Title

Reversionary interests are always vested.

Text

It has been a fundamental principle of American property law that reversionary interests, whether legal or equitable, are always vested. Such interests being vested *ab initio*, they cannot violate the rule against perpetuities. This is a topic that is taken up in §4.1.1.1 of *Loring and Rounds: A Trustee's Handbook* [pages 262-280 of the 2018 Edition], which sub-section is reproduced in its entirety in the Appendix below. One Texas court, however, appears not to have gotten the message: "…[the terms of the trust provide that if]…K.K.W and his children and remote descendants die before the trust terminates, the trust's principal and income shall be distributed to Father, if living, otherwise to Mother, if living. Mother, therefore, has a contingent remainder interest and contingent reversionary interest in trust property." See *In the interest of K.K.W.*, No. 05-16-00795-CV, 2018 Tex. App. LEXIS 6539 (Tex..App.—Dallas August 20, 2018). If Mother's *reversionary* interest were truly contingent upon her surviving some event (such as a total wipe-out of a class of her relatives), then the equitable interest would be perpetually in limbo should she not to survive the event. This would be a clear violation of the Rule Against Perpetuities. We would be in uncharted waters, however, as to what the consequences of such a violation would be. Suffice it to say that if her reversionary interest had actually been vested *ab initio*, then such a violation would trigger a passage of the entrusted property itself upon a resulting trust from the trustee to her executor (personal representative). These waters have been well-charted, as we document below in the Appendix to this posting.

Appendix

§4.1.1.1 The Resulting Trust and the Equitable Reversionary Interest: A General Discussion [from *Loring and Rounds: A Trustee's Handbook* (pages 262-280 of the 2018 Edition)].

> *The default or last-resort character of the resulting trust is illustrated by its frequent avoidance through application of constructional rules, such as that providing for an acceleration of remainders…; or even occasionally by finding gifts by implication.*[46]
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> *[A] contract, unlike a trust for a limited purpose, is not capable of occasioning a resulting trust.*[47]

The rationale for the resulting trust. A trust's governing instrument—if properly drawn—designates who takes title to the entrusted property once the trust terminates, whether the termination is intentional or unintentional.[1]. In the absence of such a designation, the property does not usually accrue to the trustee personally, although there are some rare exceptions. To put it another way, if an express trust is fully performed (or fails) without the subject property having been exhausted, the title-holding trustee may not

[46]Restatement (Third) of Trusts, Reporter's Notes on §7 cmt. a. *See generally* §8.15.47 of this handbook (acceleration of vested and contingent equitable remainders).

[47]Lewin ¶8-52 (England).

[1] The perpetuities saving clause, for example, designates who takes in the event of a prophylactic termination to avoid a violation of the rule against perpetuities. Such clauses are taken up generally in §8.2.1.6 of this handbook.

walk away with what's left, ,[48] unless there is properly admissible evidence that the settlor intended otherwise or there is one of several quirky exceptions to the general default law that provides otherwise..[49] (The "quirky exceptions" are discussed further on in this section.) A reversion is triggered because it is presumed that the settlor never intended to make a gift of what's left (or of the entire trust estate should the trust fail *ab initio*) to the trustee personally.[50] Instead, the property reverts to the settlor, or passes to the settlor's probate estate if the settlor is deceased at the time of termination, reversionary interests being always vested. It is said the property passes "upon a resulting trust."

A resulting trustee who wrongfully keeps the subject property for himself is unjustly enriched.[51] The procedural equitable remedy might well be his judicial conversion into a constructive trustee;[52] the substantive equitable remedy would likely be a specific enforcement or restitution order.[53]

Triggering events. A resulting trust is the equitable mechanism that gets the legal title of the balance of the trust estate from the trustee of an express trust back into the hands of the settlor or the settlor's probate estate[54] when the trust fails or has been fully performed.[55] In England, a resulting trust is imposed in the following situations:

- Trusts that fail at the outset for perpetuity, uncertainty, lapse, or some other reason;[56]
- Trusts to be declared in the future;[57]
- Events not provided for;[58]
- Surplus assets and surplus income;[59]
- Failure of marriage settlement;[60]
- Disclaimer, release or surrender by beneficiary;[61] and
- Trust declared as part of estate or fund.[62]

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[48]*See generally* 6 Scott & Ascher §§42.1.1 (When Trust Instrument Does Not Dispose of Entire Beneficial Interest), 41.1.1 (Ways in Which an Express Trust Can Fail).

[49]*See generally* 6 Scott & Ascher §41.2 (Rebutting the Resulting Trust).

[50]*See generally* Lewin ¶7-02 (England); 6 Scott & Ascher §40.1.1 (Distinguishing Resulting Trusts from Express Trusts) (U.S.).

[51]*See generally* §8.15.78 of this handbook (unjust enrichment). *See also* Restatement of Restitution §160 cmt. b (constructive trust and resulting trust).

[52]*See generally* §7.2.3.1.6 of this handbook (the constructive trust as a procedural equitable remedy).

[53]*See generally* §7.2.3.4 of this handbook (the specific enforcement order as a substantive equitable remedy) and §7.2.3.3 of this handbook (the restitution order as a substantive equitable remedy).

[54]Lewin ¶8-19 (England); 6 Scott & Ascher §40.1.1 (U.S.).

[55]Lewin ¶8-02.

[56]Lewin ¶8-04 (England). *See also* 6 Scott & Ascher §41.1.1 (U.S.). *See, e.g.*, Jasser v. Saadeh, 103 So.3d 982 (Fla. App. 2012) (U.S.) (trust being void *ab initio*, a resulting trust is triggered).

[57]Lewin ¶8-05.

[58]Lewin ¶8-06 (England). *See also* 6 Scott & Ascher §§41.3–41.12.2 (U.S.).

[59]Lewin ¶8-07 (England). *See also* 6 Scott & Ascher §42.1.1 (U.S.). *See generally* §9.31 of this handbook (noting that with respect to property held in trust to secure the contractual rights of bondholders, any surplus reverts upon a resulting trust back to the issuer of the bonds). *See also* Bogert §250 (U.S.) (confirming that any entrusted surplus security held in a corporate trust would become the subject of a resulting trust, unless the governing trust indenture were to provide otherwise).

[60]Lewin ¶8-09 (England). *See generally* §9.30 of this handbook (the English marriage settlement).

[61]Lewin ¶8-11 (England). *See also* 6 Scott & Ascher §41.2.1 (U.S.).

[62]Lewin ¶8-12 (England).

