

## Title

The contingent remainder beneficiaries of an irrevocable trust may seek judicial enforcement of its terms during the life of the trust

## Text

A trust beneficiary's interest is an equitable property interest. It can be a present interest or a future interest, and, whether vested or contingent, the interest is property. Even a contingent equitable remainder-in-corpore incident to an ongoing irrevocable trust is infinitely more substantive than a mere expectancy. Admittedly the nomenclature is confusing. Here is why: A non-possessory contingent future equitable property interest incident to an ongoing trust relationship, for example, is a *future* property interest that is nonetheless *presently* enforceable. *See, e.g., Berry v. Berry*, --- S.W.3d --- (2022), 65 Tex. Sup. Ct. J. 997, 2022 WL 1510330. It is an interest that is infinitely more substantive than a mere expectancy in that in the remainder beneficiary's bundle of rights are some rights that are, again, *presently* enforceable. *Id.* The right to seek removal of the trustee for cause, for example. An expectancy, on the other hand, is generally not presently enforceable. Think the dispositive provision in the will of someone who is not yet deceased. A will being testamentary, it speaks only at death. *Id.* What, then, is the practical significance of all of this? In a word: standing. Were a contingent equitable remainder-in-corpore incident to an irrevocable entrustment a mere expectancy, the holder would not have standing to seek enforcement of the trust's terms. But it is not a mere expectancy. The question of standing in the trust context is taken up generally in §5.1 of *Loring and Rounds: A Trustee's Handbook* (2022), the relevant portion of which section is reproduced in the appendix below. The handbook itself is currently available for purchase 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 for purchase at: <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

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**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

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<sup>80</sup>Lewin ¶38-11 (England); *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955) (U.S.).

<sup>81</sup>Lewin ¶38-11 (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 ¶38-11 (England).

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 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. On the other hand, one with a contingent equitable interest and nothing more would lose the right to seek enforcement of the trust should the governing condition precedent expressed in the trust's terms at some

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<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.”).

<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). Nor granted standing to challenge the timing of income distributions. *See, e.g., In re. Wallbaum Revocable living Trust*, 813 N.W.2d 111, 121 (S.D. 2012).

<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).

point, through no fault of the trustee, become impossible of fulfillment. Going forward the trustee would owe no fiduciary duties to one who is just a *former* contingent beneficiary.<sup>4</sup> 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 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.

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<sup>4</sup> See, e.g., *Beaudoin v. David Trust Co*, 263 P.3d 755 (Idaho 2011).

<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).