

The Uniform Trust Code's stealth attack on the Trustee's time-honored duty to defend his trust

One of the critical duties of a trustee traditionally has been to defend his trust against internal attacks. By that I mean to defend the trust against those who, in contravention of the settlor's intentions as expressed in the terms of the trust, would seek to alter its terms, or even have the trust terminated altogether. This duty to defend is taken up in §6.2.6 of *Loring and Rounds: A Trustee's Handbook* (2014), excerpted below and modified, and should not be confused with the trustee's duty to defend the trust from external attacks *against the trust property*, such as from creditors whose claims are unwarranted. That duty is addressed in § 809 of the Code and §6.2.1.3 of the Handbook.

§6.2.6 Duty to Defend the Trust against Attack; Duty Not to Attack the Trust; Indirect Attacks (Construction Proceedings)

[Excerpted from Charles E. Rounds, Jr., et. al, *Loring and Rounds: A Trustee's Handbook* (2014) and modified].

The trustee's duty to defend the trust. The trustee has a duty to defend the trust.⁶⁸⁹ The trust may be attacked by those who have an economic interest in bringing about its cancellation or termination.⁶⁹⁰ It may be attacked by those who oppose its purposes.⁶⁹¹ To fail to mount a vigorous defense is to thwart the intentions of the settlor and may be grounds for the trustee's removal. Moreover, the trustee would be liable to the beneficiaries for any injury occasioned by an unwarranted capitulation.⁶⁹²

However, if it is clear to a reasonable person who has sought and obtained independent, competent legal advice that an attack is warranted or that resistance would be futile, then a defense should not be mounted.⁶⁹³ This exception would not apply when there is reasonable uncertainty as to the facts or the law.⁶⁹⁴

The trustee must do what is necessary within the bounds of law and reason to defend the trust and thus may retain counsel for that purpose and is entitled to have the costs of such representation absorbed by the trust.⁶⁹⁵ All reasonable appeals should be taken.⁶⁹⁶

⁶⁸⁹ See generally Bogert, *Trusts and Trustees* §581. See also 2A Scott on Trusts §178.

⁶⁹⁰ See generally Bogert, *Trusts and Trustees* §581. See also 2A Scott on Trusts §178.

⁶⁹¹ See generally Bogert, *Trusts and Trustees* §581. See also 2A Scott on Trusts §178.

⁶⁹² See generally Bogert, *Trusts and Trustees* §581. See also 2A Scott on Trusts §178.

⁶⁹³ See generally Bogert, *Trusts and Trustees* §581. See also 2A Scott on Trusts §178.

⁶⁹⁴ See generally Bogert, *Trusts and Trustees* §581. See also 2A Scott on Trusts §178.

⁶⁹⁵ See generally Bogert, *Trusts and Trustees* §581. See also 2A Scott on Trusts §178. See generally 3 Scott & Ascher §18.1.2.4 (noting also that the trustee can properly "pay out of the trust estate the expenses of resisting an attempt by the beneficiaries to terminate the trust prematurely").

The trustee who is unprepared to go the distance should seek to have the trusteeship transferred to someone who is. He probably should not have accepted the trust in the first place.

In the case of an action for instructions or declaratory judgment to clarify the terms of a trust and/or sort out the rights of its beneficiaries,⁶⁹⁷ it would seem that the trustee may assume a neutral posture,⁶⁹⁸ once he has assured himself that all parties, including the unborn and unascertained, are properly represented.⁶⁹⁹ On the other hand, if the action is actually a vehicle for attacking the trust itself, *e.g.*, if there are allegations that the trust was the product of fraud, duress, or undue influence, then the trustee is duty bound to advocate for the trust's validity,⁷⁰⁰ unless to do so would be self-evidently futile and/or unreasonable. Likewise, if the judgments that are ultimately issued by the trial court amount to a "total or partial destruction of the trust," then the trustee may have a fiduciary duty to appeal to a higher court if to do so would be reasonable and in the interests of the beneficiaries.⁷⁰¹ Unless an appeal would be self-evidently unreasonable and/or futile, then its costs may be borne by the trust.⁷⁰²

Divorce proceedings. The trustee is not relieved of the duty to defend the trust and its dispositive terms just because the beneficiary happens to be getting divorced. The trustee's primary allegiance is to the beneficiary, not to the nonbeneficiary spouse or ex-spouse, unless the express terms of the trust provide otherwise. Thus, when there is marital discord, the trustee must suppress any personal feelings as to who may be at fault and vigorously defend—within reason and to the extent the law allows—the beneficiary's equitable property interest. As the English say, "[t]rustees have the custody of the property: they do not keep the conscience of their beneficiary."⁷⁰³ A trustee may even have a fiduciary duty to challenge, at trust expense, a charging order against discretionary distributions that interferes with the trustee's ability to carry out the settlor's intentions. "Although the process and division may reflect the concept of marriage as a shared enterprise or partnership, this process and division likely will be counter to the intent of the trust's settlor and perhaps will require the participation of the family members of a beneficiary in the proceedings."⁷⁰⁴ Reaching equitable interests in the context of divorce

⁶⁹⁶Bogert, *Trusts and Trustees* §581; 2A *Scott on Trusts* §178. See P.H. Vartanian, Annot., *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147 (1949).

