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GRANTOR ENFORCEMENT OF TRUSTS: STANDING IN ONE PRIVATE LAW SETTING

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Courts sometimes allow an individual to maintain an action to enforce the terms of a trust that he has created. Typically, they justify such a decision by stating that the grantor was a beneficiary or trustee of the trust, or had a contractual right against the trustee, and thus had an enforceable interest in the trust. None of these theories, however, easily explains the disparate results in the cases. Professor Gaubatz proposes that traditional standing analysis provides an understandable framework within which to analyze the right of the grantor to enforce a trust. Problems encountered in grantor enforcement cases often are analogous to those in the public law cases, and because of this similarity, standing doctrine provides a clear and consistent analytical model for addressing problems of grantor enforcement. Application of this analysis exposes the true interests at stake in determining the grantor's right to sue, and thereby helps to identify the appropriate situations for allowing grantor enforcement of a trust. The Article applies the conclusions to a number of fact patterns that have yet to be litigated, in an attempt to assist the courts in resolving possible challenges to the grantor's right to bring the action.

The purpose of this Article is to describe the circumstances in which a grantor has standing to enforce a trust that he has created. In spite of the almost commonplace use of grantor trusts in estate planning, there is a surprising paucity of literature discussing when and how the grantor can enforce such a trust. Although commentators have treated thoroughly the tax ramifications of grantor trusts[1] and the general problems of enforcement of trusts by beneficiaries,[2] little attention has been paid to the question when, and to what extent, an individual can enforce a trust that he has created and in which he has retained several, some, or no powers or beneficial interests.[3] This lack of liter-

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1. *See, e.g.*, Pedrick, *Grantor Powers and the Tax Reform Act: End of an Era?*, 71 NW. U.L. REV. 704 (1977).

2. *See, e.g.*, 3 A. SCOTT, THE LAW OF TRUSTS §§ 197-226 (3d ed. 1967); G.G. BOGERT & G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 861-960 (2d rev. ed. 1982) [hereinafter cited as BOGERT].

3. The most notable lack of investigation is with respect to the enforceability of grantor powers. Neither commentators Scott nor Bogert, *see supra* note 2, specifically addresses most trust problems in the context of grantor powers. For example, in fourteen pages of discussion on the

ature is surprising given the number of powers and interests that can be retained, the many reasons for their retention, and the possible conflicts between the grantor, trustee, and beneficiaries.

If the grantor retains a beneficial interest, it is normally adverse to most other interests in the same trust.[4] Thus, actions of the trustee can engender conflict between the grantor and the holders of the other interests. Similarly, most grantor powers control the value, if not the existence, of beneficial interests in the trusts,[5] and their exercise usually adversely affects one or more beneficiaries. Further, this negative effect, with its potential for conflict, can result whether the power is retained to protect the grantor (as with a power to revoke), or to control the flow of benefits to the beneficiaries (as with powers to distribute income or corpus). Indeed, even retained administrative powers, the exercise of which can improve some interests while diluting others in the same trust, ultimately can pit the interests of one or more beneficiaries against the will of the grantor, and thus raise the question of the grantor's right to force compliance with his wishes.[6]

In addition, the commonplace use of spendthrift clauses and "material purpose" trusts to limit a beneficiary's power over property also suggests the importance of a grantor's right to enforce the limitations in the trust instrument. A grantor who creates a spendthrift or material purpose trust relies on the trustee to resist the importunings of the beneficiary to deviate from the trust to his immediate advantage. If the beneficiary seeks such deviation, his desires are contrary to those of the grantor, even if not contrary to the grantor's economic interests. The attempt thus raises the question of the grantor's right to prevent the trustee from acceding to the beneficiary's demands.[7]

Many circumstances exist in which the grantor is allowed to sue the trustee to enforce the trust. Enough of these situations exist to prove false the overstatement, common in the treatises, that a grantor who is not a beneficiary lacks standing to enforce a trust.[8] An analysis of the differences between suc-

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duty of the trustee to the holder of a power, Scott devotes one paragraph to grantor powers. *See* 2 A. SCOTT, *supra* note 2, § 185, at 1478-79. Several factors explain the paucity of discussion on this aspect of trust law. First, the rise of interest in grantor powers reflects the importance of the income and transfer taxes to estate planning, and is thus of somewhat recent vintage. Second, the power-holding grantor often is also the trustee, and thus has the power to enforce his own exercise of the power. Finally, most independent trustees will comply with an exercise, rather than ignore it; acceding is easier and may foster further business from the grantor.

4. The typical grantor retains an income interest that is adverse to the remainder interests of other beneficiaries. Reversionary interests similarly are adverse to income interests of other beneficiaries, although reversionary interests may not be adverse to remainder interests with respect to many issues questioning investment decisions.

5. The most common power undoubtedly is a power to revoke the trust. Examples of less pervasive powers include the powers to distribute income or corpus, to control investments, and to borrow trust funds.

6. For example, the power to control investments can be used to enhance or retard the income flow of the trust. If, of course, the beneficiary agrees with the grantor's exercise of the power, he may, as beneficiary, force the trustee to comply with the exercise. *See generally* Comment, *Directory Trusts and the Exculpatory Clause*, 65 COLUM. L. REV. 138, 145-51 (1965).

7. *See* Note, *Right of a Settlor to Enforce a Private Trust*, 62 HARV. L. REV. 1370, 1376 (1949).

8. "Where a trust is created inter vivos and the settlor is still alive, it would seem that he

cessful grantor enforcement actions and those in which the grantor was denied standing, however, has been lacking. This Article fills this void. The Article is divided into three basic parts. Part I outlines the insufficiencies of traditional doctrine as a basis for determining a grantor's standing in trust enforcement actions, discusses the general problem of standing in the private law context, and then suggests that standing concepts normally identified with public law standing cases are useful in analyzing problems in the grantor-trust area. Part II discusses circumstances in which the grantor's economic and other interests give him standing to enforce a trust, whether or not his position is easily categorizable under traditional trust doctrine. Part III applies the conclusions of part II to common grantor-trust settings for which there is currently no authority concerning the grantor's standing to sue.

In discussing grantor standing, the Article adopts the analysis of many of the public law standing cases because the tools of such analysis prove useful in grantor trust cases. By using that analysis in a private law area, however, the Article inherently questions whether standing is a concept limited to public law cases. By illustrating that concepts developed in deciding public law cases are helpful in resolving private law cases, the Article naturally suggests that it is not. The Article is not, however, a definitive discussion of standing in the private law setting. That task must wait for another time, and perhaps another author.

I. GRANTOR ENFORCEMENT AS A PROBLEM OF STANDING

A. The Importance of Standing Analysis in Grantor Enforcement Cases

Any comprehensive discussion of the grantor's right to enforce a trust inevitably leads to a discussion of standing. Normal trust doctrine is simply inadequate to resolve questions about the grantor's right to sue to enforce a trust. As noted above, accepted trust doctrine states that the grantor cannot enforce a trust;[9] yet a myriad of cases exist in which the grantor was allowed to bring an enforcement action. Indeed, the opposite statement—that the grantor may enforce—is not hard to find in judicial opinions.[10] The reason for the inconsistency, of course, is that any such statement is inherently too broad to be useful, and, as illustrated below, must be taken within the context of other doctrine.

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cannot maintain a suit to enforce the trust." 3 A. SCOTT, *supra* note 2, § 200.1, at 1643. *See also* BOGERT, *supra* note 2, § 42 (2d ed. 1966). Cases often make similar statements in dictum. *See, e.g.*, Werbelovsky v. Manufacturers Trust Co., 12 A.D.2d 793, 209 N.Y.S.2d 564 (1961) (mem.) (action to terminate or declare trust void, or to face invasion of trust); *In re* Butler's Trust, 29 Misc. 2d 225, 213 N.Y.S.2d 154 (Sup. Ct. 1961) (suit to revoke irrevocable trust). Statements that the settlor may sue to enforce a trust are also often dictum. *See, e.g.*, McGee v. Vanderventer, 326 Ill. 425, 439, 158 N.E. 127, 133 (1927) (exercise of power of appointment); Garrison v. Little, 75 Ill. App. 402 (1898) (questioning validity of charitable trust on final account of estate); Chapman v. Wilbur, 4 Or. 362 (1873) (action for return of property).

9. *See supra* note 8 and accompanying text.

10. *See, e.g.*, Warren v. Mayor of Lyons City, 22 Iowa 351, 355 (1867) (misuse of public square, when grantor owned adjacent land); Tate v. Woodyard, 145 Ky. 613, 615, 140 S.W. 1044, 1044 (1911) (lodge); Rowzee v. Pierce, 75 Miss. 846, 856, 23 So. 307, 308 (1898) (park).

1. The Inadequacy of Beneficiary Analysis

One major doctrinal exception to the "no grantor enforcement" rule always is made for the grantor who is a beneficiary of the trust.[11] It is hornbook law that beneficiaries may sue to enforce a trust against acts of the trustee that affect their respective interests.[12] Thus, in many common situations, the grantor may enforce the trust because he is a beneficiary. That the beneficiary is also the grantor does not limit this inherent right of beneficiaries to sue. Further, the grantor's right to sue exists when his beneficial interest is implied, as well as when it is expressly retained.

Attempting to regulate the grantor's standing by using as a standard the presence of a beneficial interest in the trust is problematical, however, because of the difficulty in defining when a grantor is a beneficiary. The modern trust is a flexible device, and the grantor may create interests and powers not easily categorized in traditional terms. Reflecting this fact, most discussions of the enforcement of beneficial rights assume that the plaintiff is a beneficiary, but note that the extent of the beneficiary's interest depends on the intent of the grantor.[13] Further, the traditional definition of beneficiary—those persons whom the grantor intended to have an enforceable right[14]—is inherently self-fulfilling unless limited to identifiable rights resembling equitable property interests. A proper definition of beneficiary must exclude persons who might benefit incidentally from the performance of a trust established for the purpose of benefiting someone else,[15] and those whose interest is defined by the term "expectancy,"[16] such as possible appointees of powers not in trust. It must include, however, contingent beneficiaries, such as members of a class in whose favor a power of appointment must be exercised,[17] as well as persons whose interests are contingent on the happening of events, such as the death of another beneficiary without surviving issue. Thus, a beneficiary should be defined as an individual who has a vested or contingent right to require present or future distribution of trust property to himself or for his benefit.

Such a limited definition, however, does not explain adequately a number of cases in which a grantor was allowed to enforce a trust. For example, courts

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11. There is no question that the grantor may be a beneficiary of a trust. Early trusts were almost always trusts for the grantor. Indeed, this gave rise to the concept of the resulting trust—a presumption that property transferred without consideration was for the benefit of the transferor. Further, although grantor trusts that purported to pass the property to third parties at the death of the grantor were at one time questioned as will substitutes, now they generally are deemed to be valid and are so common that they have acquired the special name "living trusts." *See* 2 A. SCOTT, *supra* note 2, § 114.

12. "Any beneficiary who can prove that the threatened or actual wrongdoing may or has affected him adversely financially may bring an action for relief." BOGERT, *supra* note 2, § 871, at 125. *See also* 3 A. SCOTT, *supra* note 2, § 205.

13. *See, e.g.*, BOGERT, *supra* note 2, § 182; 2 A. SCOTT, *supra* note 2, §§ 128, 128.3

14. *Cf.* BOGERT, *supra* note 2, § 182, at 258 (beneficiary is one "entitled to a direct benefit from the trust").

15. *See id.*; 2 A. SCOTT, *supra* note 2, § 126.

16. *See* BOGERT, *supra* note 2, § 182, at 261; L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 58 (2d ed. 1966).

17. *See* L. SIMES, *supra* note 16, § 80.

often allow grantors to enforce the terms of major charitable gifts,[18] as well as trusts for the support of children.[19] In neither case is the grantor a beneficiary under any normal use of the term, although in both cases he has a personal, if not economic, interest in seeing that the trust is maintained in accordance with its terms.[20] Thus beneficiary analysis is inherently inadequate to the task of determining when the grantor ought to be allowed to bring an action to enforce the trust. The tools for that determination must be sought elsewhere.

2. The Inadequacy of Fiduciary Analysis

A second doctrinal intrusion on the "no grantor enforcement" rule is that a grantor who is a trustee may sue cotrustees to redress abuses of trust by them. Not only is a trustee allowed to sue his cotrustees for wrongdoing on their part, it is his duty to do so,[21] and failure in that duty can make him liable for the loss.[22] It also is clear that a grantor may make himself a trustee or cotrustee,[23] which would enable him to bring an action to enforce the trust.

