

III. Trusts and Trust Responsibilities

A. What is a Trust?

The legal concept of trusts dates back to the earliest history of European legal theory.¹ In its simplest form, a trust is a legal relationship in which one party holds property for the benefit of another – in legal terms, a relationship in which the owner of the legal title does not hold the equitable title. There are three participants in every trust relationship: a “settlor” or “trustor” who establishes the trust and provides the property to be held in trust; a “trustee,” who is charged by the settlor with the responsibility of managing the trust in keeping with the settlor’s instructions; and a “beneficiary,” who receives the benefits from the property held in trust.²

In order to establish a trust, three elements are necessary: first, there must be a manifestation of intent to create a trust by the settlor; second, there must be property that is held by the trustee (the trust “corpus” or trust “res”); and, third, there must be an identified beneficiary or charitable public purpose for which the property is held in trust.³ Perhaps the most critical of these requirements is the manifestation of intent to create a trust – or, stated differently, the intent to create a relationship that encompasses the essential elements of a trust. Courts will generally not recognize the existence of a trust unless the settlor’s intent to create a trust was “clear and unequivocal” or “definite and particular”⁴ – in other words, that the language used in the documents or conveyance that create the trust (known as the trust instrument) must indicate the settlor’s intent to create the relationship to some reasonable level of certainty.⁵

However, courts will recognize a manifestation of intent if this intent can be inferred from the language, even if the trust instrument does not expressly indicate that a trust relationship is intended. In making this determination, courts will also look to the surrounding circumstances, the parties’ conduct, the purpose of the transaction, the scheme of distribution provided by the trust instrument, and the relationship between the parties.⁶ In essence, if there is any ambiguity in the language used by the settlor, the court will attempt to place itself in the position of the settlor at the time of the grant to discern the settlor’s purpose and intent.⁷

B. Fiduciary Duties of the Trustee

Under the common law, trustees are charged with a series of fiduciary duties – duties which can be either express or implied – to the beneficiary of the trust.⁸ The most important of these are, (1) to manage the trust in accordance with the instructions of the settlor; (2) a duty of good faith, which requires the trustee to put the best interests of the trust ahead of his own; (3) a duty of prudence, which requires the trustee to manage the trust property with the same degree of skill that a prudent person would exercise in his or her own affairs; and (4) a duty to preserve and protect the trust assets, or trust corpus, to satisfy both present and future claims against the trust.⁹

¹ Trust doctrine dates back at least to the Middle Ages, and is found both in early Christian and Muslim theological concepts. Its origin in Christianity relates to mechanism established within the Catholic church to insure that payments made to “purchase” heavenly afterlife were actually used for that purpose. See Souder & Fairfax, *In Lands We Trusted, State Trust Lands As An Alternative Theory of Public Lands Ownership*, in C. GEISLER AND G. DANER, PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP (2000).

² RESTATEMENT 2D, TRUSTS §§ 2,3.

³ *Id.* at § 74.

⁴ *C.f.* De Mello v. Home Escrow, Inc., 659 P.2d 759 (Haw. 1983).

⁵ Hoyle v. Dickinson, 746 P.2d 18 (Ariz. App. 1987); McGhee v. Bank of America (1st Dist) 60 Cal. App. 3d 442, 131 Cal. Rptr. 482 (1976).

⁶ Shumway v. Shumway, 44 P.2d 247 (Kan. 1935); Lambrecht v. Lee, 249 NW 490 (Mich. 1933).

⁷ Thomas v. Reynolds, 174 So. 753 (Ala. 1937); Farmers Trust Co. v. Bashore, 445 A.2d 492 (Penn. 1982).

⁸ RESTATEMENT 2D, TRUSTS § 3.

⁹ *Id.* at § 170.

1. *The Duty to Follow the Settlor's Instructions*

The trustee is normally required to follow the instructions of the settlor in administering the assets of a trust; as a general matter, no trust can exist where the trustee has absolute and unqualified discretion in managing the trust assets.¹⁰ However, depending on the level of detail associated with the restrictions established by the settlor, the trustee may have broad discretion in the trust's administration and may enjoy great flexibility in the management of trust assets – as long as this discretion is exercised in furtherance of the purposes of the trust.¹¹

An associated requirement is that after a trust has been established, the settlor, the trustee, and any beneficiaries deemed to have a vested interest must consent to any change in the terms of the trust.¹² However, courts will authorize changes to trusts under limited circumstances. For example, under the doctrine of “equitable deviation,” courts will authorize the trustee to deviate from the express instructions of the settlor in administration of the trust where compliance with the directions becomes illegal, impracticable, or would no longer affect the purpose of the trust due to new information or changed conditions – as long as the deviation will further and not alter the purpose of the trust.¹³