⁶⁹⁷See generally §8.42 of this handbook (complaints for instructions versus complaints for declaratory judgment).

⁶⁹⁸See generally §6.2.5 of this handbook (trustee's duty of impartiality); 3 *Scott & Ascher* §17.10. Cf. 3 *Scott & Ascher* §18.1.2.4 (noting that "if the trustee is reasonably in doubt about the terms of the trust or the scope of the trustee's duties or powers, the trustee can properly incur the expense of a judicial proceeding to construe the terms of the trust or for instructions").

⁶⁹⁹See generally §6.2.5 of this handbook (trustee's duty of impartiality); 3 *Scott & Ascher* §17.10.

⁷⁰⁰See generally 3 *Scott & Ascher* §17.10.

⁷⁰¹3 *Scott & Ascher* §17.10.

⁷⁰²See generally 3 *Scott & Ascher* §17.10.

⁷⁰³Lewin on *Trusts* ¶20-161 (England).

⁷⁰⁴Marc A. Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 *Real Prop. Prob. & Tr. J.* 1, 3 (Spring 2005).

proceedings is taken up in Section 5.3.4.1 of this handbook.

The trustee's duty not to attack the trust. The trustee being a fiduciary, he may not mount an attack against his own trust.⁷⁰⁵ It has been said that the trustee, having accepted the trust, is “estopped” from then setting up its invalidity.⁷⁰⁶ At minimum, such acts of betrayal are grounds for removal. This would include attacks on only some of the equitable interests. Take the mistake-based reformation suit.⁷⁰⁷ Legal title to the property of a trust being in the trustee, it is likely that the trustee would have standing to bring such an action.⁷⁰⁸ Whether under equitable principles the trustee should do so is another matter. If the trustee is seeking to bring about a reordering of the equitable property interests at the expense of one or more of the beneficiaries designated within the four corners of the governing instrument, then his initiating the reformation action, and certainly his appealing of any lower court decision not to reform, would be difficult to square with his fiduciary duties of loyalty and impartiality, not to mention his duty to defend the trust.⁷⁰⁹ Even as a nominal defendant in a mistake-based reformation action brought by someone else, the trustee should be wary of taking a position that amounts to a constructive attack on the equitable interests of any designated beneficiary.

The Uniform Trust Code. The Uniform Trust Code neglects to “state” in its Article 8 the trustee’s critical common law duty to defend his trust. But the Code also neglects to expressly negate the duty. Thus, the duty remains very much alive and well in the jurisdictions that have enacted the Code. “The Uniform Trust Code is supplemented by the common law of trusts and principles of equity.”¹ Actually, vice versa is more precise. In any case, the application of the doctrine of substantive equitable deviation, a topic we take up generally in Section 8.15.20 of this handbook, and the application of the doctrine of substantive equitable reformation, a topic we take up generally in Section 8.15.22 of this handbook, are constrained and tempered by the trustee’s duty to defend. The Code’s failure to expressly “state” the trustee’s duty to defend is a trap for the unwary trust professional who labors under the misconception that in any given situation all applicable trust law lurks only within the Code’s four corners. What applies to the trustee’s duty to defend his trust applies also to his duty not to attack it.

⁷⁰⁵See generally Bogert, Trusts and Trustees §581; 2A Scott on Trusts §178 (“Clearly, the trustee owes a duty to the beneficiaries not to destroy the trust”); P.H. Vartanian, Annot., *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147 (1949).

⁷⁰⁶See generally Bogert, Trusts and Trustees §581; 2A Scott on Trusts §178 (“Clearly, the trustee owes a duty to the beneficiaries not to destroy the trust”); P.H. Vartanian, Annot., *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147 (1949).

⁷⁰⁷See generally §8.15.22 of this handbook (reformation actions).

⁷⁰⁸See, e.g., *Reid v. Temple Judea & Hebrew Union Coll. Jewish Inst. of Religion*, 994 So. 2d 1146 (Fla. Ct. App. 2008).

⁷⁰⁹See §6.1.3.6 of this handbook (breaches of the trustee’s duty of loyalty that do not involve self-dealing) and 6.2.5 of this handbook (the trustee’s duty of impartiality).

¹ Uniform Trust Code, General Comment to Article 1.

It may well be that the trustee's duty to defend his trust, that critical duty that is essentially what makes a trust a trust, at least as it has been understood in the Anglo-American legal tradition, was intentionally not "stated" in Chapter 8 of the official version of the Code. To have done so would have put a drag on general acceptance of the Code's controversial sole-benefit-of-the-beneficiary-principle. If the duty had been expressly stated, it would have prompted some uncomfortable questions, such as "Can the UTC's sole-benefit-of-the-beneficiary-principle and the trustee's duty to defend the trust, as a practical matter, ever really coexist?"