Similarly, a grantor who is a guardian or conservator for a beneficiary may bring an action to enforce the rights of the beneficiary. Both types of fiduciaries lawfully may represent their wards in litigating claims of the ward.[24]

Unfortunately, the utility of trustee or fiduciary analysis is limited in much the same way as is beneficiary analysis. It explains the ability of the trustee-grantor to sue cotrustees, but does not help determine when a grantor is to be deemed a trustee or fiduciary for the purposes of applying the doctrine. As a result, it is of minimal help in deciding, for example, if a grantor may sue to enforce his exercise of a retained power to control investments.[25] Rather, it provides rhetoric for explaining the result.[26]

3. The Inadequacy of Contract Analysis

Finally, a grantor's right to sue might be supported on the ground that he was a promisee of a third-party beneficiary contract, with the trustee as a promisor. Normally, the promisee may enforce a third-party beneficiary con-

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18. *See infra* notes 82-91 and accompanying text.

19. *See infra* notes 92-96 and accompanying text.

20. Courts that seek a property-like "interest" in the trust as a test for determining a grantor's standing to enforce the trust face much the same problem as do those trying to determine whether the grantor is a beneficiary entitled to sue. Any such interest in a trust is the result of imposition of enforceable duties on the trustee, in favor of the grantor. If the term were to be defined broadly enough to allow enforcement in all of the appropriate cases, it would be too broad to exclude those cases in which grantor enforcement of the trust would be inappropriate.

21. *See generally* 2 A. SCOTT, *supra* note 2, § 184.

22. *See, e.g.*, First & Merchants Nat'l Bank v. Bank of Waverly, 170 Va. 496, 197 S.E. 462 (1938).

23. *See generally* 2 A SCOTT, *supra* note 2, § 100.

24. *See infra* notes 97-98 and accompanying text.

25. *See infra* text accompanying note 131 and notes 141-42 and accompanying text.

26. *See* K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 77-92 (1960).

tract as may the beneficiary,[27] although the promisee's relief usually is limited to specific performance. The specific performance limitation does not present practical problems because any relief would accrue to the trust estate. Thus, contractual relief seems appropriate in the trust context.

The major difficulty with justifying a grantor suit on contractual grounds is the often repeated statement that contractual relief is unavailable to enforce trusts,[28] unless there is a separate agreement between the grantor and the trustee for specific acts by the trustee beyond performance of the trust.[29] That statement is too broad, however, because the cases do not universally support it,[30] and the English cases normally cited as supporting the rule do not do so for the grantor.[31] Nevertheless, the statement does act as a significant bar to

27. *See* 2 RESTATEMENT (SECOND) OF CONTRACTS §§ 305, 307 (1979).

28. *See* 3 A. SCOTT, *supra* note 2, § 197.2; BOGERT, *supra* note 2, § 17.

29. *See* 3 A. SCOTT, *supra* note 2, § 197.2, at 1629.

30. *See, e.g.*, Underhill v. United States Trust Co., 227 Ky. 444, 13 S.W.2d 502 (1929); Rosenblatt v. Birnbaum, 16 N.Y.2d 212, 212 N.E.2d 37, 264 N.Y.S.2d 521 (1965), *aff'g* 20 A.D.2d 556, 245 N.Y.S.2d 72 (1963), *rev'g* 236 N.Y.S.2d 893 (1962) (suit to enjoin diversion of trust funds intended for children of grantor). The contractual nature of the cause of action in *Rosenblatt* was recognized in Associated Teachers of Huntington v. Board of Educ., 33 N.Y.2d 229, 306 N.E.2d 791, 351 N.Y.S.2d 670 (1973). Some cases appear to obscure the importance of any distinction between trust and contract analysis. *See, e.g.*, Hall v. Gardiner, 126 F.2d 227 (D.C. Cir. 1942) (rights of second mortgagee against third mortgagee in possession); Wolosoff v. Gadsden Land & Bldg. Corp., 245 Ala. 628, 18 So. 2d 568 (1944) (employees against developer of employee housing contracted for by employer); City of Salem v. Attorney Gen., 344 Mass. 626, 183 N.E.2d 859 (1962) (declaratory judgment action to determine whether park could be used as school); *In re* Reynold's Estate, 131 Neb. 557, 268 N.W. 480 (1936) (insured's personal representatives against trustee of insurance trust for the payment of creditors). *Cf.* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 627 (1819) (trust protected by contract clause of Constitution):

> It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

Accord In re Manning, 185 La. 894, 171 So. 68 (1936); Cary Library v. Bliss, 151 Mass. 364, 25 N.E. 92 (1890).

31. The only case that can be read as addressing the grantor's right to sue in contract allowed the action. Megod's Case, 4 Leon. 225, 78 Eng. Rep. 40 (1585). The vast majority of the English cases involved the right of a third-party beneficiary to sue in contract. Several, including *Megod's Case*; Smith v. Jameson, 5 T.R. 601, 101 Eng. Rep. 336 (1794); Jevon v. Bush, 1 Vern. 342, 23 Eng. Rep. 508 (1685); and Butler v. Butler, 2 Sid. 21, 82 Eng. Rep. 1234 (1657), recognize the availability of an action at law. Three cases, Holland v. Holland, 4 L.R.-Ch. App. 449 (1869); Barnardiston v. Soame, 6 How. St. Trials 1063 (1674); and Turner v. Sterling, 1 Freem. 15, 89 Eng. Rep. 13 (K.B. 1671), deny the availability of the action. Other cases sought to establish a covenant running to the third-party beneficiary (which would give his claim preference against the trustee's bankrupt estate). *See* Holland v. Holland, 4 L.R.-Ch. App. 449 (1869); Adey v. Arnold, 2 De G., M. & G. 432, 95 Rev. Rep. 151 (Ch. 1852). Given the ambivalence of the English courts to third-party beneficiary contracts, *compare* Dutton v. Poole, 2 Lev. 210 (K.B. 1677) *with* Bourne v. Mason, 1 Vent. 6 (K.B. 1669) *and* Tweddle v. Atkinson, 1 Best & S. 393 (Q.B. 1861); *see generally* 4 A. CORBIN, CORBIN ON CONTRACTS § 839 (1951), the courts' refusal to recognize legal rights in the beneficiary of a trust is not surprising. To extend the analysis to the promisee-grantor, however, is another matter entirely and not justified by the cases.

Indeed, the English courts on occasion have allowed the grantor to bring an action at law to enforce the obligation in the nature of trust. For example, in Gifford v. Manley, 25 Eng. Rep. 689 (1735), the grantor transferred funds to trustees to hold at interest, which transfer was acknowledged under seal. The trustee who received the funds failed to invest them, and then died. The grantor sued the trustee's executor, and successfully urged that the obligation to him was a specialty debt. In ruling for the grantor, the Lord Chancellor stated:

relying on the contract theory to support a grantor's right to sue the trustee. This is especially true in light of the relative paucity of modern cases in which the question of the grantor's contractual right to enforce a trust at law arises. Although the lack of cases is understandable,[32] the few existing cases seem to confirm that contractually-based relief is available if the agreement between the grantor and the trustee indicates a promise running from the trustee to the grantor separate from the trustee's duties to the beneficiaries.[33]

The weakness of contract analysis as a basis for standing is twofold. First, it is not recognized universally; the treatise writers have fairly effectively convinced the courts of its unavailability.[34] Second, it does not resolve the question of when the underlying contract exists. Clearly, not all breaches of trust

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> I have no doubt but that this is a specialty debt: for, though breaches of trust are indeed in some cases considered but as simple contract debts; yet, . . . here it must be otherwise, by reason of the express acknowledgement under hand and seal, that he alone has received the whole money, and had received it as trustee for the particular purposes mentioned.

Id. at 689. Not only was this not an unusual result, *see, e.g.*, Mavor v. Davenport, 2 Sim. 227, 57 Eng. Rep. 774 (1828), it was evidently the normal result. *See* Holmes, *Early English Equity*, 1 LAW Q. REV. 162, 168 (1885). That the advantages of covenant are no longer available seems irrelevant to the question whether law will enforce an obligation undertaken by the trustee to the grantor.

32. A variety of reasons explain the paucity of cases:

(a) In the early years of the development of trust theory, the law courts had not developed contract theory, so the only relief for breach of an obligation was in trust. *See* Holmes, *supra* note 31, at 172-74. That contract relief developed after equity recognized the validity of trusts is also unpersuasive as a reason for law courts to refuse currently to recognize a contractual obligation to the grantor. First, to say that because the remedy at equity exists, and therefore the law courts ought not interfere, is to reverse the jurisdictional predicate of equity courts. Second, the willingness of courts of law to involve themselves in trust questions in other settings, *see* BOGERT, *supra* note 2, § 870, undercuts the analysis. Third, with the now almost universal merger of law and equity jurisdictions into a single court, no deference would be real. For the same reason, it is unpersuasive to say that the law courts lack the expertise to decide trust questions, and therefore ought not recognize the obligation of the trustee as contractual; given the merger of jurisdictions, the same court will hear the issue in any event. Indeed, the need for a contractual clause of action arises only when the grantor's connection with the trust is other than as a beneficiary, and rarely will entitle him to damages. Thus, the nature of relief sought virtually always will be in the nature of specific performance, and thus equitable. The "expert" equity court therefore will ultimately hear the cause, even if it sounds in law.

(b) There were few advantages to bringing the action at law, because the equity courts could provide any relief necessary.

(c) In testamentary trust cases, the grantor was dead, and the trustee owed no obligation to his heirs.

(d) In most cases the grantor had no interest in the trust to enforce in contract, and thus could not plead successfully an action at law. *See, e.g.*, Padelford v. Real Estate-Land Title & Trust Co., 121 Pa. Super. 193, 183 A. 442 (1936). Normally the law does not provide damages for emotional distress on breach of contract. *See, e.g.*, Jankowski v. Mazzotta, 7 Mich. App. 483, 152 N.W.2d 49 (1967). Thus, without specific performance, no remedy would be available to the grantor even if the trustee made a specific promise to the grantor regarding the manner of operation of the trust.

33. *See* Hopkins v. Women's Medical College, 331 Pa. 42, 200 A. 32 (1938) (promise to grant scholarship not dependent on performance of endowment); Alumnae Ass'n of William Penn High School v. Trustees of Univ. of Penn., 306 Pa. 283, 159 A. 449 (1932) (association can enforce right to use endowed bed in hospital). The cause of action exists even though equitable relief for breach of trust may be available to the beneficiaries, although when the grantor is the beneficiary, no contract is implied. *Cf.* Padelford v. Real Estate-Land Title & Trust Co., 121 Pa. Super. 193, 183 A. 442 (1936) (action in assumpsit by grantor-beneficiary, claiming violation of investment restrictions and right to statutory interest, dismissed).

34. *See* RESTATEMENT (SECOND) OF TRUSTS § 197 (1959); *cf.* Nedd v. Thomas, 316 F. Supp. 74, 76-77 (M.D. Pa. 1970) (no right to jury trial, quoting Restatement).

should leave the trustee liable to a contract action by the grantor. One would think that in the normal case the trustee is entitled to limit his concerns to the desires of the beneficiary. On the other hand, in some cases the importance of particular terms of the trust should allow the grantor to enforce those terms. Such distinctions are hard to apply to trust cases, however, because in all trust situations an agreement exists between the trustee and the grantor, making contractual distinctions difficult.

B. Grantor Enforcement as a Problem of Standing

Standing analysis is the obvious alternative to using beneficiary, fiduciary, or contract analysis for discussing the grantor's right to bring an enforcement action. A significant barrier to such discussion, however, is the failure of many courts to address the right in standing terms. Rather, decisions typically discuss the grantor's right to bring the action either in terms of the existence of a cause of action or in terms of his "interest" in the matter.[35] Even when the word "standing" appears in an opinion it usually is used as a conclusory statement, not as part of the analysis.[36] Little, if any, analysis exists on the question of standing to bring private law proceedings, reflecting the paucity of cases using the term. Instead, contemporary standing analysis is limited to the general field of public law.[37]

Notwithstanding the absence of standing rubric in grantor enforcement cases, standing analysis seems an appropriate tool to use in analyzing those cases. Breach of trust actions and public law actions are hauntingly similar. In each, the plaintiff alleges that an individual or entity has violated duties imposed upon him, and that the violation is redressable by the defendant. In trust cases, the defendant is the trustee and the duties are imposed in the trust instrument. In the public law arena the defendant is a government employee and his duties come from constitution, statute, or regulation. In both situations, however, the problem is whether the plaintiff has a cognizable right to bring the action challenging the actions of the defendant. A grantor suing to prevent a trustee from terminating a trust by distributing trust assets to the only beneficiary can present much the same analytic problem as does an outdoors club suing the Secretary of the Interior to prevent leasing of wilderness

35. The reverse is also sometimes true, when, for example, public law courts discuss "standing" without addressing the underlying interest that gives rise to it. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975). *See generally* Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41.

36. *See, e.g.*, Smith v. Thompson, 266 Ill. App. 165 (1932); Dillaway v. Burton, 256 Mass. 568, 153 N.E. 13 (1926).