2. *The Duty of Good Faith*

The trustee's duty of good faith requires that the trustee act honestly and with undivided loyalty to the interests of the trust and its beneficiar(ies). In essence, this means that the trustee cannot put his own interests (frequently referred to as self-dealing), or the interests of third parties, ahead of the interests of the trust. Common examples of violations of the duty of loyalty are where the trustee attempts to secure a material advantage to himself, to a relation, or to a third party in a transaction on behalf of the trust.¹⁴

3. *The Duty of Prudence*

The trustee's duty of prudence descends in part from the duty of good faith, requiring that the trustee act with due care, diligence, and skill in managing the trust. Although there are various formulations of this duty, most are similar to the following:

[T]he standard or measure of care, diligence, and skill required of a trustee in the administration of a trust is that of an ordinarily prudent person in the conduct of his or her private affairs under similar circumstances, and with a similar object in view.¹⁵

This duty applies to both affirmative and negative conduct on the part of the trustee, including the timing of management decisions.¹⁶ For example, in the context of a sale of real estate that is held in trust, the trustee must make the sale for the best price and on the best terms that are reasonably attainable.¹⁷ Where there is a significant opportunity to benefit the trust through the disposition of trust property, the trustee can be held liable if she negligently fails to consider the opportunity or waits too long to dispose of trust property, leaving the trust with de-valued property. However, the trustee could also breach his duty of prudence by selling trust property prematurely (such as where the property would have earned greater returns in the future through an alternative use, or where it had significant potential for appreciation).

¹⁰ *Id.* at § 125.

¹¹ 76 AM. JUR. 2D *Trusts* § 58. *C.f. In re Trust of Brooke*, 697 N.E. 2d 191 (Ohio 1998) (trustee's discretion limited by terms of the trust).

¹² *Garrott v. McConnell*, 256 SW 14 (Ky. 1923); *Kendrick v. Ray*, 53 NE 823 (Mass. 1899).

¹³ 15 AM. JUR. 2D *Charities* § 155.

¹⁴ GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES*, 235-241 (2nd ed. 1978); *C.f. Re Hubbard's Will*, 97 N.E.2d 888 (N.Y. 1959) (trustee must subordinate his interest or resign in case of irreconcilable self-interest).

¹⁵ RESTATEMENT 2D, *TRUSTS* § 227(a).

¹⁶ 76 AM. JUR. 2D *Trusts* § 390.

¹⁷ *Id.* at § 562.

A similar “prudent investor” rule applies to the trustee with regard to the investment of trust assets.¹⁸ The Third Restatement of Trusts provides the most recent formulation of this rule under common law, providing that the trustee has a “duty ... to invest and manage the funds of the trust as a prudent investor would,” exercising reasonable care, skill, and caution “in light of the purposes, terms, distribution requirements, and other circumstances of the trust,” and balancing risks and returns in a manner suited to these circumstances.¹⁹

Significantly, the Restatement provides that this standard should be “applied to investments not in isolation but in the context of the trust portfolio.”²⁰ This portfolio approach represents a significant departure from older trust management rules that considered most aggressive forms of investment to be “speculation” and instead placed the greatest emphasis on caution and the preservation of the trust corpus in every investment, requiring the trustee to make conservative investment decisions.²¹ However, it is also very different than a simplistic, short-term “revenue maximization” philosophy. By evaluating investments in the context of an overall portfolio, trustees are empowered to construct a balanced portfolio of diversified investments that meet the trust’s long-term management objectives. Because these investments are evaluated as a part of an overall portfolio of balanced risk and return, these may include investments that involve more risk than would be permitted under the old “prudent man” rule.²² This, however, should not be understood as insulating the trustee from responsibility for imprudent investments even if the overall portfolio shows a gain; each investment should still be “prudent” when viewed in the context of the strategy for the overall portfolio and the balancing of risks and returns.²³

Analyzed more closely, the trustee’s duty of prudence involves a number of interrelated components. First, it requires the trustee to bring the appropriate level of expertise to the administration of the trust asset.²⁴ At the most basic level, this requires the trustee to exercise the care and skill of an ordinary prudent person – even if the trustee lacks the competency so to do.²⁵ Where the trustee lacks the knowledge or skill to manage the asset appropriately may require the trustee to retain experts to assist with this management. More importantly, however, where the trustee has greater skill than an ordinary prudent person with regard to the management of the trust assets, the trustee’s performance will be judged according to a standard based on the expectations that would apply to others with such special skills.²⁶