The United States differs only at the margins as to what events can trigger the imposition of a resulting trust. Here is one commentator's list:

- Failure to name a beneficiary;[63]
- Beneficiary nonexistent;[64]
- Beneficiary unascertainable;[65]
- Named beneficiary of testamentary trust predeceases testator causing a lapse;[66]
- Failure to designate beneficiary properly;[67]
- Beneficiary incapable of taking beneficial interest;[68]
- Indefiniteness of beneficiaries;[69]
- Indefiniteness of trust purposes;[70]
- Beneficiary renounces beneficial interest;[71]
- Disposition invalid for illegality;[72]
- Trust imposed on only a part of the trust res;[73]
- Trust imposed on all the res for a limited period only; and[74]
- Entire res not needed to accomplish the trust's purposes (surplus).[75]

Action of trustee generally not a triggering event. A breach of a trust generally does not cause its failure and the imposition of a resulting trust,[76] nor would the refusal of the trustee of a discretionary trust to consider in good faith whether or not to distribute income and/or principal.[77]

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[63]6 Scott & Ascher §41.1.1 (U.S.).
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[65]6 Scott & Ascher §41.1.1 (U.S.).
[66]6 Scott & Ascher §41.1.1 (U.S.).
[67]6 Scott & Ascher §41.1.1 (U.S.).
[68]6 Scott & Ascher §41.1.1 (U.S.).
[69]6 Scott & Ascher §41.1.1 (U.S.).
[70]6 Scott & Ascher §41.1.1 (U.S.).
[71]6 Scott & Ascher §41.1.1 (U.S.).
[72]6 Scott & Ascher §41.1.1 (U.S.).
[73]6 Scott & Ascher §42.1.1 (U.S.).
[74]6 Scott & Ascher §42.1.1 (U.S.).
[75]6 Scott & Ascher §42.1.2 (U.S.).

[76]If a trust ought not to fail for want of a trustee, it certainly ought not to fail on account of a breach of trust, unless the terms of the trust so provide. *See* 6 Scott & Ascher §39.7.1 (No Reverter for Breach of Charitable Trust).

[77]In the event of a trustee's failure to exercise such a discretionary authority, the court may decline to compel the trustee to exercise the authority, appoint a special trustee solely for the purpose of exercising the authority, or exercise the authority itself. The court also might order that the subject property be distributed in equal shares to the members of the class of permissible beneficiaries. *See generally* 6 Scott & Ascher §41.4 (Trust for Members of Definite Class); §3.5.3.2(a) of this handbook (the discretionary trust). In the face of a trustee's failure to exercise discretionary authority to apply income and/or principal for the benefit of the "relatives" of a designated individual, the court might order that the subject property be distributed to those who would be the individual's heirs at law. *See generally* 6 Scott & Ascher §41.5

When a testamentary trust fails *ab initio*. If a *testamentary trust* fails at the outset, however, a resulting trust is not imposed, unless there has been a vesting of legal title to the subject property in the trustee.[78] The failed legacy or devise merely lapses.[79]

The partial failure of a trust. A trust's partial failure can trigger a resulting trust with respect to some but not all of the trust estate. There is the partial vertical failure and the partial horizontal failure.[80] An example of a partial vertical failure would be two sub-trusts, one of which lacks beneficiaries. The property in the failed sub-trust passes upon a resulting trust to the settlor or the settlor's probate estate, *together with the income that is thrown off by that property*.[81] The other sub-trust continues. An example of a partial horizontal failure would be a failed disposition of income but not of principal, or of principal but not of income.[82]

Some fact patterns. Here are three noncharitable trust fact patterns that do implicate the resulting trust. Only in the third would the subject property almost certainly return to the settlor or the settlor's probate estate upon a resulting trust.[83] In the first two, imposition of a resulting trust is just one of several possible outcomes.

> Situation #1:
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> *A* entrusts property to *B* for *C* in perpetuity. *C* subsequently dies.
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> Situation #2:
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> *A* entrusts property to *B* for *C* for life, then to *D*. *C* disclaims at the outset, or renounces in mid-course, the equitable interest.
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> Situation #3:
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> *A* entrusts property to *B* for *C* for life. *C* subsequently dies. There is no *D*.[84]

In Situation #1, there might well not be a reversion.[85] *C* arguably was the sole beneficiary, the one with the entire equitable interest other than the equitable right of reverter.[86] If that is the case, then upon *C*'s death, the trust property would become an asset of *C*'s probate estate.[87] The critical wording is *in*

(Trust for Relatives). Finally, the court may remove the trustee and appoint a suitable successor. *See generally* §7.2.3.6 of this handbook (removal).

[78]6 Scott & Ascher §41.1.

[79]*See generally* §8.15.55 of this handbook (lapse and antilapse).

[80]6 Scott & Ascher §41.1.2 (Partial Failure of Trust).

[81]6 Scott & Ascher §41.1.2 (Partial Failure of Trust).

[82]6 Scott & Ascher §41.1.2 (Partial Failure of Trust).

[83]*See generally* 6 Scott & Ascher §42.1.1 (When Trust Instrument Does Not Dispose of Entire Beneficial Interest).

[84]There could be any number of reasons why there is no remainderman, that is to say why there is no *D*. They range from a failure of the settlor to designate a remainderman in the terms of the trust to the creation of an equitable remainder that violates the rule against perpetuities. *See generally* 6 Scott & Ascher §41.1.1.

[85]*See generally* 6 Scott & Ascher §42.1.1 ("One must bear in mind, however, that although the terms of the trust provide for the payment of income to a designated beneficiary and fail to make any express provision with respect to the principal, the instrument may nevertheless be interpreted as giving the entire beneficial interest to the designated beneficiary, and not merely a life interest").

[86]Restatement (Third) of Trusts §49 cmt. c. *See generally* 3 Scott & Ascher §13.2.2.

[87]Restatement (Third) of Trusts §55.

perpetuity.[88] Had *A* assigned the nonpossessory equitable reversionary interest to *C* and had *C* died intestate and without heirs at law, then the law is unsettled as to whether the subject property would escheat to the state or revert upon a resulting trust to the settlor (or to the settlor's probate estate), notwithstanding the assignment.[89]

In Situation #2, a resulting trust is not necessarily imposed upon the income stream until such time as *C* actually does die.[90] It all depends upon what the settlor would have wanted, or most likely would have wanted.[91] If *D*'s equitable remainder interest is indefeasibly vested, then there likely would be an immediate acceleration to *D*.[92] The topic of acceleration is further discussed in Section 8.15.47 of this handbook.[93] If acceleration is not an option, then the income stream is diverted to the presumptive remaindermen until such time as *C* actually does die; income is accumulated for eventual payment to the actual remaindermen; or a resulting trust is imposed upon the income stream until such time as *C* actually does die.[94] The troublesome wording in the terms of the trust that all parties, including the court, must contend with is *C for life*.

