Title

A trust-instrument scrivener's practical guide to avoiding the problematic and doctrinally unsettled

Text

The 2027 Edition of *Loring and Rounds: A Trustee's Handbook*, due out in mid-December of 2026, is a work in progress. Chapter 10 is being repurposed to house a one-stop digest and compilation for trust scriveners of the problematic and doctrinally unsettled, the latter being for the most part the consequence of ill-considered legislative intrusion into the equity-based jurisprudence. In the prior chapters of the handbook, the problematic and unsettled are extensively addressed, but not as a group, and with little attention paid to countermeasure drafting. Chapter 10, a draft of which is reproduced in its entirety in the appendix below, is intended to address these deficiencies.

Appendix

CHAPTER **10** [Working draft #1, dated March 31, 2026, for inclusion in *Loring and Rounds: A Trustee's Handbook* (2027), due out mid-December 2026]

A Trust-Instrument Scrivener's Practical Guide to Avoiding the Problematic and Doctrinally Unsettled

Introduction. The institution of the trust is a creation and ward of the judicial branch, specifically of the equity courts. Equity jurisprudence is primarily principles-based. Thus, when the legislative branch presumes via statute to partially codify aspects of trust jurisprudence, too often doctrinal un-assimilation rather than doctrinal assimilation/hybridization ensues. In prior chapters we have flagged the doctrinal redundancies, inconsistencies, and outright incompatibilities that are the practical consequence of ill-considered and promiscuous legislating in the trust space. As the confusing alphabet soup of poorly coordinated partial codifications of trust-related equity doctrine, such as the UTC, UPIA, UDTA, UTDA, UFIPA, UTATA, UCTA, UPAA, UPMIFA, UFTA (VTA), as well as elements of the UPC, for the most part has messed with the default-law only, the

scrivener is free to craft trust provisions that are doctrinally integrated, coherent, and clean, that are grounded in the uncluttered principles-based tried and true that had prevailed in both trust default law and trust practice before the partial superimposition of the legislative on the judicial in the trust doctrinal space became pervasive and relentless.

What follows is a one-stop digest and compilation for trust scriveners of the problematic and doctrinally unsettled. In the other chapters, the problematic and unsettled are extensively addressed, but not as a group. Though the trust-instrument scrivener is duty-bound to end-run or otherwise mitigate the adverse effects of the problematic and unsettled, there is not much on countermeasure drafting in the other chapters. There is in this chapter.

[Item 1] UTC's qualified beneficiary concept is far less than meets the eye. The "qualified beneficiary," an unfortunate creation of the UTC, is essentially a current beneficiary or a presumptive remainderman who is expressly entitled to notice of certain quasi-ministerial undertakings of the trustee that do not affect one way or another the equitable property rights of the other beneficiaries. See §6.1.5.1 of this handbook. This carving out of a sub-class of beneficiary in no way is in derogation of the principle that the trustee has an affirmative duty to provide each qualified beneficiary and each nonqualified beneficiary, or his or her surrogate, with a subjective understanding of all the facts and all the law that that the beneficiary would need to protect and defend his, her, or its equitable property rights, and to be timely about it. There is a misconception that notice to the qualified somehow binds the non-qualified when it comes to fiduciary activity that truly matters. Ideally the governing instrument should expressly repudiate the UTC's technically convoluted, jurisprudentially misleading, and litigation-breeding qualified-beneficiary sub-classification. Short of that, the terms of the trust should make clear that the qualified beneficiary's approval of a trustee's action may not bind the non-qualified beneficiary, to the extent the approval otherwise would constitute a shifting or extinguishment of the non-qualified beneficiary's equitable property rights in contravention of settlor intent. These drafting tweaks are as much in the trustee's interest as in the beneficiaries' interest. Why? Because so long as the non-qualified beneficiary is kept in the dark with respect to a breach of trust, the applicable statute of limitations will not begin to run against that beneficiary, unless it is the UTC's statute of ultimate repose.

