Title

A private charitable donation is to be made in trust for the collective benefit of a municipality's citizens: Better the title-holding trustee be a nongovernmental entity than the municipality

Text

Assume the citizen of a municipality donates his art collection to the municipality, not outright but in charitable trust, for display in a public museum. The city council constitutes a six-citizen "board" and delegates to the board the task of administering the trust. When it comes to a true charitable trust, the state's judiciary is in charge, not the mayor, not the city council, not the state's legislature, and not the governor. The board is merely an agent of the municipality, that is of the common law title-holding trustee. As the fiduciary-based culture of a trust company and the political culture of a city hall are very different, it is critical, assuming enforcing donor intent is to be a priority, that the governing trust documentation unambiguously makes clear, particularly to government officials serving from time to time and to the public at large, that the board is never to morph into an "instrumentality of government executing public policy." *See, e.g.,* Trustees of Walters Art Gallery, Inc. v. Walters Workers United, 340 A.3d 786, 809 (Md. 2025). In other words, the donation is not to become a political football, the saga of the Franklin Trust being a cautionary tale in this regard. See https://www.jdsupra.com/legalnews/reliving-the-200-year-saga-of-benjamin-f-807851/. Rather, the lodestar of those directly or indirectly involved administratively in this true fiduciary relationship shall be donor intent.

In the case of property truly entrusted to a municipality, the state's attorney general would have standing and the duty to seek judicial enforcement of its provisions. The practical, political, and legal realities are, however, that an AG, even if so inclined, would find it politically awkward advocating for judicial removal of the municipality from the trusteeship and for the appointment of a nongovernmental entity as successor trustee. See generally Woodward Sch. for Girls, Inc. v. City of Quincy, 469 Mass. 151, 177 (Mass. 2014). Political influence and press oversight are typically the only practical means of getting municipalities to cease maladministering their trusteeships. The Restatement (Third) of Restitution and Unjust Enrichment, specifically §17, illus. 1, however, proffers an optimistic illustration of a municipality being judicially compelled in a taxpayer suit to honor its fiduciary responsibilities as a charitable trustee, litigation in which the state's attorney general's division of public charities, which should have been advocating for the charitable trust's very existence and for judicial enforcement of its charitable purposes, is AWOL from the illustration altogether:

> *"City holds Blackacre under a perpetual charitable trust for public park purposes. Acting with the consent of the mayor and city council, as subsequently ratified by the State legislature, City conveys Blackacre to Developer for use as a parking lot. Taxpayers (as trust beneficiaries) sue City and Developer to compel rescission of the conveyance. City argues that (i) the original conveyance to City did not create a public trust, (ii) if a trust was created it has since become impossible to carry out, (iii) using Blackacre as a parking lot is justified under the doctrine of cy pres, and (iv) any breach of trust was eliminated when the State legislature enacted a statute authorizing the conveyance to Developer. The court rejects each of these arguments, concluding that the conveyance was made in breach of trust and that Developer had notice of the relevant facts. Taxpayers are entitled to an order rescinding the conveyance and to injunctive relief enforcing City's duties as trustee.*

For the challenges, both legal and practical, of having a true trust enforced against the United States or one of her states, see §9.8.2 of *Loring and Rounds: A Trustee's Handbook* (2026), the relevant portions of which are set forth in the appendix below.

Appendix

## §9.8.2 *The City, the State, or the United States as Trustee* [from *Loring and Rounds: A Trustee's Handbook* (2026)].

**The U.S. as common law trustee.** A trust may well be unenforceable and thus illusory if its trustee is the United States or a U.S. state. At common law as enhanced by equity, a "use," the trust's ancient doctrinal predecessor, could not be enforced against the Crown.[84] Today, jurisdiction over any suit against the United States, as trustee or otherwise, requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver.[85] While the sovereign, in theory, may have common-law, statutory, or constitutional authority to hold property in trust, the absence of the critical element of credible enforceability makes such trusteeships all but illusory.[86] Moreover, a sovereign's trusteeship of an item of property cannot constrain the sovereign's power to de-entrust it by eminent domain. Nor is it helpful that a court of equity will not issue an unenforceable specific-performance order, such as to a legislature. Consider the interminable litigation over the United States's incompetent trusteeship of Native American properties.[87] That trust law is primarily state-specific further complicates matters when it comes to federal trusteeships. Too bad those properties belonging to the Native Americans had not long ago been entrusted to private entities, entities that could easily be compelled to carry out specific-performance orders issuing from the equity courts.

**The state as common law trustee.** In 2021, a matter came before the Supreme Court of Washington involving the State's trusteeship of a common law charitable trust that had been settled by the federal government, effective November 11, 1889. The subject property was thousands of acres of land that initially had been granted to the State by the United States pursuant to the Omnibus Enabling Act of 1889. Their entrustment had been a statehood pre-condition. Third parties, unhappy with how the trust is now being administered, had brought a declaratory-judgment action. The trial court's dismissal of the action was affirmed.[88] No fault was found with the State's administration of the trust. Had the court found fault with how, say, the State's legislature had been involving itself, or not involving itself, in the trust's administration, the separation-of-powers doctrine could well have prevented the courts from doing much

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[84] *See* United States v. Mitchell, 463 U.S. 206 n.8 (1983) (Powell, J., dissenting) (citing 2A Scott, Law of Trusts §95, at 772 (3d ed. 1967)).

[85] *See* United States v. White Mtn. Apache Tribe, 537 U.S. 465, 470 (2003) (holding that a federal statute providing that Fort Apache shall be held by the United States in trust for the White Mountain Apache Tribe imposed certain fiduciary obligations on the United States to include keeping the property from falling into disrepair).

[86] *See* 2 Scott & Ascher §11.1.5 (confirming that when either the United States or a state holds land in trust, sovereign immunity may complicate enforcement). As to the authority of a U.S. state under its constitution to act as trustee, see, e.g., Conservation Nw. v. Comm'r of Pub. Lands, 514 P.3d 174, 199 Wash. 2d 813 (2022) ("These … [Enabling Act]… provisions make clear that the federal government intended to create a trust whereby the State … [of Washington]… accepted control of the granted lands with the express understanding that the lands were not its absolute property but, instead, were to be held and used exclusively for the enumerated purposes … The Washington Constitution was ratified approximately seven months after the Enabling Act was passed and provided, in part, that '[a]ll the public lands granted to the state are held in trust for all the people.' Wash. Const. art. XVI, §1.").

[87] *See* Jalonick, *Federal Judge Says Interior Dept. Delayed Indian Trust Accounting*, Boston Globe, Jan. 31, 2008, at A16 ("The federal agency 'has not, and cannot, remedy … [its breach of fiduciary duty]… to account for the Indian money,' US District Judge James Robertson said in a 165-page decision …," the judge also blaming Congress for failing to appropriate enough money for a proper forensic accounting).

[88] *See* Conservation Nw. v. Comm'r of Pub. Lands, 514 P.3d 174, 199 Wash. 2d 813 (2022).

about it, a situation reminiscent of the ongoing maladministration by the United States of the properties of the Native Americans.

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**Faux public trusts.** Some public-sector initiatives are falsely advertised as true trusteeships. Social Security is a prime example. Social Security is nothing more than two autonomous schemes: A welfare scheme and a taxation scheme. Neither involves actual entrustment of segregated enforceable property rights. See generally §9.9.3 of this handbook.