Situation #3 is a common resulting trust fact pattern. There almost certainly would be an equitable reversion upon the death of *C*.[95] If pursuant to the terms of an express trust the income interest is for the life of the beneficiary only[96] (or for a term of years) and there is no other disposition of the property upon the beneficiary's death (or expiration of the term of years), then the trust property returns free of trust to the settlor or the settlor's probate estate upon a resulting trust, which is the equitable equivalent of a legal reversion.[97] Thus it cannot be said that *C* was the sole beneficiary,[98] unless *C* also was the settlor, in which case there might well have been a state of merger *ab initio*.[99] In other words, there would never have been a trust in the first place.[100]

The procedural mechanics. Here are the mechanics of imposing a resulting trust. In response to the petition or complaint of someone with a property or fiduciary interest in the entrusted property, the court in the exercise of its equitable powers orders that the trustee hold the property "upon a resulting trust" for the benefit of the settlor or the settlor's probate estate (or perhaps in the case of a valid assignment, for the benefit of the settlor's assignees); instructs the trustee as to who the rightful takers of the property are; and then orders that the legal title to the property be transferred to them. Once legal title duly leaves the trustee, the resulting trust terminates.[101] Because a resulting trust involves a fiduciary relationship between the trustee and the reversionary beneficiaries, the reversionary beneficiary who unreasonably delays in bringing an action against the trustee for breach of fiduciary duty must contend with the laches doctrine.[102] Laches

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[88]A provision for the benefit of C only that contained no time limitation whatsoever might well bring about the same result, even in the absence of the words "in perpetuity" or their equivalent.

[89]*See generally* 6 Scott & Ascher §41.1.4 (When Settlor Disposes of Entire Beneficial Interest).

[90]6 Scott & Ascher §42.1.2 (When There Is or Will Be a Surplus).

[91]6 Scott & Ascher §41.2.1 (Acceleration).

[92]6 Scott & Ascher §41.2.1 (Acceleration). *See also* §8.2.1.3 of this handbook (discussing the concept of vesting in the trust context).

[93]*See also* 6 Scott & Ascher §41.1.2.

[94]6 Scott & Ascher §41.2.1 (Acceleration).

[95]*See generally* 3 Scott & Ascher §13.2.2.

[96]Restatement (Third) of Trusts §49 cmt. c.

[97]5 Scott on Trusts §411. *See also* Nat'l Shawmut Bank v. Joy, 315 Mass. 457, 463, 53 N.E.2d 113, 119 (1944).

[98]3 Scott & Ascher §13.2.2.

[99]*See generally* §8.7 of this handbook (merger).

[100]*See generally* §8.7 of this handbook (merger).

[101]6 Scott & Ascher §40.7 (Termination of Resulting Trust).

[102]6 Scott & Ascher §40.6.

is generally covered in Sections 7.2.10 of this handbook and 8.15.70 of this handbook.

The statute of frauds and the resulting trust. The resulting trust, as is also the case with the constructive trust, is exempt from the statute of frauds applicable to trusts, a topic we cover in §8.15.5 of this handbook.

The beneficiary of a resulting trust is the settlor. The beneficiary of a resulting trust is the settlor of the terminated express trust. If there are multiple settlors, each takes upon the imposition of a resulting trust a share of the trust estate that is proportional to his or her contribution.[103] In the case of the imposition of a resulting trust, if the settlor had died intestate without heirs at law, any personal property would pass upon a resulting trust to the Crown or the State as *bona vacantia*.[104] Otherwise, the property would follow the fortunes of the residue of the settlor's probate estate, or pass by the laws of intestate succession in the event that the trust's failure had resulted in the failure (lapse) of the will's residuary disposition as well.[105] An equitable reversion is fully vested and assignable *ab initio*.[106] Thus the settlor of an ongoing express trust could actually assign the equitable reversion to the trustee of another express trust.[107]

The settlor of a trust is not always the one designated as such in the documentation. An outstanding equitable reversionary interest is a beneficial interest in the trust property that remains back with the settlor. It is superior to the trustee's legal interest[108] and may become possessory by operation of law through the mechanism of the resulting trust should the trust fail or become fully performed without the trust estate having been exhausted. By settlor we mean "the person who in reality provided the funds for the settlement, not necessarily the person who appears to be the settlor on the relevant documents."[109] Thus, if *A*, in exchange for fair consideration furnished by *B*, transfers certain property to *B* in trust for *C*, then *B* is both settlor and trustee.[110] Though the legal title came from *A*, equity considers the transferee to be the actual settlor, even when the documentation's terminology suggests otherwise.[111] "If the trust fails, the transferee can therefore keep the property, and no resulting trust arises."[112] The consideration, however, must have had a value that was more or less commensurate with the value of the entrusted property at the time of the exchange. In other words, the exchange cannot have been a sham, such as if the consideration had only been a nominal sum. The logic is the same when the owner of property transfers it for consideration provided *by a third person* upon a trust that fails, or whose purposes are subsequently accomplished without

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[103]*See generally* 6 Scott & Ascher §§41.1.5 (Trust Fails), 42.1.3. (Surplus), 42.3 (Surplus in the Case of a Charitable Trust).

[104]*See generally* §8.15.46 of this handbook (*bona vacantia* doctrine); 3 Scott & Ascher §14.10.3 (Death of Beneficiary without Heirs); 6 Scott & Ascher §41.1.3 (Resulting Trust When Testator Dies without Heirs).

[105]*See generally* §8.15.55 of this handbook (lapse and antilapse) and §8.26 of this handbook (will residue clauses).

[106]*See* §4.1.1 of this handbook (the reversionary interest), including the introductory quotation.

[107]*See, e.g.*, New England Trust Co. v. Sanger, 337 Mass. 342, 348–349, 149 N.E.2d 598, 602 (1958) (involving the effective funding of one express trust with the equitable reversion incident to another express trust).

[108]If, for example, those who take upon a resulting trust cannot be ascertained, absent a contrary statute or trust provision, the trust property will be held for the state. Restatement (Third) of Trusts §8 cmt. c(1). The trustee may not walk away with the property or divert it to other purposes. Restatement (Third) of Trusts §8 cmt. c(1).

[109]Lewin ¶8-18 (England). *See also* 6 Scott & Ascher §41.13 (U.S.).

[110]*See* 6 Scott & Ascher §41.13 (To Whom Trust Results).

[111]*See* 6 Scott & Ascher §41.14 (suggesting that under these circumstances *A* would simply be a vendor). *See also* 6 Scott & Ascher §42.4 (suggesting that when the transferor receives consideration for the transfer in trust, the transferor is merely a vendor and has no further interest in the property).