[Item 2] UTC's statute of ultimate repose: Is it even constitutional? In a radical departure from long-standing fiduciary norms, UTC §1005(c) provides that under certain circumstances a trust beneficiary has only five years to bring a

breach-of-trust action the trustee even should the beneficiary lack actual or constructive notice of the breach. See §7.1.3 of this handbook. It gets worse. The UTC is agnostic even as to whether there is a fraud exception. Besides being a nasty trap for the unwary trust counsel, there is the threshold question of whether the statute is even constitutional. See §7.1.3 of this handbook, which includes a general discussion of whether unjust-enrichment doctrine may be the statute's Achilles heel. In any case, it is hard to see how a fully informed prospective settlor would ever knowingly fail to at least attempt to negate the statute's enforceability as against the prospective beneficiaries of the trust. Trust scriveners take note, as well. The agency-based fiduciary duties of a trust scrivener run to the settlor, not to the trustee. As a negation of the statute's applicability vindicates equitable property rights, not degrades them, it should not run afoul of the UTC's panoply of mandatory rules, specifically of UTC §105(b)(12). As an aside, the scrivener who has been unsuccessful in persuading the prospective settlor to endeavor to negate the statute's applicability in the trust's terms might consider obtaining an affidavit to that effect from the prospective settlor.

[Item 3] Leashing the UTC §305 Representative. The UTC makes no effort to "reform" the office of guardian ad litem (GAL), the subject of §8.14 of this handbook. The UTC, however, does provide for judicial appointment of a "representative" to "receive notice, give consent, and otherwise report, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown." A UTC §305 representative is apparently not a GAL, though the general explanation why in the official commentary is not particularly enlightening. But lurking in the body of the section itself is a glaring and troubling deviation, namely that the representative may "consider in making decisions" the "general benefit" accruing to members of the "family" of the one being represented. See UTC §305(c). In §8.14 of this handbook we suggest that rationalizing such objectively conflicting and competing interests is best left to the court. Consider the family feud. It is in the interest of both court and represented that the representative's focus and advocacy be solely in furtherance of the interests of the represented, undistracted by the interests of third parties. But it gets worse. There is no definition of "family" in the UTC. It thus falls to the trust-instrument scrivener to supply one for §305 purposes. Better still, have a trust term end-run this legislatively induced divided-loyalty jurisprudential conundrum altogether by memorializing the settlor's intent that any UTC §305 representation be solely focused on the interests of the represented beneficiary. This should not be a problem in that also lurking in the UTC itself, see §105(b)(3), is a "mandatory

rule" to the effect that a trust and its terms shall be for the benefit of the beneficiaries.

[Item 4] Virtual representation: Less than meets the eye. UTC §304 partially codifies the doctrine of virtual representation applicable in the trust context. It reads that "unless otherwise represented, a minor, incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, *but only to the extent there is no conflict of interest between the representative and the person represented*." Virtual representation, despite the ULC hype, is less than meets the eye. When it comes to "representing" a yet-to-exist or otherwise unascertainable trust beneficiary *incident to the sorting out of equitable property rights*, due process considerations will generally dictate that it be direct via a court-appointed guardian ad litem rather than virtual, particularly if the trust has a principal-invasion feature, as most do nowadays. It would be penny wise and pound foolish, if not constitutionally suspect, for a trustee to eschew the direct in favor of the virtual in the face of such a feature. See §8.14 of this handbook. Moreover, the courts must always be open for adjudicating *at trust expense* the threshold conflict issue. So much for litigation cost avoidance. But even in the absence of a conflict, the virtual "representative" owes no fiduciary duties to the virtually "represented." He or she is free to make personal side deals mid-course in derogation of the constitutionally protected equitable property rights of the "represented." And then what? Petition mid-course at trust expense for judicial appointment of a GAL? It would have been better had the virtual-representation siren song been put on permanent mute at the drafting stage.

[Item 5] The trust protector/director merely conflates pre-existing settled doctrine. The literature is replete with jurisprudential handwringing and confusion. Is a trust protector/director a fiduciary? What if the terms of the trust provide otherwise? Is such a negation of fiduciary status unenforceable? If not, then is not the trust itself illusory? See generally §3.2.6 of this handbook. As to the ethical implications of all of this, one has to wonder why the typical prospective trust settlor who has been fully informed of the applicable facts and law would ever knowingly deprive the trust's beneficiaries of equity's generous fiduciary protections. It is settled law that the scrivener of a trust instrument is saddled with

serious agency-based fiduciary duties that run at minimum to the settlor. See §8.15.61 of this handbook.