Second, the duty of prudence is generally understood to imply a requirement that the trustee distribute the risks of loss through a reasonable diversification in the trust portfolio – a requirement that is closely related to the trustee’s duty to preserve the corpus of the trust by not putting “all one’s eggs in one basket.”²⁷ This requirement of diversification is generally understood to apply unless it would be imprudent to do so, or unless the trust instrument directs otherwise.²⁸ The duty applies both to the retention of existing investments as well as to participation in new investments.²⁹

¹⁸ This rule has its American common law origins in the case of *Harvard College v. Amory*, 26 Mass. 446 (1830) (“all that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how individuals of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.”)

¹⁹ RESTATEMENT 3D, TRUSTS § 227.

²⁰ *Id.*

²¹ Jesse Dukeminier & James Krier, *The Rise of Perpetual Trusts*, 50 UCLA L. Rev. 1303, 1336-1337 (2003). See also 76 AM. JUR. 2D Trusts, § 534.

²² See Haskell, *The Prudent Person Rule For Trustee Investment and Modern Portfolio Theory*, 69 N.C. L. Rev. 87 (1990).

²³ *C.f.* *Re Bank of New York*, 35 NY2d 512 (1974).

²⁴ See Jon A. Souder, *The Importance of Being Prudent: What Pension Funds, Junk Bonds, and the 1980’s Real Estate Bust can Teach Us About Managing for Ecosystem Sustainability and Restoration* (unpublished, on file with author).

²⁵ *Finley v. Exchange Trust Co.*, 80 P.2d 296 (Okla. 1938) (trustee bound to exercise knowledge skill and care of ordinary person regardless of whether trustee actually possesses skill).

²⁶ *C.f. In re Estate of Killey*, 326 A2d 372 (Pa. 1974); *Estate of Beach*, 542 P2d 994 (Cal. 1975), *cert. denied*, 434 U.S. 1046 (1978).

²⁷ 76 AM. JUR. 2D Trusts § 542; *C.f. Dowsett v. Hawaiian Trust Co.*, 393 P2d 89 (Haw. 1964); *First Nat. Bank v. Hyde*, 363 SW2d 647 (Mo. 1963); *Re Trust of Mueller*, 135 NW2d 854 (Wis. 1965).

²⁸ RESTATEMENT 3D, TRUSTS § 227.

²⁹ 76 AM. JUR. 2D Trusts § 537; see also *Re Trust of Mueller*, 135 NW2d 854 (Wis. 1965); *Stevens v. National City Bank*, 544 NE2d 612 (Ohio 1989).

Third, this duty can be understood to require the trustee to arrive at a decision using an appropriate process. Rather than evaluating the trustee solely on the outcome of management decisions, the rule focuses primarily on the prudence of the trustee's conduct at the time that management decisions were made, and the process followed to reach those decisions. As such, the requirement on the trustee when making management decisions is to utilize the proper level of care, precaution, attentiveness, and judgment; investigate and evaluate alternatives; assess risks and rewards; and then make the best choice in light of this information.³⁰ As a result, it is entirely within the fiduciary duty of a trustee to take some level of risk where the likelihood of success and failure is analyzed; conversely, the doctrine also allows for trade-offs between short-term and long-term returns, with the trustee authorized to accept lower returns from trust assets if the trustee's analysis suggests that this will result in better outcomes over the long term.

Finally, the duty of prudence implies a requirement to constantly monitor and re-assess trust-related decisions over time. A trustee generally cannot be held liable for trust losses resulting from decisions which, although they seemed prudent at the time given the available information, later turned out to be poor investments that did not achieve investment goals, or were frustrated due to unforeseeable events (such as market downturns or natural catastrophes). However, the trustee is expected to ensure that trust management strategies continue to be based on correct facts and assumptions and if they are not achieving the desired objectives, to change course.³¹ Although not often discussed in the trust lands context, the prudent investor rule thus explicitly recognizes that not all management decisions will result in successful outcomes; however, there is a requirement that the trustee demonstrate that he or she has learned from these mistakes.