[112]6 Scott & Ascher §41.14 (When Transferee Provides Consideration for Transfer in Trust).

the trust estate being exhausted. In either case a resulting trust arises not in favor of the transferor but in favor of the person who provided the consideration.[113] A third person who provides consideration for the establishment of a declaration of trust also would be entitled to the trust property, not the one designated in the trust documentation as the declarant.[114]

Resulting trust versus *cy pres* (charitable trusts). In the case of a charitable trust, a court would be more amenable to enforcing a resulting trust in lieu of applying *cy pres* were the trust to fail at the outset than were it to fail in mid-course.[115] This is the case whether the purposes of an express trust cannot be accomplished[116] or have been fully accomplished without exhausting the trust estate.[117] For more on *cy pres* as an alternative to the imposition of a resulting trust, see Section 9.4.3 of this handbook.

Constraining the resulting trust in the charitable context. We should note here that in response to concerns "about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose,"[118] the Uniform Trust Code would sharply curtail the ability of a settlor to create *a charitable trust* whose property would revert to the settlor's personal representative, *i.e.*, the settlor's probate estate, upon the accomplishment of that purpose (or upon the impossibility of its fulfillment), even when the purpose is a limited one.[119] This is a topic we take up in Section 9.4.3 of this handbook as part of our coverage of the *cy pres* doctrine.

Dissolution of noncharitable unincorporated association. In the case of a trust established for the benefit of a noncharitable unincorporated association, the trustee may not walk away with the trust estate in the event the association dissolves.[120] Instead, depending upon what the association's purposes were and how the trust was funded, there should be:

- Retention of the subject property in trust for the benefit of the successor association, if there is one;[121]
- A division of the balance of the trust estate among the members who are on the rolls of the association at the time of dissolution, either in equal shares or in proportions that correspond to what was contributed by each to the trust fund;[122]
- An imposition of a resulting trust on the balance for the benefit of all contributors, each receiving an amount that is proportional to what he or she contributed to the trust fund;[123]
- Dedication of the subject property to an alternate purpose as provided by the terms of the trust;[124]
- Disposition of the subject property as provided by statute;[125] or
- A transfer of the balance to the state as *bona vacantia*.[126]

In the case of the dissolution of a business trust with transferable shares of beneficial interest, for

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[113]6 Scott & Ascher §41.15 (Failure). The transferor is merely a "vendor." 6 Scott & Ascher §41.15 (Failure). *See also* 6 Scott & Ascher §42.5 (Surplus).

[114]6 Scott & Ascher §§41.16 (Failure), 42.6 (Surplus).

[115]*See generally* 6 Scott & Ascher §41.3 (Failure of Charitable Trusts).

[116]*See generally* 6 Scott & Ascher §41.3 (Failure of Charitable Trusts).

[117]*See generally* 6 Scott & Ascher §42.3 (Surplus in the Case of a Charitable Trust).

[118]UTC §413 cmt.

[119]UTC §413. *See generally* 6 Scott & Ascher §39.5.2.

[120]6 Scott & Ascher §42.1.4.

[121]6 Scott & Ascher §42.1.4.

[122]6 Scott & Ascher §42.1.4.

[123]6 Scott & Ascher §42.1.4.

[124]6 Scott & Ascher §42.1.4.

[125]6 Scott & Ascher §42.1.4.

[126]6 Scott & Ascher §42.1.4.

example, those who own the shares at the time of dissolution are generally entitled to take pro rata legal interests in the underlying property.[127] When a country club dissolves, it is likely that any trust property held for the club will be distributed outright and free of trust to those who are on the club's membership rolls at the time of dissolution, *in equal shares*.[128] Had the trust been for the benefit of an association of workers should they at some point go on strike, there is precedent for current members in the event of dissolution taking outright and free of trust the subject property, but *in proportion to what each had paid into the fund*, *i.e.*, not necessarily in equal shares.[129] Had the purpose of the trust merely been to provide financial assistance to workers who might from time to time fall on hard times, then, upon dissolution, a resulting trust might well be imposed on the balance of the trust estate for the benefit of all contributors, each taking in proportion to his or her contribution.[130] This result would be all the more likely if management has paid into the fund as well.[131] Take, however, a trust for the benefit of an unincorporated association whose purpose is to provide fixed annuities to the widows of its members from time to time. Should the association at some point become extinct, all members having died and all annuity obligations having been satisfied, then there is precedent for the balance of the trust estate passing to the state as *bona vacantia*, rather than upon a resulting trust to the contributors' personal representatives (probate estates).[132] The longer such an association has been in existence, the more attractive the *bona vacantia* option, at least from a practical standpoint.[133]

Restraints on alienation of reversionary interest are unenforceable. A spendthrift clause in a trust purporting to restrain alienation of the reversionary interest or to insulate it from the reach of the settlor's creditors is generally unenforceable.[134] This durable right of alienation accrues to the settlor's successors in interest as well.

Only an affirmative gift over can trump the equitable reversion. While the terms of a trust may provide that the equitable reversionary interest shall not accrue to the settlor's probate estate upon the death of the settlor should the trust fail or its purposes be fulfilled, such a provision would be unenforceable in the absence of an effective gift-over or an effective assignment of the reversion by the settlor.[135] In other words, there needs to be a remainderman available to take the legal title to the subject property from the trustee. "The settlor's heirs are excluded only if there is a provision, express or implied, that someone else is to have the property."[136] As Blackstone has noted: "A reversion is never … created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in praesenti*, though taking effect *in futuro*."[137]

The Rule against Perpetuities and the resulting trust. In the United States, reversionary interests are

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[127]6 Scott & Ascher §42.1.4. *See generally* §9.6 of this handbook (the business trust explained).

[128]6 Scott & Ascher §42.1.4. "Former members have no claim to any part of the property because their interests ceased when their memberships ceased." 6 Scott & Ascher §42.1.4. "It is immaterial that some have paid dues for longer than others, because they have presumably received greater benefits." 6 Scott & Ascher §42.1.4.

[129]6 Scott & Ascher §42.1.4.

[130]6 Scott & Ascher §42.1.4.

[131]6 Scott & Ascher §42.1.4.

[132]6 Scott & Ascher §42.1.4. *See generally* §8.15.46 of this handbook (*bona vacantia* doctrine).

[133]6 Scott & Ascher §42.1.4.

[134]6 Scott & Ascher §40.4 (Transfer by Beneficiary). The settlor, however, could assign the equitable reversionary interest to the trustee of another spendthrift trust for the benefit of a third person. In that case, the spendthrift clause of the other trust might well be enforceable with respect to the assignment.

[135]6 Scott & Ascher §41.2 (Rebutting the Resulting Trust).