37. *See* K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE ch. 22 (1958 & Supp. 1976); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-17 to -29 (1978); Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973). The proliferation of standing cases in public law is of recent vintage. *See infra* notes 42-45. Discussion of standing in early challenges to public activities tended to be articulated in terms of "interests" and "rights," *see infra* note 45, as did such discussions in equity cases generally. *See, e.g.*, *In re* Debs, 158 U.S. 564, 582-86 (1895). It is interesting to note, in this connection, that one commentator has suggested that modern standing analysis is simply the way interest analysis is done in public law cases. *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 476-77 (1974).

land for a ski slope.[38] A doctor suing to prevent restrictions on the distribution of birth control devices, who claims that the restrictions abridge the privacy rights of his patients,[39] is in much the same position as a grantor suing to prevent an ex-spouse from misusing funds conveyed in trust for the support of their children.[40] In both trust enforcement and public law settings the issue is the appropriateness of a particular individual's assertion of the defendant's obligations.[41]

Standing analysis also is appropriate because its roots are in equity practice and the decline of the writ system of pleading, rather than in constitutional litigation. Notwithstanding an occasional assertion in the literature that standing is a modern concept,[42] references to it are found in older equity cases,[43] as well as in English parliamentary practice.[44] Indeed, many of the early cases challenging governmental activity arose in the trust context, as governments sought to misuse donated or dedicated property.[45] Its general application is thus historically sound.

Finally, and most importantly, standing doctrine works. It focuses on the immediate question of the grantor's right to sue, and as a result avoids the inadequacies of normal trust doctrine in this context.[46] Consequently, as part

38. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

39. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

40. *See* Rosenblatt v. Birnbaum, 16 N.Y.2d 212, 212 N.E.2d 37, 264 N.Y.S.2d 521 (1965).

41. Standing exists when "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

42. *See, e.g.*, Chayes, *supra* note 37, at 8 n.27: "Indeed, the term 'standing' did not appear in judicial opinions until the middle of the 20th century." Undoubtedly, however, the explosion of standing cases in the twentieth century results from New Deal legislation arising at a time when notice pleading was limiting the effectiveness of cause of action analysis.

43. *See, e.g.*, City of Chicago v. Ward, 169 Ill. 392, 416, 48 N.E. 927, 935 (1897); Clark v. Oliver, 91 Va. 421, 425, 22 S.E. 175, 176 (1895). Equity provided a fertile ground for the development of standing questions, because of its loose definition of parties:

> [Equity's] fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit.

1 POMEROY'S EQUITY JURISPRUDENCE § 114, at 153 (5th ed. 1941).

44. For a discussion tracing the term to parliamentary practice, see J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 55-56 (1978).

45. *See, e.g.*, City of Chicago v. Ward, 169 Ill. 392, 48 N.E. 927 (1897); Rowzee v. Pierce, 75 Miss. 846, 23 So. 307 (1898) (right to sue in equity).

46. The analysis of grantor enforcement of trusts using concepts found in modern standing analysis as developed in public law cases also has the attraction of making available a large mass of sophisticated contemporary judicial analysis concerning the basic problem of when an individual should be allowed to judicially challenge wrongful actions that primarily injure someone else. This analysis can illuminate distinctions made by the courts in the private law arena. In the process, of course, it allows the public law analysis to be tested against cases arising in a more traditional legal context. This, in turn, ultimately may assist in resolving some of the uncertainties and ambiguities currently present in the standing arena. Because grantor trust enforcement presents a variety of three-party litigation situations, it seems particulaly well suited as a medium for testing the strength of standing analysis. In short, the mirror of trust law may illuminate the strengths, the weaknesses, and the tensions in public law standing analysis.

II shows, standing doctrine clearly defines the results of various trust cases and it suggests appropriate results in cases previously unresolved.

II. An Analysis of Grantor Standing

A. Introduction

A review of grantor enforcement cases suggests that concepts which have been used by the courts to control standing in the public law setting also can be applied to resolve questions of grantor standing. The first applicable concept is that standing is not controlled by the existence of a legal interest of the plaintiff,[47] but rather by whether the plaintiff has suffered an injury in fact as a result of the alleged act.[48] As discussed in part I, distinctions involving legal interests or beneficiaries do not distinguish easily those cases in which the grantor has standing from those in which he does not. The basis of his standing clearly is different in quality from any recognized legal interest he might have, although the basis of a particular grantor's action may be a legally cognizable interest.

The second concept of public law standing that helps describe a grantor's standing to enforce a trust is that of zone of interests. Standing analysis in public law demands that the plaintiff's interest be within the zone of interests addressed by the statute or constitutional provision asserted.[49] A similar concept arises from the grantor trust cases. For example, grantors may be able to enforce trusts established to support their children,[50] although the other parent may not[51]—the grantor has a foreseeable interest in seeing that his children are provided for, although the circumstances do not suggest an intention to benefit the other spouse by creating the trust.

The third useful concept is that the creator of legal rights may determine

47. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723-25 (1975).

48. *See* Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 152 (1970) (new competition constitutes injury in fact even if plaintiff has no legal interest in freedom from competition).

49. *Id.* at 153-56; Flast v. Cohen, 392 U.S. 83, 102-03 (1968). See L. TRIBE, *supra* note 37, § 3-17; Chayes, *supra* note 37, at 23. *See also Restatement of Torts* § 286 (1934): "The violation of a legislative enactment . . . makes the actor liable for the invasion of an interest of another if: *(a)* the intent of the enactment is . . . to protect the interest of the other as an individual, and *(b)* the interest invaded is one which the enactment is intended to protect."

50. *See, e.g.*, Rosenblatt v. Birnbaum, 16 N.Y.2d 212, 212 N.E.2d 37, 264 N.Y.S.2d 521 (1965) (action to enjoin diversion of funds). Compare Landau v. Ostrowe, 50 Misc. 2d 474, 270 N.Y.S.2d 722 (Sup. Ct. 1966), in which no trust was found to exist. The theoretical basis for standing to enforce trusts for the support of dependents of the grantor is similar in effect to that describing the standing of taxpayers to challenge government expenditures, based on the assumption that a favorable ruling will reduce their taxes. *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034 (1968). In the private trust setting, however, standing would exist only if the parent were also the grantor. A parent's interest normally would be outside the zone of interests to be protected by a trust established by someone else, even if the trust's performance would reduce the parent's legal obligations. Although one can presume that a grantor would see that a trust for the benefit of his children would also benefit himself, no such presumption is necessary if the trust is established by another.

51. *See, e.g.*, City Bank Farmers Trust Co. v. Macfadden, 274 A.D. 1039, 85 N.Y.S.2d 791 (per curiam), *aff'd mem.*, 299 N.Y. 711, 87 N.E.2d 124 (1949).

who has standing to enforce them, up to the limitation imposed by article III of the Constitition that a case or controversy exist. The public law cases suggest this result with respect to Congress creating standing in individuals to enforce the acts of Congress,[52] and a similar concept is found in the ability of the creator of a charitable foundation or trust to appoint visitors to enforce the charitable gift.[53]

A fourth concept of public law standing is that persons in a fiduciary relationship with others may sue to protect the rights of their beneficiaries within the scope of the relationship.[54] Thus, for example, trustees may sue to enforce the terms of a trust against their cotrustees,[55] just as a guardian may sue to represent the interests of his ward, a best friend to represent the interests of a minor,[56] and an organization to represent the interests of its members.[57]

Fifth is that the plaintiff's injury does not need to be economic,[58] although it must be substantial.[59] Although most grantor enforcement actions

52. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982). The Court sometimes has expressed a prudential limitation requiring that the plaintiff assert more than generalized and undifferentiated grievances common to all members of the public. *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). Many early equity cases suggest a similar standard in requiring that the plaintiff have an interest beyond that of the general public. *See, e.g.*, Packet Co. v. Sorrells, 50 Ark. 466, 474-75, 8 S.W. 683, 685-86 (1888); Wilkins v. Chicago, St. L. & N.O. R.R., 110 Tenn. 422, 464-65, 75 S.W. 1026, 1036 (1903). Congress may avoid prudential limitations by creating standing to the fullest extent permitted by U.S. CONST. art. III, *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), although it is sometimes difficult to discern whether it has done so. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). In trust cases, the grantor, as the creator of the rights being asserted, seemingly would have an equivalent right to determine his future standing to enforce the duties created, and, for obvious reasons, would have no difficulty fulfilling the "differentiated interest" standard.

53. *See generally* 4 A. SCOTT, *supra* note 2, § 391; BOGERT, *supra* 2, § 416.

54. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez 102 S. Ct. 3260 (1982) (commonwealth suing as *parens patriae*).

55. *See* 3 A. SCOTT, *supra* note 2, § 200.2. Although one might be tempted to justify representational standing by reference to the public law cases justifying "surrogate" standing, *see, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (competitor allowed to represent public interest in challenging license award), the two have different bases. Surrogate standing requires that the surrogate suffer direct economic injury, *see* Sierra Club v. Morton, 405 U.S. 727, 737 (1972), which is not always present in representational standing cases. *See* Stewart, *supra* note 47, at 1745. Problems of representational standing may be more closely analogous to problems of permissive intervention, under FED. R. CIV. P. 24(b), by parties who might be derivatively liable for damages in an action. *See, e.g.*, Lemelson v. Larami Corp., 32 Fed. R. Serv. 2d (Callaghan) 1133 (S.D.N.Y. 1981) (intervention by possible contributory infringer in patent infringement action). Note, however, that to the extent that standing is considered a problem of allocation of judicial resources, standing to intervene does not create the same tension as does standing to initiate the action.

56. Best friend pleading was necessary in equity pleading, because infants and married women were not allowed to bring an action in their own name, since they lacked the ability to make themselves responsible for costs. *See generally* C. COOPER, PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 27-33 (1809).

57. *See, e.g.*, San Diego County Council, Boy Scouts of Am. v. City of Escondido, 14 Cal. App. 3d 189, 92 Cal. Rptr. 186 (1971) (boy scout council has standing to sue to prohibit diversion of land in trust for benefit of scouts).

58. *Cf.* Sierra Club v. Morton, 405 U.S. 727 (1972) (plaintiff must have suffered direct injury).

59. It has been said that to pass constitutional muster the plaintiff must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharp-

are brought to protect the economic interests of either the grantor or persons he represents, economic harm is not necessary to support a grantor enforcement action. A grantor may also sue to protect substantial expectation interests. Thus, grantors are allowed to enforce the terms of major gifts to charities,[60] as well as trusts created to maintain children after a divorce,[61] although other contributors, whose expectations presumably were less substantial, may be denied standing.[62]

Finally, in grantor trust cases, as in the public law cases, the grantor's interest (and thus his injury) must have some nexus with the alleged wrong.[63] It is often said of breach of trust actions that they must relate to the interest of the plaintiff.[64] For example, a remainderman may not sue to require the trustee to distribute income from the trust, or to object to investments on the ground that they produce insufficient income. The cases are similar to the public law doctrine, which requires a "traceable injury"—a connection between the injury complained of and the alleged wrong.[65]

The discussion that follows accepts these concepts as applicable to a discussion of grantor standing, even though the weight given to each is uncertain in the public law context. That uncertainty does not detract from the utility of the concepts in discussing the grantor's standing to enforce a trust. Nor does it detract from the value of contrasting the private law results with the public law model. For example, the analysis that follows relies heavily on the "zone of interest" concept, even though that concept is on the wane in public law cases;[66] zone of interests analysis proves particularly helpful in trust cases. The extent to which such a public law concept is helpful in resolving the grantor standing problem may suggest a rethinking of the appropriateness of the concept in the public law forum.[67]

B. An Analysis of Existing Grantor Standing

Grantors generally have standing to enforce trusts in three types of situations. First, the grantor has standing if his economic interest in the subject

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ens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). *But see* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

60. *See, e.g.*, Woman's Hosp. League v. City of Paducah, 188 Ky. 604, 223 S.W. 159 (1920) (action to enjoin conversion of facility constructed with funds contributed by plaintiff).

61. *See, e.g.*, Carr v. Carr, 185 Iowa 1205, 171 N.W. 785 (1919).

62. *See, e.g.*, Smith v. Thompson, 266 Ill. App. 165 (1932) (contributor to public charitable trust lacks standing to challenge, absent special facts beyond contribution).

63. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976); Chayes, *supra* note 37, at 16-22.

64. *See, e.g.*, Badham v. Johnston, 239 Ala. 48, 193 So. 420 (1940) (rights of contingent beneficiary limited to preventing wrongful diversion of trust funds).

65. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

66. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

67. For a defense of the zone of interest test, see Note, *A Defense of the "Zone of Interests" Standing Test*, 1983 DUKE L.J. 447.

matter of the alleged breach was sufficiently foreseeable at the creation of the trust that protection of the interest by the grantor can be said to have been intended. Second, he has standing if the breach violated the grantor's substantial expectations, if those expectations resulted from the trustee's actions in soliciting or accepting the trust. Third, standing has been allowed if the grantor acts as a representative of beneficial interests, either by lawful appointment, appointment under the trust instrument, or by recognition of the equity court. The word "interest" is used in the sense described above,[68] and includes a number of interests other than merely economic interests. Further, the requirement in the first two categories that this interest be foreseeable reflects the "zone of interests" analysis familiar to public law standing, and explains why some grantors, who have a real interest in the matter at issue, are denied standing to pursue that matter. Of course, because courts rarely discuss the matter in standing terms, such an analysis cannot be found in the opinions. It does, however, describe the way in which the cases actually are resolved. This can be illustrated by a review of the situations in which courts have found grantor standing to exist.

1. Grantor Standing Based on Economic Interests

The most common cases in which a grantor has standing are those in which he has an economic interest in the performance of the trust, an interest that was intended either expressly or impliedly to be protected by the trust duties. Persons intended to have such an interest usually are referred to as beneficiaries of the trust, and whenever a grantor is defined by a court to have standing as a beneficiary of the trust, the court is validating the concept that an intended economic interest in the trust's performance is a sufficient basis for standing to enforce it. On the other hand, when a court labels a plaintiff an "incidental beneficiary," it is saying that, in spite of the plaintiff's economic interest in the trust, he lacks standing, normally because that interest is not within the zone of interests that the grantor intended for the trustee to protect.

Grantor standing has been found to exist, however, even when the grantor lacked a traditionally-defined beneficial interest in the trust. In many such cases the grantor possessed an economic interest in the trust's performance, even though a traditionally-defined beneficial interest did not exist. For this reason, this section is defined in terms of economic, rather than beneficial, interests in the trust. A grantor's standing based on economic interests will be divided into two categories: the first includes situations in which standing is based on economic interests that are either expressly retained or implied in law (such as resulting trust interests). In the second, standing is based on economic interests not so retained, but which are within the zone of interests that the trust's terms are intended to protect. This second category is composed almost entirely of economic interests other than traditionally-defined beneficial interests.

68. *See supra* notes 58-62 and accompanying text.

a. Express economic interests

To say that courts recognize a grantor's express economic interests is to state the obvious. Anyone with an economic interest created by the express trust terms is a traditional beneficiary. A grantor who expressly retains trust interests is a beneficiary of the trust and has standing under traditional analysis.[69] Thus, for example, a grantor who retains the right to income from the trust has standing to enforce that income right. Similarly, a grantor who retains rights to the distribution of corpus may sue to enforce those rights.

Grantor standing based on express interests in the trust is consistent with normal standing analysis. For example, a grantor who has an economic interest in the performance of a trust obviously suffers real injury if that interest is defeated, and would satisfy the normal injury in fact test used in the standing cases. Because the affected interest was created by the duties imposed on the trustee, the injury would be caused directly by the violation of those duties, and the injury would satisfy any nexus requirement. Likewise, an express interest clearly is within the zone of interests which the trustee's duties were established to protect. Unlike a person whose interest in the performance of the trust is incidental, because he is not expressly mentioned in the trust document, the grantor with an expressly retained interest is clearly intended to benefit from the performance; therefore, any zone of interests limitation which might haunt traditional standing analysis is avoided.

b. Economic interests by operation of law

Clear economic interests also often arise in the trust context by operation of law. For example, upon the failure of a charitable trust, the grantor or his heirs are said to have a resulting trust interest,[70] which they can enforce. Similarly, the doctrine of worthier title can result in the grantor having retained an interest even though he apparently had attempted to dispose of his entire interest in the assets.[71] In both situations, the law recognizes that the holder of the interest can sue to protect the interest, even though the interest was not express.

The grantor's standing to enforce interests that arise by operation of law also is consistent with traditional standing analysis. Once the grantor is said to have an interest by operation of law, he immediately has an economic interest in the performance of the trust, which could be injured if the trustee violates his duties. Further, that interest can be deemed to be within the zone of interests intended for protection by the creation of the trust. In the resulting trust case, the grantor normally did not intend for the trustee to be able to benefit if

69. *See, e.g.*, Carter v. Uhlein, 36 A. 956 (N.J. Ch. 1897) (equity of redemption). An action against a charity alleging the failure of a condition of a charitable gift asserts an interest similar to a right of reentry, and would fall within this category. *See, e.g.*, Sumner v. Darnell, 128 Ind. 38, 27 N.E. 162 (1891) (action by heirs).

70. *See* 5 A. SCOTT, *supra* note 2, § 413.

71. *See, e.g.*, Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919) (remainder in the heirs of the grantor constitutes a reversion). *But see* Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).

the express beneficiaries failed, and so the intent to benefit himself can be presumed. Similarly, a grantor's interest under the doctrine of worthier title is implied in law to be intended, and thus to be within the zone of interests intended.

c. Implied economic interests

Sufficient cases exist to support standing based on the grantor's economic interests that are affected adversely by the alleged act and that are not protected by the trust terms, but that impliedly were to be protected by the trustee's duties. Further, review of the cases suggests that such implied-interest standing exists when the grantor's economic interest in the performance of the trust either existed, or was foreseeable, when the trust was created. In standing terms, this existence or foreseeability establishes that the grantor's interest was within the zone of interests intended to be protected by the trust duties, even though no beneficial interest in the trust was retained expressly.

Several categories of cases have allowed grantor actions under circumstances fitting the above description. One includes cases in which a grantor has contributed part of a parcel of land to a municipality, for use as a school or park,[72] while retaining the remaining portion of the land. A park, by its nature, inures to the benefit of land adjacent to it, and the adjacent landowners have an economic interest in seeing that the land remains a park. The grantor's restricting the use of contributed land implies a desire that the restriction benefit his retained land, putting his economic interest within the zone of interests intended to be protected by the restriction. Thus, if the restriction is violated, the grantor may enforce it against the grantee, even though an action by a grantor who did not retain adjacent land would fail (because of no implication of continued benefit), as would an action by other adjacent landowners (because the restriction does not imply an intent to benefit non-grantors).

A similar type of case allows a grantor who is a member of a church or lodge the right to enforce the use of property he gives to the organization for the purposes of the grant. Because the grantor is a member of the congregation or lodge, he will benefit from the organization's use of the property that he has given for as long has he chooses to belong to the congregation or lodge. Ceasing to use the property for the restricted purpose injures him in a way directly related to his retained interest. Further, the foreseeability of his benefiting from use of the property in the manner described in the granting instrument suggests that the restriction on the property's use was inserted, at least in part, for his benefit, and that his use was within the zone of interests protected by the restriction on the property's use. Therefore he may sue to enforce the restriction.[73]

72. *See, e.g.*, Warren v. Mayor of Lyons City, 22 Iowa 351 (1867) (misuse of public square); Rowzee v. Pierce, 75 Miss. 846, 23 So. 307 (1898) (park). *See also* Whitney v. Union Ry., 77 Mass. (11 Gray) 359 (1858); United Fuel Gas Co. v. Morley Oil & Gas Co., 102 W. Va. 374, 135 S.E. 399 (1926) (action on covenant).

73. *See* Tate v. Woodyard, 145 Ky. 613, 140 S.W. 1044 (1911) (lodge); Ludlam v. Higbee, 11 N.J. Eq. 342 (1857) (island church). *See also* Nelson v. Monitor Congregational Church, 74 Or.

Yet another type of case recognizing economic interest standing notwithstanding the lack of an express beneficial interest includes those cases in which the performance of the trust will relieve the grantor of a foreseeable legal obligation. For example, if a trust is established for the support of persons whom the grantor is legally obligated to support, the grantor has an economic interest in the support being provided to the beneficiary, and the trustee's failure to provide the support will cause him injury. In addition, because the support provision in the trust will relieve the grantor's legal obligation, it is logical to assume that he intended the trustee's provisioning of support to supplant his own. This, in turn, implies that the grantor intended to benefit indirectly from the trust, and that he intended his economic interest to be within the zone of interests intended to be protected by the trust. Thus, a failure of the trust to provide the required support is actionable by the grantor.[74]

Finally, recognition of implied economic interests may also be seen in cases in which a grantor sues to require compliance with retained powers. For example, it is not uncommon to retain voting rights of stock in closely-held companies when the stock is placed in trust.[75] If the grantor owns other shares in the company, or is employed by the company, he has an economic interest in how those shares are voted, because the vote can affect the value of those other shares, or his job. Further, the significance of the power to vote for those shareholder or employee interests suggests that a grantor who has such interests and who retains a voting right does so to protect his interests. Therefore his interest in the voting right is within the zone of interests created by that term in the trust instrument. Thus, although cases enforcing the right to vote stock[76] usually do not discuss the matter of standing, their existence is easily explainable in standing terms.

162, 145 P. 37 (1914) (subsequent contributor lacks standing to question acts of grantee church when he is not a member); Strong v. Doty, 32 Wis. 381 (1873) (grantor not member of the grantee church). To the extent that the grantor's interest is deemed not to be economic, his standing could be grounded on the denial of a substantial expectation interest. *See infra* notes 77-96 and accompanying text.

74. *See* Carr v. Carr, 185 Iowa 1205, 171 N.W. 785 (1919); Rosenblatt v. Birnbaum, 16 N.Y.2d 212, 212 N.E.2d 37, 264 N.Y.S.2d 521 (1965) (action to enjoin diversion of funds).

75. *See, e.g.*, United States v. Byrum, 408 U.S. 125 (1972).

76. *Cf.* Ecclestone v. Indialantic, Inc., 319 Mich. 248, 29 N.W.2d 679 (1947) (retention of voting rights until liquidation, by director and president of company); Clowes v. Miller, 60 N.J. Eq. 179, 47 A. 345 (1900) (business trust). Enforcement of the right to vote may be by an action to enjoin the trustee voting, *see* Georgia Granite R.R. v. Miller, 144 Ga. 665, 87 S.E. 897 (1916), or to require the trustee to grant the grantor a proxy to vote the stock. *See, e.g.*, Pennsylvania R.R. v. Pennsylvania Co. for Ins. on Lives & Granting Annuities, 205 Pa. 219, 54 A. 783 (1903).

In general, the right to vote corporate shares is determined by title as registered on the corporate books. 5 O. SMITH, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2033 (rev. ed. 1976). Therefore, a transfer of stock into trust would not deny automatically the grantor the right to vote the shares. *See id.* § 2035. *Compare* DEL. CODE ANN. tit. 8, § 217(a) (1974). Transfer of shares to the trustee, however, entitles the trustee to have his ownership registered on the books of the corporation, and his right to vote the shares is thereupon presumed. Therefore, unless the grantor reserves the power to vote, either expressly or by implication from the terms of the instrument, *see* Georgia Granite R.R. v. Miller, 144 Ga. 665, 87 S.E. 897 (1916), the trustee would thereupon be entitled to vote the shares.

Although a contractually retained right to vote sold shares may be invalid, *see* F. O'NEAL, CLOSE CORPORATIONS § 5.36 (2d ed. 1971); *cf.* Thibadeau v. Lake, 40 Idaho 456, 234 P. 148 (1925) (period of proxy not limited), controls on the voting of closely held stock are generally not against

2. Standing Based on Expectation Interests

Even if the grantor cannot show a personal economic interest in the performance of the trust, courts have allowed him to enforce it if the circumstances of the creation of the trust are such that the alleged wrong violates substantial reasonable expectations arising from the promise of the trustee accepting the trust. As noted above,[77] noneconomic interests are sufficient to support standing in equity.[78] It therefore is not surprising that grantors also have standing to enforce trusts in a variety of situations in which their interests are not clearly economic.

Grantor standing based on noneconomic interests has been found to exist in trust enforcement cases whenever the situation suggests violation of substantial reasonable expectations of the grantor arising from the creation of the trust. If the express representations of the trustee provided an incentive for the creation of the trust, and were sufficient to create in the grantor substantial expectations that the terms of the trust would be carried out as stated, grantor action to force compliance is allowed. Standing also exists if the circumstances surrounding the creation of the trust imply the existence of such expectations. Because of the substantiality of the expectations, equity acts to prevent their wrongful defeat by allowing the grantor to redress material misrepresentations by the trustee when obtaining the trust, whether or not the misrepresentations were intentional. In short, if the nature of the trustee's act is such that it is reasonable to assume that the grantor would not have established the trust if he had known that the act would occur, then the grantor has standing to litigate the trustee's action, regardless of a continued economic

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public policy. *See* Edson v. Norristown-Penn Trust Co., 359 Pa. 386, 59 A.2d 82 (1948); F. O'NEAL, *supra*, § 5.38.

77. *See supra* notes 58-62 and accompanying text.

78. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). Although some early cases suggested that equity would not protect personal, rather than property, rights, *see* Gee v. Pritchard, 36 Eng. Rep. 670 (1818), a variety of personal rights are now protected, especially in the contract setting. *See, e.g.*, Ritter v. Couch, 71 W. Va. 221, 76 S.E. 428 (1912) (relative of the dead granted standing to prevent closing of cemetery by city). *See generally* W. WALSH, A TREATISE ON EQUITY 277-78 (1930); Note, *The Protection of Personal Rights in Equity Since 1946*, 32 B.U.L. REV. 419 (1952). The development of this enforcement of personal rights in some ways mirrors the development of the injury-in-fact test of standing.

> What standing does the father have to enjoin the use of a different name [by his child]? The interest of the father in having his child bear his surname has been described as one of "inherent concern," Robinson v. Hansel, [302 Minn. 34,] 223 N.W.2d 138 (1974); or a "natural," "fundamental," "primary," or "time honored" right. But is it a legal right? Texas holds that the father has an interest protected by the Fourteenth Amendment to the United States Constitution, however, Georgia holds that the interest of the father is not a property interest entitled to constitutional protection but merely a custom of persons to bear the names of their parents. Fulghum v. Paul, 229 Ga. 463, 192 S.E.2d 376 (1972). We agree with the Georgia courts. Although hereditary surnames are customary, that custom has never amounted to a common law legal right.
>
> Whatever the nature of the father's interest, courts have generally recognized that the father has a protectible interest in having his child bear the parental surname in accordance with the usual custom, even though the mother may have been awarded custody of the child. Robinson v. Hansel, supra; and see generally Annot. 53 A.L.R.2d 914.

Laks v. Laks, 25 Ariz. App. 58, 60, 540 P.2d 1277, 1279 (1975).

interest in the trust.[79]

Three types of cases illustrate the application of this principle in grantor enforcement cases. The first, discussed above,[80] includes cases in which a member of a church or lodge who gives property for a building is allowed to enforce use of the property for that purpose. To the extent that the expectation of future use is not deemed to be economic, his standing is easily explainable on the basis of substantial expectation interests. The second clear group of expectation cases includes those in which, as a result of the active intervention of the trustee, a gift is made creating a charitable trust, only to see the trustee later depart from his representations concerning the use of the trust property.[81] The third group includes those cases in which the grantor is allowed to enforce a trust, created for his children as a part of a divorce settlement, against the attempts of his divorced spouse to misuse the trust assets.

The standing of the grantor to enforce substantial expectations arising from the creation of a charitable trust is illustrated by *Woman's Hospital League v. City of Paducah*.[82] In that case, an association that had contributed one-half of the cost of an isolation ward in a city hospital was allowed to bring an action to enjoin conversion of the ward into a residence for nurses. The league proposed the building, and offered one-half its cost; the city agreed to the proposal, constructed the building, received the funds from the league, and then operated the facility. When the city later threatened to convert the facility, the action was brought. The court held that the city's agreement prevented diversion of the facility for other uses, citing the conditional receipt of the funds,[83] and allowed the association to maintain the action. In so doing, the court inherently recognized that because the city breached the association's expectations, the association had standing to enforce the terms of the grant, even though the association did not allege any economic harm to itself.

Although courts often allow a grantor to enforce a charitable trust that he was solicited to create, they have been less willing to allow the same right to

79. The contractual nature of the basis for this type of standing explains why the heirs of the grantor lack standing to enforce the promise, *see* Cary Library v. Bliss, 151 Mass. 364, 377-379, 25 N.E. 92, 95 (1890); Wemme v. Noyes, 134 Or. 590, 294 P. 602 (1930) (en banc); *id.* at 595, 295 P. at 465 (Rand, J., dissenting), as does the grantor's executor. *See* Judkins v. Hyannis Pub. Library Ass'n, 302 Mass. 425, 19 N.E.2d 727 (1939). Without any express reference to the grantor's heirs or successors, there is nothing to suggest a promise to anyone other than the grantor himself.

80. *See supra* text accompanying note 73.

81. To be distinguished here are actions to enforce a resulting trust upon failure of a condition on the gift, *cf.* Green v. Old People's Home, 269 Ill. 134, 109 N.E. 701 (1915) (action by heirs), or upon failure of the trust purpose without application of *cy pres*, *cf.* Trustees of Presbyterian Church v. Venable, 159 Ill. 215, 42 N.E. 836 (1896) (action by heirs). In such cases, the grantor would clearly have a present economic interest.

82. 188 Ky. 604, 223 S.W. 159 (1920).

83. *Id.* at 615-16. *Accord* Rector of Church v. Crawford, 43 N.Y. 476 (1871) (dictum). *See also* Tate v. Woodyard, 145 Ky. 613, 140 S.W. 1044 (1911); Chambers v. Baptist Educ. Soc'y, 40 Ky. (1 B. Mon.) 215 (1841). In *Chambers* a college brought an action against a subscriber for payment of a subscription to the college. The subscriber defended on the ground that contributions by the original contributor to the college had been misused. The court rejected the defense on the ground that no representations made to the defendant had been broken, so that he lacked standing to complain. The court noted, however, that the original grantor would have had standing to enforce the representations.

either contributors to existing trusts, or multiple contributors to a new trust. This is true even if the contributions were solicited,[84] unless circumstances suggest that the solicitations were designed to create a significant expectation in the contributors.[85] Even in the latter case, the courts may require that all contributors be represented in the action.[86] For example, in *Smith v. Thompson*[87] several early contributors to a flood relief fund were denied standing to complain of diversion of the funds to a flood prevention organization. In denying their standing, the court distinguished cases in which the plaintiff contributed such a significantly large portion of the trust that it entitled him to visitorial rights over the trust.[88] Thus, the court recognized the reduced rights of individual contributors in the multiple-contributor setting.

The individual contributor's lack of standing to enforce the use of solicited contributions reflects the need for a substantial expectation as the basis for standing. Both the size of the normal contribution[89] and the number of contributors undercut any presumption that an individual contributor has any significant expectation to be protected by giving him standing to enforce the trust. Indeed, charities normally exist for a long time, necessitating change. A gift to an existing charity, even if solicited, therefore suggests acceptance of the possibility that the gift will be used in ways not originally contemplated.[90] This is the antithesis of a promise to use the gift only for the particular purpose, and undercuts any reason equity might have for allowing the action.[91]

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84. Without the solicitation, of course, there would be no reason to assume that trustee activity caused the gift. Therefore, mere creation of, or contribution to, a trust does not give standing to enforce it. *See, e.g.*, O'Hara v. Grand Lodge, 213 Cal. 131, 2 P.2d 21 (1931) (lodge that founded and contributed to orphanage lacked standing to contest sale of orphanage property); Holmes v. Trustees of Wesley M.E. Church, 58 N.J. Eq. (13 Dick) 327, 330 (1899); Clarke v. Oliver, 91 Va. 421, 22 S.E. 175 (1895) (contributors for establishing industrial school, alleging diversion of funds); Strong v. Doty, 32 Wis. 381 (1873); *cf.* Trustees of Lone Oak Graded School Dist. v. Gentry, 220 Ky. 703, 295 S.W. 1063 (1927) (declaratory judgment action by charity). *But see* Tate v. Woodward, 145 Ky. 613, 140 S.W. 1044 (1911).

85. *See, e.g.*, Larkin v. Wikoff, 75 N.J. Eq. 462, 72 A. 98, 79 A. 365 (1909) (contributors to chapel).

86. *See id.* The court's requirement that the plaintiffs bring a class action prevents attributing the plaintiff's standing to an implied reservation of a use (and therefore economic) interest, *see* Sierra Club v. Morton, 405 U.S. 727 (1972); the possibility of a future class action normally does not prevent an individual from bringing an action. Thus, the case suggests an alternative analysis: that the requirement that expectations be significant requires that grantor standing not be bifurcated among contributors. *See also* Rowzee v. Pierce, 75 Miss. 846, 23 So. 307 (1898) (grantors of land for public park have standing to prevent its diversion). When the subject of the gift is land, the action is often brought in covenant. *See, e.g.*, Board of Supervisors v. Bedford High School, 92 Va. 292, 23 S.E. 299 (1895). The latter actions are subject, however, to the balancing of equities. *See* Robinson v. Edgell, 57 W. Va. 157, 49 S.E. 1027 (1905).

87. 266 Ill. App. 165 (1932).

88. *See, e.g.*, Tyree v. Bingham, 100 Mo. 451 (1889).

89. *See id.*

90. The duration of trusts may mean that a substantial period has passed between the contribution and the diversion of funds by the charity. This period itself reduces the likelihood of an action by the grantor, in that he may be dead, or his interest in the charity may have waned.

91. "[S]ubsequent contributors are subject to the . . . conditions [of the original grant], and the heaviest have no such interest as will entitle them to come into court in their own name, but, like others, they must be represented by the attorney-general." State *ex rel.* Pittman v. Adams, 44 Mo. 570, 582 (1869). *See also* Holden Hosp. Corp. v. So. Ill. Hosp. Corp., 22 Ill. 2d 150, 174 N.E.2d 793 (1961); McFarland v. Atkins, 594 P.2d 758, 762-63 (Okla. 1978); Leeds v. Harrison, 7 N.J. Super. 558, 72 A.2d 371 (1950).

Standing based on disappointment of substantial expectation interests also can explain why the grantor is allowed to enforce trusts created as a part of a divorce settlement. It is not unusual, in the divorce context, for a trust to be created and funded by one spouse, and trusteed by the other spouse or a third party. These trusts typically have one of two purposes: (a) to guarantee the financial well-being of children of the marriage; or (b) to provide for the beneficiary spouse during life or before remarriage, while preserving the corpus for the benefit of other beneficiaries selected by the grantor spouse. In either case, the grantor has an obvious continuing personal interest in seeing that the trust is properly fulfilled. Not surprisingly, courts have allowed the grantor spouse to maintain an action to enforce the trust if the trustee violates its terms.

Illustrative of the grantor's right to enforce trusts for the primary benefit of the grantor's children is *Rosenblatt v. Birnbaum*,[92] in which the father-grantor was allowed to maintain an action to enjoin his ex-wife's diversion of trust funds intended for his children.[93] Illustrative of the grantor's right to protect the remainder interests of his children is *Carr v. Carr*,[94] in which the husband-grantor sued the trustee to prevent delivery of the corpus of the trust to the grantor's ex-wife. Although defendants did not contest the grantor's standing, the court noted that "[i]t is not denied by counsel for appellee that the donor of a trust has such interest therein as to entitle him to maintain a suit in equity to compel the carrying out of the terms thereof . . . ."[95] The court clearly felt such standing existed and, although it did not articulate the nature of the grantor's interest, the facts of the case suggest that the basis was the grantor's substantial expectation that his children would receive the property.[96]

3. Standing Based on Representation Interests

In addition to basing a grantor's standing on his own economic or noneconomic interests, his standing may be based on the interests of others, as

92. 16 N.Y.2d 212, 212 N.E.2d 37 (1965), *aff'g* 20 A.D.2d 556, 245 N.Y.S.2d 72 (1963), *rev'g* 236 N.Y.S.2d 893 (1962).

93. *But see* Edmondson v. Edmondson, 303 Minn. 157, 226 N.W.2d 615 (1975) (motion to amend divorce decree).

94. 185 Iowa 1205, 171 N.W. 785 (1919).

95. *Id.* at 1209, 171 N.W. at 786.

96. *Accord* Smiley v. Melnick, 56 Misc. 2d 477, 289 N.Y.S.2d 58 (1968). *See also* Abbot v. Gregory, 39 Mich. 68, 70 (1878), in which the grantor-father

> remained sufficiently interested in [a trust established for the benefit of his daughter] to enable him to come into court and insist upon the conveyance being made by [the trustee] in accordance with the agreement . . . in order to prevent a frustration of the only object which he had in view in making the conveyance . . . .

Such an interest also is sufficient to support an action at law, in that the promisee of a third-party beneficiary contract is allowed to enforce it on behalf of the beneficiary. *See* 2 Restatement (Second) of Contracts § 307 (1979). The English courts naturally allow such action, given their refusal to recognize the validity of third-party beneficiary rights. *See* Beswick v. Beswick, 1968 A.C. 58 (action by promisee's administratrix seeking specific performance of a contract to pay annuity to promisee's widow); *see also* Caulls v. Bagot's Executor and Trustee Co. Ltd., 40 Austl. L.J. Rep. 471, 487 (1967) ("It seems to me that contracts to pay money or transfer property to a third person are always, or at all events very often, contracts for breach of which damages would be an inadequate remedy . . . .").

their recognized representative. The most common example of such representative standing is that of the grantor-trustee, who as trustee has the right to sue his cotrustees to redress any wrongdoing by them.[97] It also is reflected, however, in the right of guardians and conservators to sue on behalf of their wards, and in the right of visitors to sue to enforce charitable foundations and trusts.