4. The Duty to Preserve the Trust

The duty to preserve and protect the assets of the trust is closely related to the duty of prudence; in essence, it requires the trustee to manage the corpus of the trust in a manner that takes a long-term perspective, and ensures that the trust can satisfy both the present and future needs of the trust beneficiary in accordance with the instructions of the settlor. In the context of a perpetual trust, this generally requires the trustee to manage the trust corpus in a manner that will ensure that the trust will remain undiminished to serve the needs of future beneficiaries in perpetuity.³²

C. Private Trusts, Charitable Trusts, and the Public Trust Doctrine

There are dozens of different types of trusts recognized under American law. Each involves variations on traditional trust doctrines that are based on the character of transaction that creates them, the intentions and instructions of the settlor, the nature of the beneficiary, and other variables. These include concepts ranging from business trusts, which operate businesses in a manner similar to a corporation; constructive trusts, which are created by operation of law to prevent frauds; one-party trusts, in which the settlor is also the trustee; spendthrift trusts, which are used to protect property interests from being alienated by a beneficiary; and others.³³

As discussed further below, state trust doctrine does not fit neatly into any of these categories, although it inherits many of its principles from common law trust doctrine. The unique nature of the settlor (Congress), the trustee (the state), the beneficiaries of these trusts (e.g., public schools), and the perpetual nature of this relationship place state trust lands in a category of their own. However, two principal types of trust relationships are particularly relevant in relation to state trust lands: private trusts and charitable trusts.

1. Private Trusts

³⁰ See Souder, *supra* note 123.

³¹ *Id.*

³² 76 AM. JUR. 2D, TRUSTS § 404; Branson School District. RE-82 v. Romer, 161 F.3d 619, 637 (10th Cir. 1998) (common law trust doctrines require that a trustee must take steps to preserve the trust property from loss, damage, or diminution in value).

³³ For more types of trusts, see 76 AM. JUR. 2D, TRUSTS § 11.

Private trusts are the form of trust that people most commonly associate with the term “trust.” Private trusts generally involve relationships between private individuals or entities in which one person or entity puts property or money in trust for the benefit of another. A typical example is a trust established by parents for the benefit of their children (or even multiple generations of descendants) to provide for education, health care, or maintenance payments, with a specified person (such as a lawyer, banker, or family member) serving as the trustee.

The private trust is probably the “purest” form of the trust relationship, in which the settlor, trustee, and beneficiaries can be easily (and specifically) identified, even if some beneficiaries are not yet born. This has particular significance with regard to who can enforce the terms of the trust, because where there are specific individuals who are the identified beneficiaries (who hold the “equitable” interest in the trust property), only those beneficiaries automatically have the right to enforce the terms of the trust and ensure that the trustee is observing her duties and providing the anticipated benefit.³⁴ The trustee’s duties are owed to that beneficiary, and no other person (aside from the settlor) has standing to contest the management of the trust.³⁵

Private trusts are also generally limited in duration, having a purpose that will be achieved within some identifiable period of time, after which the trust terminates.³⁶ Although courts have generally permitted multi-generational trusts, until very recently, the courts were unwilling to recognize private trusts that had no limitation on their duration. Where the duration of a private trust was not explicitly stated or was not otherwise implicit in the purpose for which the trust was created, courts generally found that the trust was invalid under the Rule Against Perpetuities, a common-law rule that prohibits certain types of permanent restrictions on the use of property under the theory that such restrictions are socially undesirable.³⁷ Although most American jurisdictions have recently adopted rules allowing for the existence of private trusts with unlimited duration, these so-called “dynasty trusts” are controversial, as they can permanently devote significant amounts of property to the benefit of a few private individuals.³⁸

2. Charitable Trusts

A charitable trust, in the simplest terms, is a trust in which the beneficiary is some portion of the public. The term “charity,” in this context, has a broad meaning embracing any trust that serves a public purpose and benefits an indefinite number of persons,

either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burden of government.³⁹

Traditionally, it was the charitable purpose of the trust that provided the necessary justification for property dedication to a single purpose in perpetuity; as such, a purpose is charitable if “its accomplishment is of such social interest to the community as to justify permitting property to be devoted to the purpose in perpetuity.”⁴⁰

Charitable trusts can include relationships in which the trust property is set aside for the benefit of a specific public purpose (i.e., supporting public education or cancer research), for the benefit of a specific class (i.e., a college scholarship or a fund to support homeless children), for the benefit of a charitable institution that serves a public purpose (i.e., a school or hospital), or where

³⁴ Mary Blasko, Curt Crossley & David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 59 (1993).

³⁵ *Id.*

³⁶ 76 AM. JUR. 2D, TRUSTS § 92; *C.f.* Hills v Travelers Bank & Trust Co., 7 A2d 652 (Conn. 1939); Copenhaver v. Pendleton, 155 SE 802 (Va. 1930).

³⁷ 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 67.