[136]6 Scott & Ascher §41.2 (Rebutting the Resulting Trust).

[137]Blackstone's Commentaries, Book II, 175.

generally exempt from the Rule against Perpetuities as they are vested *ab initio*.[138] In England, on the other hand, a reversion upon the happening of a condition subsequent now implicates the Rule.[139] The Rule is also implicated when the duration of an English charitable trust is subject to a contingency-based limitation, *e.g.,* as long as a certain state of affairs continues.[140] Thus, an equitable reversion upon the failure of an English charitable trust would be unenforceable if the interest were to become possessory beyond the period of the Rule.[141] *Cy pres* would then have to be applied.[142]

Resulting trustee a fiduciary. From a trust's inception, the settlor possesses the possibility of reverter, which is a fully transferable nonpossessory vested equitable interest in the subject property.[143] The trustee is in a fiduciary relationship with the one who takes, or would take, upon imposition of a resulting trust, unless they are one and the same.[144] Just as one may not contract with oneself, so also one may not owe oneself a fiduciary duty.

Fiduciary duty of trustee to the settlor. The resulting trust represents the law's commitment to protecting the settlor's property rights. The concept of the trust begins with the settlor, exists to fulfill the settlor's wishes as reflected in the terms of the trust, and ultimately ends with the settlor or the settlor's probate estate to the extent that the terms of the trust cannot be fulfilled or are unknown.[145] "Every legal estate and interest not embraced in an express trust and not otherwise disposed of remains in the creator."[146] The trustee is the steward of someone else's property—in part the steward of the reversionary interest.[147] The scrupulous trustee understands this. On the other hand, "if the settlor is still alive and remains competent, he or she cannot ordinarily hold the trustee liable for distributing the trust property in accordance with the terms of the trust instrument, even if the trust is invalid."[148] It would be unfair for the settlor to fault the trustee for endeavoring to carry out the settlor's own instructions.[149]

When the trustee may walk away with the property in lieu of the imposition of a resulting trust. When an express trust is fully performed and there is property still remaining in the trust estate, a resulting trust is imposed on the surplus.[150] Generally the trustee may not walk away with the property, unless the terms of the express trust provide otherwise.[151] "Whether the trust is inter vivos or testamentary, the traditional view is that extrinsic evidence of the settlor's declarations that the trustee is to be permitted to keep the property if the trust is fully accomplished without exhausting the trust estate is ordinarily inadmissible."[152]

At English common law, there were some quirky default exceptions to the general default rule that the beneficial interest in a trust may not accrue to the trustee. Here are two:

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[138]6 Scott & Ascher §39.7.2.

[139]*See generally* 6 Scott & Ascher §39.7.2

[140]6 Scott & Ascher §39.7.3 (Limitations).

[141]*See generally* 6 Scott & Ascher §39.7.2

[142]*See generally* §9.4.3 of this handbook (the *cy pres* doctrine).

[143]J. Gray, The Rule Against Perpetuities §§113, 603.9 (4th ed. 1942).

[144]6 Scott & Ascher §40.6.

[145]*Cf.* §9.27 of this handbook (the purpose trust) and §9.29 of this handbook (the adapted trust).

[146]N.Y. Est. Powers & Tr. Law §7-1.7.

[147]*Cf.* §9.27 of this handbook (the purpose trust) and §9.29 of this handbook (the adapted trust).

[148]4 Scott & Ascher §24.31.1 (Liability for Distributions Under Invalid, Amended, Revoked, or Ineffective Trust Instruments).

[149]4 Scott & Ascher §24.31.1 (Liability for Distributions Under Invalid, Amended, Revoked, or Ineffective Trust Instruments).

[150]*See generally* 6 Scott & Ascher §42.2 (Rebutting the Resulting Trust).

[151]*See generally* 6 Scott & Ascher §42.2 (Rebutting the Resulting Trust).

[152]*See generally* 6 Scott & Ascher §42.2 (Rebutting the Resulting Trust).

- If a person who held land free of trust died intestate and without heirs at law, the land escheated to his overlord.[153] "In the case of equitable interests, however, there was no tenure, and since the equitable interest was not held of any overlord, there was no escheat of the equitable interest."[154] The consequence of all of this was that the trustee actually could keep the land, the doctrine of *bona vacantia* applying only to personal property.[155] In 1884, Parliament closed this loophole.[156] It enacted a statute that provided that the beneficial interest in the land, rather than accruing to the trustee, passes to the Crown.[157]

- In the case of a trust for the benefit of one person, say *C*, whose duration was keyed to the life span of another, say *X*, *C* is said to have an "equitable estate *pur autre vie.*"[158] At one time, if *C* were alive when the trust was created, assuming the underlying property were land, but died before *X*, and if the terms of the trust had not specified that the property was to be held for the benefit of "C *and his heirs*," then, after *C*'s death, "the trustee could simply hold the … [the property]… for the trustee's own benefit until the death of the measuring life,"[159] namely, *X*. Nowadays, the equitable interest would be held in the interim for the benefit of "those entitled to the … [probate]… estate … [of *C*]…, as determined under the law of intestate succession or by will,"[160] unless, of course, the terms of the trust had provided otherwise. Note that the law French term for the measuring life is *cestui que vie*.

The Restatement (Third) of Trusts has its own limited default exception to the imposition of a resulting trust upon the failure of an express trust, an exception that also could bring about a windfall for the trustee. If the express trust fails for illegality "and the policy against permitting unjust enrichment of a transferee is outweighed by the policy against giving relief to one who has entered into an illegal transaction,"[161] the trustee may keep the property free of trust.[162]

This is not new law. An example of such a situation would be the debtor who transfers property to an innocent trustee for the debtor's own benefit in an effort to defraud creditors. The court might well decide neither to enforce the terms of the express trust nor impose a resulting trust, leaving the trustee to walk away with the property.[163] So also if one establishes an inter vivos trust for one's own benefit in order to clothe *the trustee* with apparent ownership, causing those who may transact with the trustee in his individual capacity to be misled as to the trustee's personal creditworthiness.[164] The trustee may keep the property rather than return it.[165] He who comes into equity must come with clean hands.[166] Equity reluctantly would rather leave things as they are than afford "comfort and encouragement to wrongdoing."[167] The settlor's probate estate, or the assignee of the equitable nonpossessory reversionary for that matter, would generally

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[153]*See generally* 3 Scott & Ascher §14.10.3.

[154]Scott on Trusts §411.4 (1939 ed.).

[155]*See* §8.15.46 of this handbook (*bona vacantia*). *See also* 6 Scott & Ascher §41.1.5 (Multiple Donors).