The clearest form of representational standing is that of the guardian or conservator, suing on behalf of his ward. A grantor may sue on behalf of a beneficiary if a competent court has appointed him as the beneficiary's legal representative. Thus, if the grantor is or becomes the guardian of a minor or conservator of an incompetent beneficiary, he has standing to bring an action against the trustee to enforce any claim of the beneficiary, whether or not the beneficiary consents. The law invests the guardian with the interests of the ward, and allows him to sue. This result is required to protect adequately the interests of the minor or incompetent.[98]

Similar representational standing may be found in those cases in which grantors who lacked formal appointment were allowed to bring an action on behalf of beneficiaries. Many cases allow suits by the "best friend" of a minor beneficiary.[99] These actions are allowed both when the grantor was the beneficiary's parent,[100] and when he was the grandparent.[101] Again, standing in this situation may be a necessity, if the interests of the minor are to be adequately represented—a classic justification for standing.[102] Without grantor standing, there might be no one to bring the matter before the court,[103] especially when the grantor is not the natural guardian of the beneficiary.

Representational standing may also be found both in the right of a trustee to redress wrongs committed by cotrustees, and in the right of visitors of charitable trusts and foundations to enforce the terms of the grant establishing the charity. The trustee is inherently representing the interests of the beneficiaries

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97. Having recognized the trustee's right to sue in this context, the courts have imposed on him the duty to do so. *See* 2 A. SCOTT *supra* note 2, at § 184; 3 A. SCOTT, *supra* note 2, at § 224.5; *supra* note 2 and accompanying text.

98. Because the guardian or conservator has a fiduciary duty to protect the beneficiary's interests, he may be assumed to be willing and able to litigate the beneficiary's interests fully. His standing to do so is thus justified on theoretical grounds. *See* Stewart, *supra* note 47, at 1745.

99. *See* Abbot v. Gregory, 39 Mich. 68, 70 (1878) (grantor who established trust for daughter "remained sufficiently interested in the transaction

> to enable him to come into court and insist upon the conveyance being made by [the trustee] in accordance with the agreement . . . in order to prevent a frustration of the only object which he had in view in making the conveyance . . ."); *see also* Edmondson v. Edmondson, 303 Minn. 157, 226 N.W.2d 615 (1975) (motion to modify divorce decree); Rosenblatt v. Birnbaum, 16 N.Y.2d 212, 212 N.E.2d 37, 264 N.Y.S.2d 521 (1965).

100. *See* cases cited *infra* note 101.

101. *See, e.g.*, Andrews v. Hurt's Adm'r, 14 Ky. 765 (1893) (abstract).

102. *See e.g.*, Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 102 S.Ct. 3260 (1982) (*parens patriae* action).

103. See NAACP v. Alabama, 357 U.S. 449 (1958), in which the NAACP was allowed to sue on behalf of its members, to oppose a statute requiring disclosure of its members' names. The court reasoned that it ould be necessary for the members to disclose the very identities they sought to keep secret, if they were to bring an action challenging the statute. This assumedly would prevent them from bringing the action, therefore, the action by the organization was necessary for the protection of the members' privacy.

whose interests are affected by the alleged breach. The visitors are inherently representing the public interest in the operation of the charity.[104] Both have the right to challenge the actions of defaulting trustees.[105]

The standing of trustees and visitors has a theoretical basis similar to that which supports the standing of guardians and best friends. In each case the plaintiff is thought to represent the rights of a beneficiary. The source of the right of representation is different, however. Whereas guardians and best friends assume their authority from statute or judicial decision expressly seeking to protect the rights of those who cannot protect their own interests, trustees and visitors derive their authority from the grantor of the trust, either expressly or by implication from the terms of the trust. The courts apparently perceive that the grantor intends that the actions of the trustees be subject to review by visitors or cotrustees, and that those visitors and cotrustees must have standing to enforce the trust if the grantor's intent is to be carried out. Assumedly cofiduciaries are selected to provide the beneficiaries with the protection of more than one trustee. This suggests that the grantor does not trust the beneficiary's ability to protect himself against wrongdoing by a single fiduciary; in effect, the grantor is making the same judgment that the legislature makes in providing for guardians for the interests of minors and incompetents. Similarly, the reason for appointing visitors is to ensure that the benefits intended to pass to the public in fact do so, without requiring intervention of the attorney general—a protective function similar to that of a cotrustee, but without the latter's active duties. Thus, the grantor is expressing an intent to subject the trustee's actions to review beyond the ordinary, and suggesting the appropriateness of the visitor's standing to protect the public's rights. The cases recognizing that standing validate the importance of the grantor's intent in identifying those who will have standing to enforce the trust.

Finally, representational standing also has been allowed when the grantor sues to enforce duties to a group of which he is a member. Even when the grantor's interest alone is insufficient to support standing, he is allowed to represent others similarly situated, and thus to maintain the action. For example, some courts have allowed class actions by a representative of all contributors to a charity,[106] or by a representative of all citizens of a town who are affected by the town's threatened deviation from the terms of a grant of property to it in trust.[107] In the former case, the class action standing allows the action to be brought in spite of the insubstantial nature of the injury to the individual

104. The attorney general also normally performs this function. *See* 4 A. SCOTT, *supra* note 2, § 391.

105. *See* 3 A. SCOTT, *supra* note 2, § 200.2 (trustee); 4 A. SCOTT, *supra* note 2, § 391 (visitors).

106. *See* Rowzee v. Pierce, 75 Miss. 846, 23 So. 307 (1898); Rector of Church v. Crawford, 43 N.Y. 476 (1871) (dictum). *But see* Clarke v. Oliver, 91 Va. 421, 22 S.E. 175 (1895). In class action cases, the grantor must have an interest equal to those of the represented class. Thus, although his interest may not be individually cognizable because of lack of substantiality, it is real and minimally satisfies the traditional injury in fact and zone of interest tests used in traditional standing analysis.

107. *See* McIntyre v. Board of Comm'rs, 15 Colo. App. 78, 61 P. 237 (1900); Hartzell v. Hungate, 223 Ill. App. 346 (1921); City of Hopkinsville v. Jarrett, 156 Ky. 777, 162 S.W. 85 (1914); Perry Pub. Library Ass'n v. Lobsitz, 35 Okla. 576, 130 P. 919 (1913); *see also* Dunphy v. Common-

plaintiff's expectations. In the latter case, the action allows the cumulation of insubstantial economic interests to provide a basis for standing.[108]

Representational standing in the trust setting is justified as well under traditional standing concepts. Although the plaintiff's interest, and thus his injury, is representational, it is nonetheless real. Further, that interest is within the zone of interests protected by the trust—in the guardian's case by implication of law, and in the trustee or visitor's case by inference from the appointment. More importantly, representational standing is justified by the underlying factors that standing analysis seeks to reflect. First, in most cases the representative's position and expertise allow him to appreciate, sometimes even better than can the beneficiary, the nature of the wrong that has been committed.[109] We presume that wards are incompetent to protect their own interests, and that guardians are better qualified to do so; a trustee is usually better equipped to know what constitutes a breach of fiduciary duty than is a beneficiary; a visitor is more likely to recognize violations of the grantor's intent than are members of the general public or, even, most attorneys general. Second, because of his expertise, the representative may be in a better position than the beneficiary to bring the breach to the court's attention, and to assist in its resolution through litigation.[110] This is particularly true for the visitor, for example. Thus, recognizing representative standing often will assist in the effective resolution of controversies, fulfilling a major goal of standing theory.[111]

III. INFERENCES FOR FUTURE CASES

The court's recognition of a grantor's standing to enforce a trust if he has retained either an economic interest, a substantial expectation interest, or a representational interest, has natural ramifications beyond the cases in which these doctrines are applied. It suggests that the grantor would have standing to bring an action in a number of common situations about which there is presently no authority. In this section, some of those situations are discussed, as are the probable results if the grantor's right to bring the action is challenged.

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wealth, 368 Mass. 376, 380 n.2, 331 N.E.2d 883, 885 n.2 (1975) (standing under statute allowing suit with leave of court by ten taxpayers of county, city, town, or other subdivision).

108. Although class action standing is representational, it also fits within the definition of "surrogate" standing, *see* Stewart, *supra* note 47, at 1744-47, in that the individual plaintiff suffers actual injury. Class actions therefore are not strictly representational if the latter term is used to indicate standing based solely on the interests of someone other than the person suing. In the examples given, however, the representational nature of class actions allows the action to be brought, in that the individual plaintiff's injury would be too insubstantial, standing alone, to be the basis for the action.

109. This factor would also explain the availability of class action standing. *See* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306-310 (1979); *cf.* D'Amico v. Schweiker, 698 F.2d 903 (7th Cir. 1983) (administrative law judges lack standing to contest restrictions on the types of fact which they may decide, even if those restrictions may harm some claimants).

110. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106 (1976) (doctors allowed to assert patients' interests in challenging state's refusal to pay for nonmedically indicated abortions).

111. *See* Baker v. Carr, 369 U.S. 186, 204 (1962).

A. Grantor Standing Based on Economic Interests

As noted in the preceding section, grantor standing can be based on an economic interest in the performance of the trust, whether that interest is expressly retained, retained by operation of law, or retained by implication. The implications of the decisions establishing those principles are outlined in this section.

1. Express Economic Interests

Little need be said about the standing of a grantor to enforce a trust in which he has an express economic interest. He has the same right as any other beneficiary to enforce the trust established for his benefit, just as he would if a beneficiary assigned him an interest in the trust. Further, this right should exist whether the interest was retained by the grantor or was received by assignment from another beneficiary. Ownership of the express interest should determine his right to sue.

Applying this principle should mean that a grantor who has retained an economic power exercisable in his own favor can sue to protect the interests which are subject to that power. For example, it is obvious that a grantor who retains a power of revocation or a general power of appointment over one or more trust interests should have standing to enforce the trustee's duties relating to that interest. Although a permissible appointee under an unexercised power of appointment (other than a power in trust) is usually said not to possess an interest in the trust,[112] the statement cannot be taken to apply to the holder of a general (or similar) power. Unlike other possible appointees, the holder of a general power, an unrestricted invasion power, or a power of revocation controls whether he will become a beneficiary of the trust. His power thus gives him an economic interest in the trust, the value of which is equal to that of the legal interest that is subject to the power.[113] Further, that interest is clearly within the zone of interests intended to be protected by the trustee's duties. The power therefore should be sufficient to give the grantor who holds it standing to protect that economic interest,[114] without requiring the exercise of the power. Thus, the grantor who retains a power to revoke a trust should be allowed to sue to protect the underlying interest, without first revoking it. Likewise, a grantor who retains a presently exercisable general power to appoint income or corpus interests should have standing to protect those inter-

112. *See* L. SIMES, *supra* note 16, § 58 ("prospective appointee has a mere expectancy").

113. *Cf.* Burnet v. Guggenheim, 288 U.S. 280 (1933) (application of gift tax to revocable trust). The interest of a general power holder is similar to that of a purchaser in escrow. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 48 (1913).

114. The interest possessed by the holder of a general power is inherently more valuable to him than would be most contingent trust interests, in that the contingency is under his control. It is for this reason that the holder of a general power is treated as the owner of the appointive property for the purposes of determining transfer taxes. *See* I.R.C. § 2041 (1983). Thus, since an owner of a contingent interest is generally deemed to have standing to enforce the interest to which he may become entitled, *see* 3 A. SCOTT, *supra* note 2, § 200, the holder of the general power should have the same right, including the power to enjoin or obtain redress for breaches of trust affecting the interest which could be appointed.

ests, without exercising the power of appointment.[115] Similarly, a grantor who retains the power to invade corpus for his own behalf should have standing to bring an action to protect that corpus.

2. Economic Interests by Operation of Law

As discussed above, if a grantor has an interest in a trust, he has standing to enforce that interest even if it arises by operation of law.[116] Therefore, a grantor may sue to enforce resulting trust interests, whether they arise because of failure to dispose of the equitable fee, or because of failure of one or more of those interests. Similarly, reversionary interests that arise under the doctrine of worthier title are enforceable.[117]

3. Economic Interests Impliedly Retained

As discussed in part II, a grantor can enforce a trust if the trustee's activities violate an implied economic interest. The principle is applicable to a number of common situations other than these discussed in part II.[118] Many situations familiar to estate planners contain the underlying economic interest and forseeability upon which implied interest standing is evidently based, and in which standing should exist. Some of the more obvious are discussed here.

a. Ownership of a concurrent interest in trust assets whose use or sale is restricted

Cases that recognize the right of a grantor to enforce limitations on the use of land granted for park purposes, if after the transfer he is an adjacent landowner, suggest a more general rule: if a grantor transfers to a trust a part of his ownership interest in nonfungible assets, and the terms of the trust restrict the trustee's use of the property or forbid his disposing of it, then the grantor has standing to enforce the restrictions. In such situations, the circumstances suggest that the grantor included the restrictions to protect his investment in the portion of the property that he retained.[119] To the extent that

115. Because a general testamentary power is of questionable value to the holder, in that it cannot be used directly to benefit its holder, retention of a general testamentary power does not give the grantor the clear economic interest that a presently exerciseable power would. Economic interest standing based on a general testamentary power therefore would not be clearly required. On the other hand, a testamentary power can be used to benefit the holder, in that it can be exercised in favor of the holder's creditors, and the holder can thus anticipate the value of the interest which is subject to the power. Because this possibility is not the normal use of the power, however, it cannot be said that the interest of the grantor is within the zone of interests which the grantor intended to create in creating the duties of the trustee. Therefore, his standing to enforce the interest which is subject to the power is questionable.