³⁸ See generally Dukeminier & Krier, *supra* note 120.

³⁹ Scarney v. Clarke, 275 N.W. 765, 767 (Mich. 1937) citing Jackson v Phillips, 14 Allen 539, 536 (Mass. 1867).

⁴⁰ WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 368 (4th ed. 1987).

property is otherwise set aside for some public use (i.e., land to be used for a school building or a public park).⁴¹ As such, a primary distinction between a charitable trust and a private trust is that in a private trust, the “equitable interest” in the trust property is devoted to the benefit of an identifiable person or persons (such as a family) or a specific institution (unless the beneficiary is itself a charitable institution); whereas in a charitable trust the beneficiary is less “definite” because the benefits of the trust accrue to some portion of the public or to the community at large, and thus not all trust beneficiaries can be definitely ascertained.⁴² However, it is also critical to distinguish charitable trusts from merely “honorary” trusts – trusts without a beneficiary that also lack a charitable purpose. Honorary trusts are generally considered unenforceable in the absence of a statute allowing for their enforcement.⁴³

Unlike the traditional doctrine governing private trusts, charitable trusts are permitted to be “perpetual trusts” (i.e. indefinite in duration), since the public purposes for which they are granted are frequently not limited in time. For example, a charitable trust might provide for the continuing grant of scholarships to qualified students at a public university, a purpose that will endure as long as there are qualified students attending the university; by contrast, a private trust might provide college tuition only for one or more generations of a single family. Similarly, where the beneficiary of a charitable trust is an identifiable entity, the entity is generally an “immortal” entity such as a non-profit corporation or a public institution.⁴⁴ The courts have thus held charitable trusts to be exceptions to the rule against perpetuities.⁴⁵

Because of the broader public purposes for which charitable trusts are granted, courts will also allow greater leeway than is generally allowed in the administration of private trusts in modifying the requirements for trust administration to effectuate the charitable purposes of the trust or account for changed conditions.⁴⁶ Courts will ordinarily permit deviation from the express terms of a charitable trust where compliance with the terms of the trust becomes illegal or impractical, or where continued compliance with the terms of the trust will frustrate or impair the purpose that the trust was intended to achieve.⁴⁷ This change can be accomplished under two doctrines: the doctrine of equitable deviation, which applies broadly to all trusts (discussed above), or the doctrine of *cy pres*, which applies only to charitable trusts.⁴⁸ The primary difference between the two is that under the doctrine of equitable deviation, a change to the rules for the administration of the trust will be allowed, but not a change in its purpose, whereas *cy pres* allows an alteration of the charitable purpose of the trust.⁴⁹

The doctrine of *cy pres* takes its name from the Norman French phrase “*cy pres comme possible*,” or “so nearly as may be.”⁵⁰ The doctrine permits a charitable trust that can no longer fulfill

⁴¹ The latter type of charitable trust is to be distinguished from a public dedication, in which a private landowner devotes land to a particular public use; dedications of land do not create a trust relationship unless the relationship is intended by the grantor. As such, although lands dedicated to public use must generally conform to the grantor’s intent, the terms of dedication are construed strictly against the dedicant and in favor of public use, such that a given use will not be held to violate the terms of dedication unless it is patently inconsistent with or would defeat this intent. For example, land that was dedicated for a road that was in excess of what was needed for the road could be used for a park unless this use was expressly prohibited. Where land is dedicated by one public body to another, this discretion is even greater; the legislative body of the receiving public entity is generally entitled to change the use of the land at will. See 23 AM. JUR. 2D, DEDICATIONS § 1. For example, courts have generally interpreted the terms of federal land grants to states and local governments less strictly than where a private dedication is involved, recognizing the importance of allowing society to put lands to its best use in response to changing circumstances. *C.f.* *Choctaw and Chickasaw Nations v. Board of County Comm’rs of Love County*, 361 F.2d 932, 935 (10th Cir. 1966).

⁴² See RESTATEMENT 2D, TRUSTS § 348; see also WILLIAM MCGOVERN, JR., SHELDON KURTZ, AND JAN REIN, WILLS, TRUSTS, AND ESTATES, 322-324 (1988); *City of Palm Springs v. Living Desert Reserve*, 70 Cal. App. 4th 613 (4th Dist. 1999) (gift can be made to governmental entity for a charitable purpose for indefinite class of people.).

⁴³ *Blacks Law Dictionary*, 1511 (6th Ed. 1990).

⁴⁴ 76 AM. JUR. 2D *Trusts* § 19.