In any case, the fiduciary trust protector/director in substance is just a co-trustee by another name. The nonfiduciary protector/director in substance is either the donee of a nonfiduciary power of appointment or the donee of a common-law gift. This doctrinal conflation is proving confusing and costly. Instead, consider at the drafting stage going with the tried and true. Rather than designate X as a trust protector/director, either designate X a special-purpose co-trustee, who perforce would be a fiduciary, or grant X a garden-variety nonfiduciary power of appointment. If the power is presently exercisable and general, X in substance would be the donee of a gift. See generally §8.1.1 of this handbook.

[Item 6] No trustee incident to the delegation of a fiduciary function to a third party shall enter into an arbitration contract with that third party if its terms also would be enforceable against a trust beneficiary who is not a signatory. Under the UTC and the Uniform Prudent Investor Act, a third party to a trust relationship who has been delegated a fiduciary function by the trustee owes fiduciary duties *directly* to the beneficiaries of the trust, though the delegatee is the common law agent of the trustee-principal. This is a doctrinal conundrum if there ever was one. See §6.1.4 of this handbook. Ergo, for the terms of any arbitration contract that is incidental to the delegation event to be binding on the beneficiaries, they *ab initio* also must have been signatories to it. As to the unborn and currently unascertainable beneficiaries, a guardian *ad litem* judicially charged with representing their interests in the matter must have been involved as well. That the trust's beneficiaries must be made direct parties to the arbitration contract is by no means settled law. See §6.1.4 of this handbook. Ergo, consider including a provision in the governing trust instrument at the drafting stage to the effect that the trustee may not enter into an arbitration contract with a third-party fiduciary if the beneficiaries could be bound by its terms without their informed consent.

[Item 7] Avoid in terrorem/no-contest overreach. An overbroad *in terrorem* clause in a trust instrument can perversely foster expensive and destabilizing litigation. A good faith effort on the part of a beneficiary to have a breach of trust judicially remedied should not on public policy grounds trigger a forfeiture of his or her equitable property rights, even should the *in terrorem* clause provide otherwise. See §5.5 of this handbook. In no way is this a "contest" of the trust. Quite the contrary, fiduciary accountability being an essential element of the trust relationship. Absent enforceable accountability, it is the trustee who is the true beneficial owner. As a practical matter, it generally falls to the beneficiaries to

bring to the court's attention breaches of trust. The equity court needs all the help that it can get. Best that the *in terrorem* clause does not venture outside its traditional lane, which is to deter attacks against the trust's very existence and/or against how equitable property rights have been allocated pursuant to its terms.

[Item 8] Negate any applicability of antilapse to the irrevocable trust. For centuries, antilapse has applied only to failed testamentary dispositions. The UPC, see §2-707, however, would extend antilapse to the failed equitable interest under an irrevocable trust. The mechanics? A bizarre notional resulting trust rather than an actual resulting trust in all its doctrinal simplicity would kick in. The new regime is hyper-complicated, hyper-convoluted, and hyper-controversial on policy grounds. See §8.15.55 of this handbook. To be sure, the UPC acknowledges that this is default law but has no intention of making it easy for scriveners to draft out from under it. The settlor must have "provided unmistakably to the contrary and provided for an effective alternate disposition of the share in question." See §5.2 of this handbook for some tried and true drafting suggestions. Mere words of survivorship would not be enough to defeat the statute's applicability to the trust relationship. That all this trust-related doctrinal reform lurks in the bowels of the UPC rather than the UTC enhances the lethality of this trap for the unwary trust practitioner and jurist. At stake is the proper allocation of equitable property rights.

[Item 9] Trusts for pets: Classic Equity versus the UTC. The UTC pet trust regime has enforceability and unaddressed contingency issues. In §9.9.5 of this handbook we explain and suggest some alternatives that are equity based rather than statute based.