[156]*See generally* 3 Scott & Ascher §14.10.3.

[157]*See* Intestates Estates Act, 1884, 47 & 48 Vict., c. 71, §4. *See also* 6 Scott & Ascher §41.1.3 (text in footnotes).

[158]*See generally* Restatement (Third) of Property (Wills and Other Donative Transfers) §24.5, cmt. c. (providing examples of estates *pur autre vie*).

[159]3 Scott & Ascher §14.10.2.

[160]3 Scott & Ascher §14.10.2.

[161]Restatement (Third) of Trusts §8.

[162]Restatement (Third) of Trusts §8 cmt. i.

[163]*See generally* 6 Scott & Ascher §41.12.

[164]6 Scott & Ascher §41.12.

[165]6 Scott & Ascher §41.12.

[166]*See generally* §8.12 of this handbook (selected equity maxims).

[167]Haggerty v. Wilmington Trust Co., 194 A. 134, 137 (Del. Ch. 1937).

be no better off.[168] Again, we are talking here about inter vivos trusts, not testamentary trusts.[169]

On the other hand, if the trustee has been more at fault than the settlor, then a resulting trust is imposed.[170] The parties are said not to be *in pari delicto*.[171] So also if the settlor demands the property back before the illegal purpose is accomplished.[172] A settlor who is ignorant of the facts that make the trust illegal also may get the property back.[173] Finally, "[i]n the case of a *testamentary trust* for an illegal purpose, the trustee is never permitted to keep the property; a resulting trust always arises in favor of the testator's estate."[174]

Avoiding imposition of a resulting trust by power of appointment exercise. *Generally* **.** Assume the following poorly drafted testamentary trust: *A* (settlor/testator) to *B* (trustee) for *C* (equitable life beneficiary) for life. Unfortunately, no remainderman is designated. *C*, however, is granted a general testamentary power of appointment. If *C* were to effectively and fully exercise the power, no resulting trust of the trust corpus would be imposed in favor of *A*'s probate estate. This is clear. But what if *C*'s will makes no reference whatsoever to powers of appointment? The only dispositive term is a plain-vanilla residuary clause. And what if the trust were to continue for the benefit of certain other persons before failing for want of a remainderman to take the legal title from the trustee? And finally, what if *C* were to, say, exercise the testamentary power in a way that violates the rule against perpetuities? What then? We first consider whether a plain-vanilla will residue clause might serve, under certain circumstances, to effectively exercise a general testamentary power of appointment in favor of the residuary takers, thus obviating the need for the imposition of a resulting trust.

Plain-vanilla will residue clauses that exercise general testamentary powers of appointment. In §8.1.1 of this handbook, we note that there is some old law to the effect that a plain-vanilla will residue clause exercised all general testamentary powers of appointment that the testator had possessed over entrusted property. Of course, such a clause would not have exercised a power that by its terms could only have been exercised by an instrument making specific reference to the power.

At one time, § 2-608 of the UPC provided that a general residuary clause in a will or a will making a

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[168]6 Scott & Ascher §41.12.6 (Transferees from Settlor). "Several cases, however, have reached the opposite result when the settlor had conveyed property in fraud of creditors on a secret trust to return the property to the settlor." 6 Scott & Ascher §41.12.6 (Transferees from Settlor). "In these cases, the courts allowed recovery after the settlor's death by the settlor's personal representatives, in whose hands the property would, of course, be subject to the claims of the settlor's defrauded creditors." 6 Scott & Ascher §41.12.6 (Transferees from Settlor).

[169]6 Scott & Ascher §41.12.6 (Transferees from Settlor).

[170]6 Scott & Ascher §41.12.1.

[171]6 Scott & Ascher §§41.12.1, 41.12.3 (When Settlor and Trustee Are Not *In Pari Delicto*).

[172]6 Scott & Ascher §41.12.2. For a resulting trust to be imposed on the property, the settlor must have a *locus poenitentiae*, which, according to the Oxford English Dictionary, is an "opportunity allowed by law to a person to recede from some engagement, so long as some particular step has not been taken." The literal translation of *locus* is place. In other words, if there is still time for the settlor to abort the illegal undertaking and the settlor does so, then the property may be recovered.

[173]6 Scott & Ascher §41.12.4 (When Settlor Is Not Blameworthy). Violating the Rule against Perpetuities is not the type of illegal conduct that would prevent a settlor from recovering the entrusted property. 6 Scott & Ascher §41.12.4 (When Settlor Is Not Blameworthy). While it may be against public policy to enforce a provision that violates the Rule, it would not be against public policy to then enforce a resulting trust in favor of the settlor. 6 Scott & Ascher §41.12.4 (When Settlor Is Not Blameworthy). For a discussion of whether the settlor's right to recover from the trustee of an illegal trust depends upon whether it is necessary for the settlor to introduce evidence of the trust's illegality, *see* 6 Scott & Ascher §41.12.5.

[174]6 Scott & Ascher §41.12.1.

general disposition of all of the testator's property did *not* exercise a power of appointment held by the testator, unless specific reference was made to the power or there was some other indication of intention to include the property subject to the power. In 1990, the negative rule was made subject to several exceptions. One is that if a power is a general one and there is no gift over in default of its exercise, a general residuary clause or general disposition in the will of the donee (holder) of the power will serve to exercise it.

The Restatement (Third) of Property (Wills and Other Donative Transfers), specifically § 19.4, endorses with a vengeance the UPC's absence-of-taker-in-default exception, even upping the ante; and in so doing, sets a particularly nasty trap for the unwary trustee and estate planner. Here is the language: "A residuary clause in the donee's will or revocable trust does not manifest an intent to exercise any of the donee's power(s) [sic] of appointment, unless the power in question [sic] is a general power and the donor did not provide for takers in default *or the gift-in-default clause is ineffective*."

And here is the trap: Assume the donee possessed a general testamentary power of appointment at the time of his death under his grandmother's trust. There is no express or blanket power-exercise clause in the donee's will, just a plain vanilla residue clause. What if the gift-in-default clause in the grandmother's trust is rendered "ineffective," say, twenty years after the donee's death but before the trust itself terminates? The comments, illustrations, and Reporter's Notes supporting the Restatement (Third)'s § 19.4 only address the trust that terminates on its own terms *upon the death of the powerholder*. Distributing trustees beware. The trust property may well belong not to those who take by resulting trust, but to the lucky residuary takers under the will of the powerholder. Massachusetts has baked into its version of UPC § 2-608 such a Restatement (Third)-type trap.

