adapted trust” for the pet’s benefit<sup>77</sup> and allow the trust to continue for the life of the pet.<sup>78</sup> The UTC is generally in accord.<sup>79</sup>

**Standing to seek trust’s enforcement.** The beneficiary of a trust with even a “remote” equitable interest has standing (*locus standi*) to seek its enforcement, to include having the trust property secured.<sup>80</sup> Nor is *locus standi* dependent upon the size of the equitable interest.<sup>81</sup> A beneficiary would have standing to bring an action seeking to remedy a breach of trust that is allegedly harming principal even in a case where the beneficiary is entitled to net trust-accounting income only.<sup>1</sup> “It is different where ...[one]...has no existing equitable interest, vested or contingent, but only a mere possibility of a future interest—an expectancy or *spes successionis*.”<sup>82</sup> Just as a person who might incidentally benefit from the performance of a contract cannot enforce the contract,<sup>83</sup> so also “...a person who merely benefits incidentally from the performance of the trust is not a beneficiary.”<sup>84</sup> Thus, a trust to pay someone’s tuition at a specified educational institution does not make the institution a trust beneficiary.<sup>85</sup> Nor usually would a direction to the trustee in the terms of the trust to employ a particular individual in the administration of the trust bestow on that individual beneficiary status.<sup>86</sup> Likewise, that a trustee is compensated from the trust estate for his services alone would not make him a trust beneficiary.<sup>87</sup> Even though someone who benefits incidentally from the performance of a trust may not enjoy the status of a beneficiary, that person might still under certain circumstances have access to the trust estate as a creditor of the trustee, provided there is recourse

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trust or to remove a person appointed). *See, however*, §9.9.5 of this handbook regarding the enforceability of trusts for pets under the UTC and the UPC.

<sup>77</sup>Restatement (Third) of Trusts §47, cmt. f.

<sup>78</sup>Restatement (Third) of Trusts §47, cmt. d(2).

<sup>79</sup>*See* §9.9.5 of this handbook (honorary trusts).

<sup>80</sup>Lewin ¶138-11 (England); *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955) (U.S.).

<sup>81</sup>Lewin ¶138-11 (England); *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955) (U.S.). *See, e.g.*, *Trust Under Will of Augustus T. Ashton*, 260 A.3d 81 (Penn. 2021).

<sup>1</sup> *See, e.g.*, *Trust Under Will of Augustus T. Ashton*, 260 A.3d 81 (Penn. 2021).

<sup>82</sup>Lewin ¶138-11 (England).

<sup>83</sup>2 *Scott & Ascher* §12.13; 4 *Scott & Ascher* §24.4.

<sup>84</sup>Restatement (Third) of Trusts §48.

<sup>85</sup>Restatement (Third) of Trusts §48 cmt. a, illus. 3.

<sup>86</sup>Restatement (Third) of Trusts §48 cmt. b; 2 *Scott & Ascher* §12.13.3 (noting, however, that there is the rare case when a direction to employ someone is for the purpose of providing a benefit to that person, in which case that person will enjoy the status of a beneficiary).

<sup>87</sup>Restatement (Third) of Trusts §48 cmt. c; *see, e.g.*, *Kim v. Seung Chong*, 294 Va. 433, 807 S.E.2d 216 (2017) (“Neither Brian’s entitlement to compensation as executor and trustee, nor his power as trustee to choose...[others as]...beneficiaries of certain Trust property make him a beneficiary of the Will or Trust.”).

to the trust estate;<sup>88</sup> or as a creditor of the beneficiary, provided the equitable interest is creditor accessible.<sup>89</sup>

To summarize, any beneficiary of a trust would have standing to seek its enforcement in the courts, provided the litigation is aimed at vindicating the particular beneficiary's equitable property interest incident to the particular trust relationship, *whether that interest is present or future, vested or contingent*.<sup>90</sup> That a beneficiary, whether named or a member of a defined class, may ultimately take nothing will not prevent that beneficiary from maintaining suit.<sup>2</sup> Were it otherwise, a trustee could get away with a breach of trust that adversely affected contingent equitable property rights, that is rights subject to conditions precedent.<sup>3</sup> The Restatement (Third) of Trusts, specifically the official commentary to §94, is in accord.