[Item 10] A trust term mandating arbitration of internal disputes is a fish out of water, a trust not being a contract. A clause that mandates arbitration of trustee-beneficiary internal disputes can perversely and redundantly require judicial involvement, particularly when the equitable property interests of the yet-to-exist-or-be-identified are at stake. Nowadays, for example, many a trust upon its ultimate termination will distribute to someone's "then living issue." Or in mid-course provide for discretionary distributions of principal to someone's issue living from time to time. Due process considerations require that their contingent equitable property rights be independently represented in the arbitration, such as by a judicially appointed guardian *ad litem*. An arbitration that involves fewer than all interested parties wastes time and treasure. Moreover, even a trust-related arbitration in the face of full representation has its limitations. A contest, for example, over the validity of a trust, even one that is *inter vivos*, remains the exclusive domain of the judiciary, no matter what the governing documentation

may say. A trust term that purports to oust the court from its traditional equitable jurisdiction over trust matters has always been considered unenforceable. While the arbitration clause is compatible with the law when it comes to enforcing a contractual relationship, it is a fish out of water when it comes to enforcing a trust relationship, the latter being a creature not of the law but of equity. See §3.5.3.3 of this handbook.

There are practical concerns, as well. Arbitrating a breach-of-fiduciary-duty trust dispute while the trustee remains in office is at best awkward. Worse, it can foster fiduciary mischief, human nature being what it is. Settlor intent takes a back seat when it comes to such nonjudicial sorting out of rights, duties, and obligations. Were the matter instead before the equity court, the court itself would have an "administrative" duty, acting *sua sponte* if necessary, to see to it that settlor intent is honored and enforced. The arbitrator is saddled with no such duty. Arbitration can be more expensive than litigation. Avenues for appealing an arbitrator's decision are more limited than if the decision had been handed down by a court. See generally §8.44 of this handbook.

[Item 11] Fiduciary accountability is enhanced when charitable trust has more than one trustee. True, the attorney general of the state in which a charitable trust is administered has standing to seek its enforcement in the courts. See §9.4.2 of this handbook. Still, most state AGs lack the staffing, resources, organization, jurisprudential familiarity, and, above all, political incentive to proactively seek judicial remedies for breaches of trust in the charitable context, except for troubled charitable trusts that have been established by celebrities or are otherwise the subject of sustained press scrutiny. The pre-funding work-around, however, is simple. Have legal title to the entrusted property held by co-trustees. A co-trustee, perforce, has standing to seek judicial enforcement of its terms; in fact, a co-trustee would have an affirmative fiduciary duty to do so if he, she, or it knows, or should know, that the other co-trustees are in breach of trust. See §7.2.4 of this handbook. The AG is saddled with no such affirmative duty, fiduciary or otherwise. For other measures that might be taken at the drafting stage to increase the chances that donor intent going forward will be upheld by all concerned, see §4.1.1.2 of this handbook.

[Item 12] The U.S., a U.S. state, or a municipality as common law trustee: Not a great idea. A settlor intending to impress a charitable trust on property for a governmental or municipal purpose is advised to designate an individual or a business corporation, such as bank or trust company, as the trustee. Judicial enforceability is the *sine qua non* of the trust relationship. Thus, a trust of

which the U.S. is the ostensible trustee is jurisprudentially illusory, notwithstanding any statutory wording to the contrary. See §9.9.3 of this handbook. At common law as enhanced by equity, a "use," the trust's ancient doctrinal predecessor, could not be enforced against the Crown. This is still the case today as a practical matter. A trust under which a state (U.S.) is the designated trustee is all but illusory, as well, particularly if equitable relief would entail legislative involvement such that the state's version of the separation-of-powers doctrine is implicated. As to the municipality as trustee? Let's just say that in city hall the fiducial is generally no match for the political. See §9.8.2 of this handbook.

[Item 13] The illusory noncharitable purpose trust. Section 409(2) of the UTC provides that a noncharitable purpose trust is enforceable by a person appointed by its terms. But to whom are the enforcer's fiduciary duties owed? If the "enforcer" of a purpose trust effectively owes fiduciary duties to no one, then the enforcement mechanism is illusory; and if the enforcement mechanism is illusory, so also is the trust itself. See §9.27 of this handbook. The scrivener's challenge is the accountability conundrum inherent in the very concept of a purpose trust.