The doctrine of capture or the battle of the resulting trusts. If the donee (holder) of a general testamentary power of appointment exercises it by appointing the subject property to a trustee of a trust that fails *ab initio* or subsequently, a resulting trust is imposed.[175] The subject property, however, does not necessarily revert to the settlor of the original trust or to the settlor's probate estate.[176] Instead, a resulting trust might well be imposed in favor of the powerholder's probate estate under the so-called capture doctrine, a topic we take up in §8.15.12 of this handbook.

Expired general powers of appointment and the resulting trust. If the holder of a general inter vivos power of appointment dies without having effectively exercised the power, the power expires.[177] Likewise, if the holder of a general testamentary power of appointment fails to effectively exercise the power by will, the power expires at the holder's death. In either case, the gift-in-default clause in the granting instrument, if there is such a clause, controls the disposition of the unappointed property.[178] (So also if a power expires by inter vivos disclaimer or release.[179]) The time when a power expires "is almost invariably the death of the donee,"[180] although one could certainly fashion a grant of a general power that would be capable of expiring before its donee had, such as upon the exhaustion of an intervening equitable estate *pur autre vie*. The concept of the estate *pur autre vie* is discussed generally in §8.15.64 of this handbook.

The Restatement (Third) of Property speaks in terms of a general power "lapsing," an unfortunate

[175]*See generally* 6 Scott & Ascher §41.17 (Trust Created by Exercise of General Power of Appointment); §8.1.1 of this handbook (powers of appointment).

[176]*See generally* 6 Scott & Ascher §41.17 (Trust Created by Exercise of General Power of Appointment).

[177]As we note in §8.1.1 of this handbook, a power of appointment is exercisable; it is never directly transferable.

[178]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(a).

[179]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(a).

[180]Restatement (First) of Property §367, cmt. d.

innovation.[181] Its predecessors spoke in terms of a power "expiring,"[182] which is less ambiguous in that the term "lapse" can mean "to pass to another through neglect or omission."[183] As we note in §8.1.1 of this handbook, a power of appointment itself is never directly transmissible.

But what if the donor of an expired power had neglected to provide for takers-in-default in the granting instrument, or the instrument's gift-in-default clause was ineffective when the power expired? In that case, the unappointed property passes upon a resulting trust back to the donor if the donor is then living, or into the probate estate of the donor if the donor is not then living, but, again, not until all valid intervening equitable interests have themselves expired.[184] *In a radical departure from settled doctrine, the Restatement (Third) of Property provides that if the donee "merely failed to exercise the power," the unappointed property is captured by the donee or the donee's estate*.[185] A resulting trust, however, would still be imposed in the case of expiration by disclaimer or release,[186] or upon the expiration by any means of a power of revocation, amendment, or withdrawal.[187] In §8.15.12 of this handbook, we question the logic of treating a power of "revocation, amendment, or withdrawal" differently from other "types" of general inter vivos power of appointment, whether for capture purposes generally or for any other purpose. A resulting trust also would be imposed if the donee "expressly refrained from exercising the power."[188] Of course, this discussion is entirely academic if the donor is also the donee of the expired general power. The unappointed property would then end up in the probate estate of the donee in any case, whether by imposition of a resulting trust under traditional doctrine or by capture.

The Restatement (Third) of Property exhibits a curious and tenacious aversion to invoking applicable resulting trust doctrine,[189] particularly in the sections devoted to unexercised or ineffectively exercised general powers of appointment. The result is an unhelpful dearth of context, particularly when it comes to following chains of title, as well as a fair amount of general incoherence. Take, for example, Section19.22(b), which in part reads: "… but if the donee released the power or expressly refrained from exercising the power, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest." The phrase "passes under a reversionary interest" is nonsensical in the trust context. What actually happens is that the legal title to the unappointed property passes from the trustee to the donor or his personal representative upon a resulting trust such that the equitable reversion, which had vested *ab initio*, becomes possessory. Nothing is passing from the trustee under, over, or in a reversionary interest.

We also quibble with the failure of all of the restatements to expressly confirm that in the face of an expired power of appointment, title to property unappointed does not leave the hands of the trustee until such time as all valid intervening equitable estates have themselves expired, unless the terms of the trust so provide. An intervening equitable estate typically would be an equitable life estate.[190]

Expired nongeneral powers of appointment and the resulting trust. If the donee of a *nonfiduciary*,

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[181]*See* Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22 (term lapse employed even in the section's title); §8.15.55 of this handbook (lapse and antilapse).

[182]*See, e.g.*, Restatement (First) of Property §367, cmt. d.

[183]The American Heritage Dictionary 1014 (3d ed. 1996).

[184]*See, e.g.*, Restatement (First) of Property §367(1).

[185]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(b). For a discussion of traditional capture doctrine, *see* §8.15.12 of this handbook.

[186]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(b).

[187]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22, cmt. f.

[188]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.22(b).

[189]*See, e.g.*, Restatement (Third) of Property (Wills and Other Donative Transfers) §25.2 (although the title to the sections is *Reversion or Remainder*, the resulting trust is mentioned once, and only in passing).

[190]*See generally* §8.27 of this handbook (the equitable life estate).

nongeneral power of appointment allows the power to expire unexercised, the power-in-trust doctrine may be implicated, a topic we take up in §8.15.90 of this handbook. If it is, title to the appointive property is held *by the donor* of the power (or by the personal representative of the donor if the donor has predeceased the power's expiration) upon a constructive trust for the benefit of the permissible appointees, title to the appointive property having passed to the donor or his personal representative pursuant to the imposition of a resulting trust.

The purchase money resulting trust is actually an express trust. There is also something known as the purchase money resulting trust, which we cover in §3.3 of this handbook. The purchase money resulting trust is misnamed. It is actually a type of express trust.[191] The purchase money resulting trust does not arise automatically by operation of law.[192] Take a land transaction in which title to the land is transferred to someone other than the one who contributed the consideration, *i.e.*, the purchase price.[193] When there is intent on the part of the person who paid the consideration to make a gift of the land to the person who actually took the legal title to it, then no purchase money resulting trust will arise in favor of the one who paid the consideration.[194] When such donative intent is lacking, however, the situation may call for the imposition of a purchase money resulting trust in favor of the one who paid the consideration. On the other hand, a resulting trust that is occasioned by the failure of an express trust or the accomplishment of its purposes arises automatically in favor of those who took vested reversionary interests at the express trust's inception. Again, reversionary interests are always vested.[195] The Ohio Supreme Court appears to have lost sight of this critical difference between the purchase money resulting trust and the other two types of resulting trust in a case involving an express trust that failed for want of an equitable remainder,[196] the court then further confusing matters by mischaracterizing the nonexistent equitable remainder as a nonexistent "residue."[197] It is high time that American law schools again make Trusts required, a topic we address in §8.25 of this handbook.