⁴⁵ RESTATEMENT 2D TRUSTS § 365. *C.f.* *Fordyce & McKee v. Woman’s Christian Nat. Library Ass’n*, 96 S.W. 155 (Ark. 1906); *In re McKenzie’s Estate*, 227 Cal. App. 2d 167 (1964); *Haggin v. International Trust Co.*, 169 P. 138 (Colo. 1917); *Regents of University System v. Trust Co. of Ga.*, 198 S.E. 345 (Ga. 1938); *Nelson v. Kring*, 592 P.2d 438 (Kan. 1979).

⁴⁶ *C.f.* *Matter of Hill*, 509 N.W.2d 168 (Minn. Ct. App. 1993).

⁴⁷ 15 AM. JUR. 2D *Charities* § 148.

⁴⁸ RESTATEMENT 2D TRUSTS § 399, comment (a).

⁴⁹ 15 AM. JUR. 2D *Charities* § 155

⁵⁰ *In re Bishop College*, 81 Ed. Law Rep. 829 (Bankr. N.D. Tex. 1993); *Estate of Jackson*, 92 Cal. App. 3d 486 (2d Dist. 1979); *Simmons v. Parsons College*, 256 N.W.2d 225 (Iowa 1977); *Nelson v. Kring*, 592 P.2d 438 (Kan. 1979).

the particular purpose directed by the settlor to be reformed to serve another purpose that is in accord with the settlor's underlying charitable intent.⁵¹ The doctrine can be applied so long as, (1) the trust is a charitable trust; (2) the express terms of the trust are now impossible, impracticable, or illegal, or changed circumstances otherwise mean that the terms would "defeat or substantially impair the accomplishment of the purposes of the trust,"⁵² and (3) the settlor expressed a general intention to devote the trust property to charitable purposes (and not just to a specifically named beneficiary).⁵³ Most courts have interpreted "impracticability" or "impossibility" narrowly, requiring that a modification be truly necessary and not merely convenient or practical.⁵⁴

Perhaps the most important difference between private and charitable trusts, however, is with regard to trust enforcement. As noted above, the enforcement of private trusts is a matter entirely between the trustee and the trust beneficiary; the trustee's duties are to the named beneficiary and no other person has standing to enforce the terms of the trust. By contrast, charitable trusts can be enforced more broadly due to the fact that the "beneficiary" of the trust is in some sense the public as a whole. As a general rule, courts recognize that the state attorney general, in his capacity as a representative of the state and the public, can sue to enforce the terms of a charitable trust against the trustee.⁵⁵

As noted by some commentators, this mechanism of enforcement is not always effective, since the attorney general may lack the requisite interest or awareness in the subject of the trust to serve as an effective beneficiary representative, or may lack the resources to effectively enforce the trust due to his or her larger public responsibilities.⁵⁶ However, decisions holding that this is the only available method of trust enforcement are few in number.⁵⁷ Although the attorney general is always an appropriate party to a suit to enforce a charitable trust as the defender of the interests of the public, there is no general rule against allowing other appropriate individuals and entities to enforce a charitable trust, intervene in an enforcement action, or appeal a decision that is adverse to their interests (whether or not the attorney general does so).⁵⁸

Charitable trusts are normally subject to enforcement by their beneficiaries to the extent that these beneficiaries are sufficiently identified or identifiable. Although the rules vary from jurisdiction to jurisdiction,⁵⁹ a member of the general public generally cannot maintain a suit to enforce the terms of a charitable trust, even if that person is a potential future beneficiary of the trust (since the attorney general is the most appropriate representative of the unnamed beneficiaries of a charitable trust).⁶⁰ Similarly, taken in isolation, membership in a charity is generally insufficient to provide standing,⁶¹ nor a merely "sentimental" interest in seeing the purpose of a charitable trust achieved.⁶²

Nevertheless, courts will generally permit any person that has a "special interest" in a charitable trust to enforce its terms against the trustee;⁶³ where this special interest is shown, the

⁵¹ RESTATEMENT 2D TRUSTS § 399. *C.f.* *Arman v. Bank of America, N.T. & S.A.*, 74 Cal. App. 4th 697 (2d Dist. 1999); *Quinn v. Peoples Trust & Sav. Co.*, 60 N.E.2d 281 (Ind. 1945); *Simmons v. Parsons College*, 256 N.W.2d 225 (Iowa 1977); *In re Kay's Estate*, 317 A.2d 193 (Pa. 1974).

⁵² RESTATEMENT 2D TRUSTS § 381.