[Item 14] Best that governing trust instrument contains for its purposes a detailed, clean definition of decanting. Trust distributions in further trust have been around since time immemorial, well before the process was labeled decanting. Inherent is the right to exercise a nonfiduciary general power of appointment has been the right to exercise it in further trust. A nonfiduciary limited power has been exercisable in further trust, provided there is express authority to do so, and the exercise is not a fraud on the special power. In the case of a fiduciary power of appointment, think the trustee with discretionary authority to invade principal for a fixed class of permissible beneficiaries, a discretionary distribution of principal in further trust, that is a "decanting," has always been an enforceable option under the default law, provided the exercise is not a fraud on the special fiduciary power. By that we mean that further entrustment may not be for the benefit of non-members of the fixed class. To the extent non-members by statute or otherwise also may be benefited, "decanting" is jurisprudentially novel. Hence, the need in the governing trust instrument for a definition of decanting that would include spelling out what features, if any, deviate from the jurisprudentially traditional, such as a feature that would authorize a bestowal via the decanting process of equitable property rights on strangers to the decanted trust. See §8.15.26

of this handbook (fraud on a special power doctrine) and §3.5.3.2(a) of this handbook (decanting).

[Item 15] Expressly prohibit any jurisdiction transfer, whether via decanting or situs/governing-law change, that would directly or circuitously subvert settlor intent. Consider, for example, the truly "quiet" trust, which is a trust in name only. See §9.9.25 of this handbook. A decanting from a true trust that is being administered in a jurisdiction where quiet trusts are not enforced into a quiet trust that is administered in a jurisdiction where such trusts are enforced would be a subversion of settlor intent. The same goes for a situs/governing-law change that would bring about the same result. Such shenanigans to the extent they would be intent defeating should be expressly proscribed in the governing trust instrument or otherwise addressed. Expansion of trustee exculpation via jurisdiction transfer should be as well. So too should elimination of a trust protector/director's fiduciary status via jurisdiction transfer.

[Item 16] Proactively ring fence the perfectly drafted trust instrument with extrinsic supportive evidence, textual unambiguity being no defense to third-party attack via a UTC §415 reformation action. Section 415 if the UTC provides that the court may reform the terms of a trust, even if patently and latently unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing extrinsic evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. See §8.15.22 of this handbook. The clear and convincing evidence standard is proving a paper tiger. A third party stranger, that is one who is not currently mentioned specifically or generically, directly or indirectly within the instrument's four corners, is not foreclosed on standing grounds from bringing such an action. The tort lawyer who negligently fails to exploit UTC §415 when appropriate, see §8.15.22 of this handbook, is asking for trouble. Statutes of limitation applicable to the bringing of breach of trust actions may well not capture trust-reformation actions. Laches doctrine untweaked by statute is likely what will. UTC §415 is a meticulous scrivener's nightmare. But it gets worse. The terms of the trust may not effectively negate its applicability. See UTC §105(b)(4).

So what countermeasures can be taken at the conclusion of the drafting process to mitigate the perfect instrument's vulnerability to attack via reformation? Consider loading up the client file with clear and convincing direct extrinsic evidence, via affidavits, correspondence, and the like, that the settlor at the time the trust documentation was executed was fully competent and armed with a full, subjective, and correct understanding of the applicable facts and law. The file

should be flush with direct extrinsic evidence that a reformation attack mounted against the trust's terms as specified in the text would contravene settlor intent. Any conclusive extrinsic evidentiary items should be physically kept with the governing trust instrument.

[Item 17] A trust term that negates pretermission is not overkill in a few jurisdictions. Those who advocate expanding either by legislation or judicial fiat the reach of the generic pretermission statute applicable to wills to the revocable inter vivos trust have little to show for their advocacy. Except in a few states. See §8.15.89 of this handbook.

[Item 18] Proxy exercise of settlor's reserved right to amend or revoke: Best not leave it to the default law to wrestle with the authority issues. The terms of a trust that is initially subject to a reserved right to amend or revoke should expressly address whether the settlor's agent via a durable power of attorney may exercise that right in the event of settlor incapacity. If exercise via proxy is expressly authorized, it is best that there be express textual coordination between the trust instrument and the agency instrument. See §8.2.2.2 of this handbook.

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