116. *See supra* text accompanying notes 70-71.

117. *See supra* text accompanying notes 70-71.

118. *See supra* text accompanying notes 72-76.

119. The ease of replacement of fungible assets would negate any reason to believe that the particular assets were important to the grantor. Rather, the restrictions on use would suggest that the grantor thought the assets were a good trust investment, and that the restrictions were intended to benefit the named beneficiaries. *See, e.g.*, *In re* Estate of Kettle, 73 A.D.2d 786, 423 N.Y.S.2d 701 (1979).

violation of the restrictions contained in the trust instrument would affect adversely the value of the retained property, he has an economic interest in what happens to the portion that he has transferred to the trust. Further, if the adverse effect was foreseeable at the time the trust was created, it would be logical to assume that the restriction was placed in the trust to protect the grantor's interest in the retained property. Thus, his interest in the operation of the trust was within the zone of interests that the restrictions sought to protect. Using normal standing analysis, then, he should have standing to enforce the restrictions.

The principle established by the land use cases is equally applicable to other cases in which part of the grantor's assets are transferred to a trust, with restrictions on the use or sale of the transferred assets. For example, if a grantor transfers to a trust some of his shares in a closely-held corporation, and forbids sale of the shares, the purpose of restriction is assumedly to protect the value of the shares that the grantor retains. Thus, the grantor should have standing to bring an action enjoining the trustee's sale of the transferred shares.

Because standing of this type is based on an implied intent to protect the value of retained assets, however, a grantor should not have standing to enforce the restriction if he has disposed of the retained assets, or if he has funded the trust with all of his assets of the type, but later acquired others. Disposition of the retained assets would negate any possible grantor injury from a trustee's violation of the restriction, and the circumstances of the creation of the trust would not suggest an intent to give the grantor an interest in its operation.[120] Similarly, if he does not retain assets of the type, there is no reason to imply that the sale restriction was intended to benefit him, so that later acquisition of similar assets should be irrelevant.

120. The grantor's successor with respect to the previously retained assets also would lack standing to complain of the trustee's violation of the sale restriction. In the normal course, there is no reason to presume that the restriction was intended to benefit anyone other than the grantor. The successor's interest would thus not be within the zone of interests protected by the sale restriction, and the successor would lack standing to complain if the trustee violated it. Whether those who inherited the grantor's interest similarly would be without standing is more problematical. If a business is a family business, restricting the trustee's power of sale may be as much for the protection of other family members as it is for the protection of the grantor in his ownership of shares. If that is true, then the interest of the grantor's heirs is easily within the zone of interests that the sale restriction seeks to protect, and they should have standing to enforce it, as long as they continue to own stock in the corporation.

The heirs' standing to enforce restrictions in the above context does not mean, however, that heirs can generally enforce restrictions on transferred assets. If, for example, a grantor transfers part of his land for park or church purposes, it is difficult to say that he intends his successors to benefit specifically from the proximity of the park or church. It thus cannot easily be said that his successors' interests in the use of the property are within the zone of interests protected by the restriction. Thus, his heirs should lack standing to enforce the restriction if other neighboring landowners would not.

The reader should note that to the extent that successors lack standing to enforce restrictions, the results suggest that the "traceable injury" test that is currently in vogue in analyzing public law standing cases lacks the effectiveness of the zone of interests tests. Both successors and heirs could trace their injury to the trustee's violation of the restriction, but only those who can say that they were to be protected by the restriction can bring an action to challenge its abuse.

b. Forseeable monetary interest in the disposition of trust benefits

As discussed in part II, courts have recognized a grantor's standing to enforce a trust when operation of the trust would produce foreseeable economic gain to him. For example, courts allowed a grantor-father to enforce a marital separation trust established on behalf of his children.[121] Arguably, the reason for the grantor's standing in this setting is that performance of the trust would relieve the father of a legal obligation to support his children, even after divorce. An intention to benefit the father can be implied,[122] making the father's interest within the zone of interests for which the trust duties were imposed. Denial of that benefit would thus give the father standing to enforce the trust.

The existence of a forseeable economic interest in the disposition of trust benefits also should support standing in other trust settings. For example, it is not uncommon for an individual to establish a discretionary trust for persons whom he is obligated to support. If the circumstances surrounding the establishing of the trust suggest that the trust was established to relieve the grantor's support obligation,[123] the refusal of the trustee to provide the beneficiary's support presumedly would be actionable by the grantor whose support obligation is now unfulfilled.[124] Similarly, nonperformance of a trust established to pay creditors of the grantor should be actionable by the grantor,[125] unless the establishment of the trust constituted a novation of the contract,[126] in which case the creditors would be deemed to be the grantors, and would have the

121. *See supra* note 74 and accompanying text.

122. *See* Note, *supra* note 7, at 1374-75.

123. More is required than mere existence of a support obligation at the time the trust is created, because even if a grantor is obligated to support an individual, he can establish a trust for that individual without intending that the trust relieve the grantor of his obligations. Thus the surrounding circumstances must be considered. The classic evidence showing the requisite intent would be that the trust for children was established pursuant to a divorce agreement. In the divorce setting, the most likely reason for the trust is to define the grantor's obligation to support his children after the divorce. Because that definition would impact on his legal obligation, the intent to benefit from the trust is obvious. The conclusion would have significant income and transfer tax consequences. If the trust is defined to be for the benefit of the grantor, it is a "grantor trust," and the income is taxed to the grantor. *See* I.R.C. § 677 (1983). The trust also may be included in the grantor's gross estate under I.R.C. § 2036(a)(1) (1983). *See* Treas. Reg. § 20.2036-1(b)(2) (1983).

124. This conclusion comprehends that the trustee has an enforceable duty to the beneficiary. *See, e.g.*, Emmert v. Old Nat'l Bank, 246 S.E.2d 236 (W. Va. 1978). The result assumedly would be different if the settlor were under no legal obligation to provide the beneficiary's support. *Cf.* Parker v. Commissioner, 166 F.2d 364 (9th Cir. 1948) (income not taxable to settlor). In such a case, the grantor's interest in the trust could not be said to have been clearly within the interests intended to be protected by the trustee's duties, even though he suffered injury in fact from the failure of the trustee to provide the support amounts. Note further that this illustrates that surrogate standing analysis, *see* Stewart, *supra* note 47, at 1744-47, does not fit easily with grantor-trust cases. In the public law setting, the grantor's increased support liability would assumedly be a sufficient injury to allow him to litigate the beneficiary's rights. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

125. In some cases, such a trust is considered to be solely for the benefit of the grantor-debtor, and the creditors to be incidental beneficiaries. In this situation, the creditors would lack standing to enforce the trust. *See* 2 A. SCOTT, *supra* note 2, § 126. In other circumstances, the transferee may be considered to be the agent of the grantor-debtor. *Id.* § 126.1.

126. *See* 2 A. SCOTT, *supra* note 2, § 126.1.

sole right to enforce the trust.[127] In each hypothetical, nonperformance of the trust will injure the grantor and the prevention of that injury was the reason for the trust. In each the grantor's interest was foreseeable, and within the zone of interests intended to be protected by the terms of the trust. Thus, his interest should be cognizable, and he should have standing to maintain an action to enforce the trust.

As noted in part II, implied economic interests can also arise from the retention of a power over trust property.[128] An example is the interest of the grantor who retains the right to vote stock transferred to the trust, when he owns other shares in the company or is employed by the company at the time of the transfer.[129] Ownership of other shares at the time the voting right is retained suggests that the power was retained to protect the value of those shares, or to prevent the possibility of unfriendly management obtaining control of the company. Similarly, if the grantor is employed by the company, retention of the voting rights in transferred stock suggests a desire to either protect his employment, or to maintain his position in relation to his corporate employer. In either case, the retention presumedly would be designed to operate for his benefit, and its violation should be actionable by him.[130]

An implied interest could also be found in the retention of a power to control investments by the trustee in assets in which the grantor otherwise was interested. For example, if the grantor retained a power to direct investments, or required the trustee to obtain the grantor's consent before changing investments, and funded the trust with stock in a closely-held business in which his interest continued, the circumstances suggest that the restriction was inserted

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127. The novation would release the debt of the grantor, and he would therefore have no interest in the performance of the trust. Thus, he would lack standing to enforce it in any event.

128. *See supra* notes 75-76 and accompanying text.

129. Although retention of voting rights always suggests an unwillingness to dispose of the power to determine the economic life of the underlying company, surrounding circumstances will determine whether the retention is for the grantor's benefit or that of the beneficiaries of the trust. If, after the transaction, the grantor is otherwise unconnected with the corporation, the retention of the voting power suggests only a desire to preserve the value of the investment for the beneficiaries, or to control the beneficiaries' rights in relation to the corporation (*e.g.*, the rise of a beneficiary through the ranks of the corporation). On this point, it is interesting to note that there is some authority that the power to vote stock may not be held by a person who is neither "interested in the stock nor a representative of persons interested." Clowes v. Miller, 60 N.J. Eq. 179, 47 A. 345 (1900). *See also* People *ex rel.* Ark. Valley Sugar Beet & Irrigation Co. v. Burke, 72 Colo. 486, 212 P. 837 (1923). The restriction was commonly stated in older voting trust cases, *see, e.g.*, Robotham v. Prudential Ins. Co., 64 N.J. Eq. 673, 53 A. 842 (1903), but is now in disfavor. *See* F. O'NEAL, *supra* note 76, § 504. Obviously, the value of the right to vote stock can be significant, particularly if the stock represents a controlling interest in the corporation. *See generally* Hazen, *Transfers of Corporate Control and Duties of Controlling Shareholders—Common Law, Tender Offers, Investment Companies—And a Proposal for Reform*, 125 U. PA. L. REV. 1023 (1977).

On the other hand, if the grantor continues to have an interest in the corporation after the trust is established, that interest raises the presumption that the retention of the power was for the grantor's benefit.

130. If the grantor's family owns shares in the corporation whose shares are being transferred into trust, retention of the voting power might also be used to protect the financial health of the grantor's family, or to protect the grantor's position within the family power structure. The latter would suggest a noneconomic interest which should be actionable. *See infra* text accompanying notes 136-39. The former might give representative standing. *See infra* text accompanying notes 140-65.

in the trust to prevent the stock from falling into the hands of interests adverse to his. The situation would be similar to his having retained the voting rights with the implication that he retained the power to protect his retained interest in the underlying asset. His interest in those assets would be within the zone of interests protected by sale restriction, and enforceable by him.[131] If he owned other stock at the time of the transfer, or was employed by the company whose stock he transferred, he should have standing to enjoin disposition of the stock by the trust without his consent, as long as he continued to own stock in the company or be employed by it.

Obviously, whenever the grantor's standing is defended on the ground of an implied interest, it is not necessary to show an express intent to retain an enforceable interest. Unlike third parties who seek to establish that they were "intended beneficiaries"[132] rather than "incidental beneficiaries,"[133] and who must show some active intent to benefit them, the grantor need only show that his interest was foreseeable at the time the trust was created. As the park cases suggest, if foreseeability is present, the intent to benefit the grantor is presumed.

On the other hand, simply because the grantor was benefiting from the operation of a trust at the time of the trustee's alleged breach should be insufficient to give the grantor standing to challenge the breach. If the grantor's interest was not in existence or foreseeable when the trust was created, there would be no reason to assume that the trust was created to protect his interest. In standing terms, his interest would not be within the zone of interests to be protected by the trust, and he should lack standing to complain of the trustee's acts. A grantor should not be able to obtain standing through acts subsequent to the creation of the trust. Thus, for example, if an owner of a closely held business placed his stock in an irrevocable trust for the benefit of others, and did not restrict its sale or retain any power to control its retention, he would lack standing to complain of its sale by the trustee, even if he continued employment with the company, and even if, in light of the performance of the stock, its sale constituted a breach of trust in relation to the beneficiaries. Because the grantor did not seek to restrict the sale, no implication arises that the trustee would have any duties to the grantor. His interest in seeing that the trust continued its ownership of the stock would not be within the zone of interests created by the trust, and therefore, only the beneficiaries of the trust could complain of the sale. Similarly, a grantor who established a discretionary trust in favor of an individual to whom he then owed no obligation of support would lack standing to complain if later the trustee refused to provide support payments to the beneficiary, even if, at the time of the alleged breach, the grantor was obligated to support the beneficiary. Thus, if after a discretionary trust for the benefit of adult children were established one of the children became incompetent, and under local law the parent was responsible for

131. *See* 2 A. SCOTT, *supra* note 2, § 185.
132. *See id.*, §§ 126.1 to .3.
133. *See id.*, § 126.

the support of incompetent adult children, the grantor would lack standing to challenge the trustee's exercise of discretion. Because no support obligation existed at the time the trust was created, no implication that the trust was established to relieve that obligation would exist. Therefore, the grantor could not sue on his own behalf, and would have to sue as guardian or best friend of the child.