⁵³ 15 AM. JUR. 2D *Charities* § 149; see also Ilana Eisenstein, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. Pa. L. Rev. 1747 (2003).

⁵⁴ See discussion in Eisenstein, *supra*; see also Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 Clev. St. L. Rev. 471, 479 (1998).

⁵⁵ RESTATEMENT 2D, TRUSTS § 391. *C.f.* *Murphey v. Dalton*, 314 S.W.2d 726 (Mo. 1958) (Attorney General represents public in matters pertaining for public charity).

⁵⁶ *Fairfax & Issod, supra* note 76, at 374-375; *Blasko et al., supra* note 133, at 48.

⁵⁷ *C.f. Amundson v. Kletzing-McLaughlin Memorial Foundation College*, 73 N.W.2d 114 (Iowa 1955); *Dickey v. Volker*, 11 S.W.2d 278 (Mo. 1928), cert. denied, 279 U.S. 839 (1929); *Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403 (Wash. 1933).

⁵⁸ 15 AM. JUR. 2D *Charities* § 137.

⁵⁹ *Blasko et al., supra* note 133, at 59-61.

⁶⁰ RESTATEMENT 2D TRUSTS § 391, comment (d).

⁶¹ 15 AM. JUR. 2D *Charities* § 135. *C.f. Weaver v. Wood*, 680 N.E.2d 918 (Mass. 1997), cert. denied, 522 U.S. 1049 (1998).

⁶² *C.f. Amundson v. Kletzing-McLaughlin Memorial Foundation College*, 73 N.W.2d 114 (Iowa 1955).

⁶³ RESTATEMENT 2D TRUSTS § 391; see also David Villar Patton, *The Queen, The Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. Fla. J. L. & Pub. Pol'y 131 (2000). *C.f. Hardman v. Feinstein*, 195 Cal. App. 3d 157 (1st Dist. 1987); *Young Men's Christian Ass'n of City of Washington v. Covington*, 484 A.2d 589

person will have the same rights and enforcement abilities as the beneficiary of a private trust.⁶⁴ As a general matter, a person will be deemed to have the requisite special interest where they can assert an interest in the trust (or the organization supported by it) that is distinct from those of the general public,⁶⁵ or they are entitled to benefit from the trust in a manner that is different from the public at large.⁶⁶ This can include a showing that the person is entitled to a preference in receiving benefits under the trust,⁶⁷ which will normally include any designated or ascertained beneficiaries.⁶⁸ For example, where the beneficiary of a charitable trust is a specific institution, the institution will have standing to enforce the terms of the trust in the manner of a private trust beneficiary.⁶⁹ Similarly, citizens who have directly enjoyed the benefits of a charitable trust may have standing to preserve their interests in that trust.⁷⁰ Charitable trusts may also be enforced by one trustee, or a former trustee, against another trustee.⁷¹

One commentator has noted that, in addition to the special interest requirements, there appear to be four other factual elements that will typically influence a court's willingness to concede standing to enforce a charitable trust.⁷² These include:

(a) The nature of the complaint and the remedy sought. Courts have normally refused to allow charitable beneficiaries to seek monetary damages against trustees, but have tended to grant standing to seek limited remedies (such as a court order or declaratory judgment) where a significant violation of the purpose of the trust is alleged.⁷³

(b) The presence of fraud or misconduct. Although not expressly stated as a cause for granting standing, courts appear to be more likely to grant standing where there are allegations of fraud and abuse, as a matter of ensuring that the public interest in a particular charitable institution is adequately protected.⁷⁴

(c) The presence or absence of the attorney general as an effective enforcer. Courts will also consider the nature and the degree of the attorney general's involvement in determining whether or not to grant standing. Where the attorney general is not available or is unlikely to effectively defend the interests of the trust, standing is more likely.⁷⁵

(d) The social desirability of the suit. Where the suit would serve a broader public purpose, either by defending an important charitable institution or enumerating important principles, courts also appear to be more likely to grant standing.⁷⁶

Aside from these basic differences in the nature of charitable trusts, however, the responsibilities of the trustee of a charitable trust are essentially identical to those of a private

(D.C. 1984); *Kania v. Chatham*, 254 S.E.2d 528 (N.C. 1979); also *Valley Forge Historical Soc'y v. Wash. Mem'l Chapel*, 426 A.2d 1123, 1127 (Pa. 1981) ("An action for the enforcement of a charitable trust can be maintained by the Attorney General, a member of the charitable organization or someone having a special interest in the trust.")

⁶⁴ *Blasko et al.*, *supra* note 133, at 59.