The constructive trust and resulting trust distinguished. The constructive trust is not a resulting trust, although the two are often confused.[198] "A constructive trust is imposed when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the titleholder would be unjustly enriched if permitted to retain it."[199] We take up the constructive trust in §3.3 of this handbook. A constructive trust and not a resulting trust is imposed, for example, when *A* deeds land to *B* absolutely and *B* orally agrees at the time to hold the land for the benefit of *A* or a third person, though the deed makes no mention of this commitment.[200] In other words, *B*, the transferee, cannot hide behind the statute of frauds.[201] Similarly an absolute testamentary devise of land to *B* who has orally agreed to hold it for the benefit of *C* may warrant the imposition of a constructive trust for *C*'s benefit, notwithstanding the statute of wills.[202] On the other hand should an instrument of conveyance indicate a naked intention to impress a

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[191]*See generally* 6 Scott & Ascher §40.1.1 (suggesting that the purchase money resulting trust is actually an express trust).

[192]*See, e.g.*, Ravi Vajpeyi v. Shuaib Yusaf, [2003] EWHC (Ch.) 2339 (Eng.) (presumption of resulting trust rebutted by evidence that a loan of the property in question was intended).

[193]*See generally* 6 Scott & Ascher §40.1.

[194]Restatement (Third) of Trusts §9(1)(a).

[195]*See generally* §8.2.1.5 of this handbook.

[196]*See* Stevens v. Radey, 117 Ohio St. 3d 65, 881 N.E.2d 855 (2008).

[197]Stevens v. Radey, 117 Ohio St. 3d 65, 881 N.E.2d 855 (2008). *See* §8.15.2 of this handbook (remaindermen take "by purchase" from the trustee). See also introductory quote to §4.1.1 of this handbook (comparing a reversion with a remainder) and §8.26 of this handbook (will residue clauses).

[198]6 Scott & Ascher §40.1.2 (Distinguishing Resulting Trusts from Constructive Trusts).

[199]6 Scott & Ascher §40.1.2.

[200]6 Scott & Ascher §40.1.7.

[201]6 Scott & Ascher §40.1.7. *See generally* §8.15.5 of this handbook (statute of frauds).

[202]6 Scott & Ascher §40.1.7.

trust upon the subject property, then the imposition of a resulting trust may be appropriate, there being no indication on the face of the instrument of who the beneficiaries are and what the trust purposes might be.[203] This would essentially be a failed express trust. Had the conveyance been procured by fraud or had it been incident to the abuse of a fiduciary or confidential relationship, then there is precedent for imposing on the subject property a constructive trust for the benefit of the intended beneficiaries in lieu of imposing on it a resulting trust for the benefit of the transferor or the transferor's successors in interest.[204]

The resulting trust and express trust distinguished. The resulting trust differs from the express trust when it comes to burdens of proof in the litigation of trust matters. In the case of an express trust the burden is on the beneficiary who is alleging a breach of trust to prove that there had been an intention to impress a trust upon the subject property in the first place.[205] On the other hand, "[w]hen the circumstances are such as to give rise to a resulting trust, it is unnecessary for the person seeking to recover the property to prove that a trust was intended, since the inference that arises from the circumstances, until rebutted, suffices to justify recovery."[206]

The transfer of trust property to a BFP can cut off the reversionary interest. The transfer of a specific item of trust property *by the trustee* to a good-faith purchaser for value (bona fide purchaser, or BFP) cuts off any nonpossessory vested equitable reversionary interest which the settlor may possess in that property.[207] It also would cut off the rights of anyone who had succeeded to the interest by assignment, on account of the settlor's death, or otherwise. We cover the doctrine of bona fide purchase in §8.15.63 of this handbook.

The history of the resulting trust concept. The resulting trust is not a new concept. Not long after the chancellor began enforcing *uses* in fifteenth-century England, he was confronted with the issue of what was to happen to land that was enfeoffed by *A* to *B* and his heirs for the *use* of *C* for life when there was no mention of what was to be done with the beneficial interest once *C* died.[208] "The chancellor took the view that because there was nothing to indicate that *B* should have the use in himself, the inference was that *A* was entitled to it."[209] It was said that *B* held the property upon a resulting *use* for *A*, the transferor. In other words, the use "sprang back" or "resulted" to *A*.[210] Gratuitous land transfers also raised the presumption that the transferee held the property upon a resulting *use* for the transferor.[211] Finally even the purchase money resulting trust, a topic we take up in §3.3 of this handbook, can be traced back to what was essentially the purchase money resulting *use*.[212]

The notional resulting trust. *Default law of antilapse*. The application of antilapse to certain equitable property interests under trusts is covered in §8.15.55 of this handbook, specifically the elaborate default antilapse regime that § 2-707 of the UPC has concocted. A critical component of the regime is the notional resulting trust, which in this context is employed as a device for determining "substitute takers in cases of

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[203]6 Scott & Ascher §40.1.7.

[204]6 Scott & Ascher §40.1.7.

[205]*See generally* §8.24 of this handbook (burdens of proof in trust litigation).

[206]6 Scott & Ascher §40.3.

[207]6 Scott & Ascher §40.5 (Transfer by Trustee).

[208]*See generally* 6 Scott & Ascher §40.1 (When a Resulting Trust Arises); §8.15.1 of this handbook (statute of uses); Chapter 1 of this handbook (containing a list of all the Lord Chancellors since 1066).

[209]6 Scott & Ascher §40.1.

[210]6 Scott & Ascher §40.1 (When a Resulting Trust Arises).

[211]*See generally* 6 Scott & Ascher §§40.1 (When a Resulting Trust Arises), 40.2 (noting that "the old doctrine that a resulting use arose upon a gratuitous conveyance has nearly disappeared, although the old doctrine that a resulting use arose in favor of one who paid the purchase price for a conveyance to another still applies").

[212]*See generally* 6 Scott & Ascher §40.1.

a beneficiary's failure to survive … [a]… distribution date."[213] These substitutes take the legal title from the trustee as remaindermen. No resulting trust is actually triggered.

The notional resulting trust as a trust instrument drafting tool. An experienced trust scrivener strives to avoid any possibility of the imposition of a resulting trust upon the trust's eventual termination. The judicial imposition of a resulting trust tends to be "cumbersome and costly," particularly if it involves "distributions to and through estates of deceased beneficiaries of future interest, who may have died long before the distribution date."[214] The notional resulting trust as a handy drafting tool for avoiding want-of-remaindermen trust failures is taken up in §5.2 of this handbook, specifically in conjunction with our discussion of the term "heirs."

[213]UPC §2-707, cmt. (substitute gifts).

[214]UPC §2-707, cmt. (common-law background).