The Restatement (Third), however, is sending mixed signals as to whether the settlor of a trust, *qua* settlor, would have standing to seek its enforcement. As noted above, the §94 commentary confirms that one “who holds a reversionary interest by operation of law” under a noncharitable (private) trust is a beneficiary of that trust. Under classic principles of property and trust law, the settlor of a noncharitable (private) trust retains by operation of law a nonpossessory vested equitable reversionary property interest.<sup>91</sup> If the trust eventually terminates in favor of designated equitable remaindermen, then the equitable reversionary property interest extinguishes before the settlor can ever come into possession of the legal title to the underlying property; if the trust fails in mid-course, then legal title to the underlying property becomes possessory via the imposition of a resulting trust.<sup>92</sup> Ergo the settlor, *qua* settlor, is a beneficiary of the trust that he has established and accordingly would have standing to seek the trust's enforcement in the courts.

There is elsewhere, however, seemingly conflicting official §94 commentary, which states: “Neither the settlor of a private trust nor the personal representative or successors in interest of the settlor can, *as such*, maintain a suit against the trustee to enjoin or redress a breach of trust or otherwise to enforce the trust, absent contrary legislation.”<sup>93</sup>

Perhaps this apparent conflict can be reconciled if, for the holder of an equitable reversionary property interest to qualify as a trust beneficiary, his interest in the underlying property has to have already ripened

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<sup>88</sup>See generally 2 Scott & Ascher §12.13.2 (Debts Arising During Administration); §7.3.2 of this handbook (agreements with nonbeneficiaries to limit trustee's contractual liability) and §7.3.3 of this handbook (trustee's liability as legal owner in tort to nonbeneficiaries).

<sup>89</sup>See generally A.W. Gans, *Intervention in litigation by one claiming interest in fruits thereof as trust beneficiary*, 2 A.L.R.2d 227; §5.3.3.3 of this handbook (discretionary provisions and other restraints upon voluntary and involuntary transfers of the equitable interest including the spendthrift clause).

<sup>90</sup>Thus, a beneficiary with no current right to trust-accounting income might well not be granted standing to compel the trustee to make the trust estate more productive of trust-accounting income. See, e.g., *In re Rosemary C. Ford Inter Vivos QTIP Tr.*, 2017 PA Super 400, 176 A.3d 992 (Pa. Super. Ct. 2017).

<sup>2</sup> See *Zutavern v. Zutavern*, 961 N.W.2d 807, 819 (Neb. 2021).

<sup>3</sup> See *Zutavern v. Zutavern*, 961 N.W.2d 807, 819 (Neb. 2021).

<sup>91</sup>See generally §4.1.1.1 of this handbook (the equitable reversionary interest).

<sup>92</sup>See generally §4.1.1.1 of this handbook (the resulting trust).

<sup>93</sup>Restatement (Third) of Trusts §94 cmt. d(2).

into a possessory right.

For a general discussion of whether the settlor of a trust, *qua* settlor, should have standing to seek the trust's enforcement in the courts, see §4.1.2 of this handbook.

**Assignees of the equitable interest.** Some equitable interests are not assignable, *e.g.*, a permissible beneficiary's contingent equitable interest under a discretionary trust, but some are. A trustee on actual or constructive notice<sup>94</sup> of the valid assignment of an equitable interest under his trust, *e.g.*, the assignment by a beneficiary of his or her fully vested and assignable equitable remainder interest, owes “the same duties towards the assignee or disponee as he formerly owed to the beneficiary.”<sup>95</sup> For all intents and purposes, the assignee or disponee is a beneficiary.<sup>96</sup> On the other hand, if an assignment is invalid due to an enforceable spendthrift clause, then not only does the trustee owe the purported assignee no duties but the purported assignee would also lack the requisite standing to litigate matters pertaining to the trust.<sup>97</sup>

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<sup>94</sup>Lewin ¶126-47.

<sup>95</sup>Lewin ¶126-46.

<sup>96</sup>See generally 4 Scott & Ascher §24.4.3 (suggesting that “the transferee of a beneficiary's interest becomes, as a result of the transfer, a beneficiary and can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust”); UPC §1-201(3) (deeming one who owns by assignment an equitable interest under a trust a beneficiary); A.W. Gans, *Intervention in litigation by one claiming interest in fruits thereof as trust beneficiary*, 2 A.L.R.2d 227.

<sup>97</sup>See, *e.g.*, *In the Est. of Lee*, 551 S.W.3d 802 (Tex. 2018) (“Lee’s standing to contest the Second Codicil is dependent on the validity of the Agreement. Because Whitten attempted to assign her beneficial interest in the spendthrift trust to Lee via the Agreement, the Agreement is invalid for violating the spendthrift clause. Consequently, the Agreement cannot serve as a basis for Lee’s standing to contest the Second Codicil.”).