⁶⁵ 15 AM. JUR. 2D *Charities* § 142. *C.f.* *Weaver v. Wood*, 680 N.E.2d 918 (Mass. 1997), *cert. denied*, 522 U.S. 1049 (1998).

⁶⁶ Robert Mahealani M. Seto & Lynne Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 Haw. L. Rev. 393, 410 (1999). Some states have more liberal policies on special interest standing than others; a few states extend this standing well beyond the class of beneficiaries that are addressed by the trust. See discussion in Jennifer Komoroski, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify*, 45 Wm. & Mary L. Rev. 1769 (2004).

⁶⁷ RESTATEMENT 2D TRUSTS § 391, comment (c).

⁶⁸ 15 AM. JUR. 2D *Charities* § 142.

⁶⁹ 38 AM. JUR. 2D *Gifts* § 68; 76 AM. JUR. 2D *Trusts* § 135.

⁷⁰ *C.f.* *Parsons v. Walker*, 328 N.E.2d 920 (Ill. App. 1975).

⁷¹ *Blasko, et al.*, *supra* note 133, at 60. *C.f.* *Takabuki v. Ching*, 695 P.2d 319 (Haw. 1985).

⁷² *Blasko, et al.*, *supra* note 133, at 61.

⁷³ *Id.* at 61-64.

⁷⁴ *Id.* at 64-67.

⁷⁵ *Id.* at 67-70.

⁷⁶ *Id.* at 74-76.

trustee.⁷⁷ As with a private trustee, the charitable trustee is bound to follow the terms and conditions of the trust, is subject to a duty of loyalty to the trust purposes and its beneficiaries, must act with reasonable care, diligence, and skill in the management of the trust assets, and must preserve and protect the corpus of the trust.⁷⁸ As such, the charitable trustee is subject to the same “prudent investor” rules that apply to private trust managers.⁷⁹

3. The Public Trust Doctrine

One trust-related concept that is frequently confused with the state trust land doctrine is the “public trust doctrine.” Public trust doctrine is a common-law doctrine, traceable to Roman civil law, which provided that running water, the seas, and the shores of the sea were “held in common by all men,” and thus could not be held as property to the exclusion of the public. This doctrine survived into the English common law, which recognized the public’s interest in navigable waters and waterways and recognized them as property held by the King in trust for the public. This concept survived in American common law after the Revolutionary War, with the Thirteen Colonies held to have inherited the King’s public trust property when they became independent sovereigns. As new states were admitted into the Union, they were admitted on an equal footing with those who came before, and thus took title to the beds of navigable streams and seashores upon their admission to the Union to hold “in trust” for the public.⁸⁰

The public trust doctrine requires the states, as the trustees of the lands underlying navigable waters, to preserve these lands for the benefit of the public for navigation, fishing, recreation, and other uses, and to protect the right of the public to use the lands for these purposes. Under the doctrine, while the state can permit private uses to occur on those lands, the state is prohibited from alienating public trust resources or from allowing their value to the public to be degraded.⁸¹

This doctrine has evolved significantly over the past few decades in response to changing concepts relating to the ownership and protection of important natural and cultural resources. With these changes, the suite of public resources that are considered subject to the doctrine has also been expanding, with many courts (and many more advocates) finding that the doctrine should require the protection of not just the “navigable waters” to which it has traditionally applied, but also to the ecological systems that are connected to and maintain the integrity of those waters. Modern conceptions of the doctrine thus impose obligations to consider and protect public trust resources and connected natural systems when allocating public trust resources.⁸² Although this doctrine has application to some of the lands managed by trust management agencies (such as navigable waterways and tidelines), this doctrine is conceptually distinct from that applied to state trust lands.⁸³

⁷⁷ 76 AM. JUR. 2D *Trusts* § 93; RESTATEMENT 2D, TRUSTS § 379 (1959); RESTATEMENT 3D, TRUSTS § 379 (1992); FRATCHER, *supra* note 139, § 379.

⁷⁸ 76 AM. JUR. 2D *Trusts* § 93.

⁷⁹ *Id.* at § 100.

⁸⁰ See generally Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980).

⁸¹ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

⁸² See generally Wilkinson, *supra* note 179; Sax, *supra* note 180. A contemporary (mid-1990’s) survey of how states were implementing the public trust can be found in David Slade, *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine To Lands, Waters, and Living Resources of the Coastal States*, COASTAL STATES ORGANIZATION (2nd Ed. 1997).

⁸³ *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 919 (Utah 1993) (the public trust doctrine is “limited to sovereign lands and perhaps other state lands that are not subject to specific trusts”).