Further, when standing is based on implied economic interests, the nature of the alleged breach is particularly important. The grantor must have standing to complain of the particular wrong; the breach must relate to the grantor's asserted interest in the trust. Thus, if a grantor creates a trust for the support of his children, he may sue to require distribution of support payments,[134] but not to question trust investments,[135] unless he alleged that the investments were endangering the ability of the trustee to provide the support payments. The grantor may enforce only the implied obligation to him; he lacks the power to enforce duties not related to the implied obligation, even if the express beneficiary through whom he claims would have the right.

B. Standing Based on Expectation Interests

Part II discussed circumstances in which the substantial expectations of the grantor were sufficient to support his standing to enforce the trust. Such a basis for standing, however, undoubtedly will be rare. Although grantors always expect that the terms of the trust will be followed, it is the unusual case in which the trust would not have been created except for the expectation that the alleged breach violates. Most charitable gifts are motivated by generosity and a desire to help, without regard to the importance of the particular scheme contained in the granting instrument. Indeed, the entire concept of *cy pres* modification of charitable trusts when the specific purpose of the gift becomes impossible to perform is based on a belief that such general purposes control gifts.[136] Unless the specific purpose of a charitable gift would prevent application of *cy pres* doctrine, it should be insubstantial enough to prevent the grantor enforcing it in an action against a trustee who violates the restriction.[137]

Grantor standing based on substantial expectation interests also should be the exception. Rarely does the grantor have a purpose beyond the benefiting of the named beneficiaries of the trust. Undoubtedly, most trusts are established for the members of a grantor's family, and have as their dominant motive only the present and future well being of the beneficiaries. Although

134. *Cf.* Rosenblatt v. Birnbaum, 16 N.Y.2d 212, 212 N.E.2d 37, 264 N.Y.S.2d 521 (1965) (action to enjoin diversion of funds).

135. *Cf.* Landau v. Ostrow, 50 Misc. 2d 474, 270 N.Y.S.2d 722 (Sup. Ct. 1966) (action for accounting; no trust found to exist).

136. *See* 4 A. SCOTT, *supra* note 2, § 399.

137. If the purpose becomes impossible, however, rather than merely violated by the trustee, the grantor would have standing as the beneficiary of a resulting trust to require return of the trust assets. *See, e.g.*, Evans v. Abney, 396 U.S. 435 (1970).

restrictions sometimes are placed on the receipt of those benefits,[138] the reasons for those restrictions usually are secondary to the overriding purpose of presently furthering the interests of the beneficiaries,[139] and are too insubstantial to justify grantor standing based upon them. It therefore should be the rare case, such as the divorce trust cases noted above, that illustrates standing on this ground.

C. Standing Based on Representation Interests

As noted in part II, a grantor has standing to enforce a trust if he sues as a representative of a beneficiary. Two types of representative standing are recognized: representatives, such as guardians and best friends, who are appointed by law or recognized by the court to represent the interests of minors and others who lack legal capacity to represent themselves, and representatives, such as trustees and visitors, who are appointed by the instrument. Both types are well recognized, and the latter, in particular, suggests standing in situations other than those that establish the criteria for representative standing.

1. Representation of Incapacitated Persons

The standing of guardians, conservators, and best friends to represent the interests of their wards is outlined in part II. To the extent that an incapacitated beneficiary has a cognizable interest in the trust, his duly appointed representative may sue to enforce the interest. Further, to the extent that the jurisdiction recognizes the institution of the best friend, an action may be brought by the best friend on behalf of minors and other beneficiaries incapable of representing themselves. In no instance is a grantor prevented from qualifying as a representative of either type. Thus, the grantor who is properly appointed may represent an incapacitated beneficiary.

2. Representation by Appointment in the Trust Instrument

Representation by appointment in the trust instrument is a more likely basis for grantor standing. As noted in part II, a grantor who appointed himself trustee has standing to enforce the duties of his cotrustees. Indeed, if he fails to enforce those duties, he is liable for the wrong that the cotrustees commit.[140] Similarly, if he appoints himself as visitor to a charitable foundation or trust he created, he has standing to enforce the charitable gift.

Recognition of the right of representatives appointed by the grantor to

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138. *See, e.g.*, Claflin v. Claflin, 149 Mass. 19, 10 N.E. 454 (1889) (payment of corpus over time).

139. It could be argued that any reasonable grantor expectation should be protected, and thus give the grantor standing to enforce the terms from which that expectation arose. *See* Note, *supra* note 7, at 1376-77. Standing based on insubstantial expectations, however, would encourage (or not discourage) frivolous litigation without marked gain to the fairness of the legal system, and therefore ought not be allowed.

140. *See* 2 A. SCOTT, *supra* note 2, § 184 n.3 and accompanying text; 3 A. SCOTT, *supra* note 2, § 224.5.

enforce trust duties suggests that the grantor also has standing in at least four situations that previously have not produced litigation.

a. Standing as investment advisor

A grantor who holds either a directory power or a consent power over trust investments presumedly does so as a fiduciary if he is not also a beneficiary.[141] By retaining the investment advisor function, the grantor suggests a lack of faith in the trustee's investment abilities, and implies the desire that that trustee function be supervised. If this supervisory power is to have any meaning, it must be enforceable by the grantor-investment advisor, on behalf of the beneficiaries. As an investment advisor, he performs like a trustee, and like a trustee, should be able to bring an action to force the trustee to comply with his investment decisions.

Because a grantor's standing as an investment advisor is representational, however, it should not support actions challenging transactions to which the beneficiary has consented after a full disclosure of the facts. Otherwise, the grantor would be enforcing the trust against the apparent desires of the person whose interests were being represented.[142] Thus, a necessary allegation in a complaint by a grantor-investment advisor who sues on behalf of the trust's beneficiaries is a lack of consent by the beneficiaries whose interests are affected by the alleged malfeasance.

Further, the grantor-investment advisor's right to enforce the trust would be limited by the nature of the investment power. For example, trustee inactivity would be actionable if the grantor had a directory power, but not if he retained merely a consent power. Because a consent power allows its holder merely to disapprove changes in trust investments, its retention does not suggest that the grantor intended to protect the beneficiaries from trustee inactivity. Therefore, the grantor who holds the power should not be able to question that inactivity. In contrast, trustee investments without consent would be actionable under either a directory power or a consent power, because the investments would be without direction or consent. The act would be within the retained area of supervisory responsibility, and should be subject to the grantor's control, suing on the basis of his retained power.

b. Standing under retained dispositive powers

Representational standing theory also should justify a grantor's action to enforce compliance with the exercise of dispositive powers he retained. For example, if he retains the power to direct distribution of corpus to one or more beneficiaries, he should be able to bring an action to force the trustee to comply with his directions on the distribution of that corpus.[143] Similarly, if he

141. *See* Carrier v. Carrier, 226 N.Y. 114, 123 N.E. 135 (1919). *See generally* 2 A. SCOTT, *supra* note 2, § 185.

142. If the investment power is held by the grantor for his own interests, *see supra* text accompanying notes 118-135, beneficiary consent would be irrelevant.

143. *See* Associated Alumni v. General Theological Seminary, 163 N.Y. 417, 57 N.E. 626

retains a power to accumulate income, he should be able to force the trustee to comply with a lawful exercise of that power.

Representational standing in this contest is justifiable on a variety of grounds. First, the grantor's standing is necessary to uphold his full intent at the time the trust was created. To the extent that his purpose in retaining the power was to determine the relative rights of the beneficiaries in the future, he should be able to enforce it in spite of the objections of the trustee or any beneficiary who is not *sui juris*.[144] To the extent that his purpose reflected a distrust of the trustee's discretion, that purpose also would be frustrated if the trustee were allowed to ignore the grantor's exercise of power. Further, allowing the grantor to bring the action more fully protects the beneficiary's interest as defined in the trust instrument. Even assuming that the beneficiary could bring an action to force compliance with the grantor's exercise of power, requiring the beneficiary to bring such an action requires him to do something that the grantor clearly sought to protect him from—having to monitor the trustee's activities. Grantor enforcement, on the other hand, results in the beneficiary obtaining what was intended, without his active intervention. Third, recognizing the grantor's standing validates the fiduciary nature of his office. By retaining the dispositive power, the grantor makes himself a fiduciary, and liable for abuse of power. Were the trustee given the same power, he would have a duty to the beneficiary to exercise the power for the beneficiary's interest, and the exercise of the power would be reviewable,[145] but he would have total control over its effectiveness. By retaining the power, the grantor puts himself in the shoes of the trustee for this purpose. If he is to have the power of a trustee, however, he must have the right to enforce his exercise of the power, a right that would be inherent if he held the power as a trustee.

c. Retention of a general directory power not held for his own benefit

The grantor also should have standing to enforce his directions (or to prevent the trustee from acting without direction) when he retains a general power to direct the trustee, even if the power is not held for his own benefit.[146] If the power is retained for the purpose of ensuring the interests of the benefi-

(1900) (retained right to name holder of donated professorship). *Cf.* Williams v. Stevens, 335 Ill. App. 123, 80 N.E.2d 451 (1948) (abstract).

144. If all beneficiaries are *sui juris*, then they would have the right to adjust their interests between them if their interests were not subject to a spendthrift clause. Further, even if a spendthrift clause existed, they might be able to disclaim interests in favor of other beneficiaries. In that case, the grantor's desires would become irrelevant, and he should lack standing to enforce them. In either event, recognizing the beneficiaries' right to adjust their own interests would be consistent with the concept of "self-determination" as developed in constitutional standing cases. *See* Brilmayer, *supra* note 109, at 130-15.

145. *See* First Nat'l Bank v. Department of Health, 284 Md. 720, 399 A.2d 891 (1979).

146. If the grantor retains a general directory power for his own benefit (as might be the case if the trust included assets in which the grantor had a personal economic interest), his standing would be personal, not representative. Such powers must, of course, be exercised consistent with the rights of other beneficiaries. *See* Chase Nat'l Bank v. Reinecke, 10 N.Y.S.2d 420 (Sup. Ct. 1938) (requested loan improper when it would put assets of trust in jeopardy).

ciaries, the grantor holding it is deemed to be the trustee.[147] For analytic purposes, the named trustee is the agent of the grantor-trustee, whose power is limited to holding title to the assets and executing the grantor's directions. In such an analytic setting, the grantor would, as a trustee, have a representational right to enforce the trust. He would also have a personal economic interest in doing so, based on his potential liability as trustee for wrongdoing. Indeed, the grantor's standing should exist even if the trustee were held to have a fiduciary duty to question whether the grantor's directions constituted a breach of trust,[148] because his standing is based on his own duty to represent the interests of the beneficiaries.

d. Retention of corrective oversight powers

A grantor may also have standing to enforce a trust based on an expressly retained right to do so. As noted in part II, the right of overseers to enforce trusts is recognized in the case of visitors to charitable foundations and trusts.[149] Indeed, in the case of gifts to charitable foundations, the appointment of visitors is presumed.[150] Further, although its roots are in the enforcement of gifts to charitable corporations, the validity of visitorial powers[151] also is recognized with respect to noncorporate charitable trusts. Indeed, although there is authority that the law does not imply a visitorial right from the mere creation of a charitable trust (as opposed to the creation of a charitable corporation),[152] authority to the contrary exists,[153] and, in any event, the donor expressly may reserve the right.[154] The standing of a visitor is as a representative of the interests of the public at large.[155]

Assumedly, a grantor has standing to enforce a similar retained oversight power over a private trust. Analytically, there is no reason to limit the standing of named overseers to charitable trusts and foundations. If a grantor can appoint a representative for the interests of beneficiaries in the one situation, he should be able to do so in the other. He could do so in either situation were

147. *See* Carrier v. Carrier, 226 N.Y. 114, 123 N.E. 135 (1919).

148. *See* 2 A. SCOTT, *supra* note 2, § 185.

149. As to the existence of the right, *compare* Trustees of Andover Theological Seminary v. Visitors of Theological Inst., 253 Mass. 256, 148 N.E. 900 (1925), *with* Wier v. Howard Hughes Medical Inst., 407 A.2d 1051 (Del. Ch. 1979).

150. *See, e.g.*, Trustees of Putnam Free School v. Attorney Gen., 320 Mass. 94, 67 N.E.2d 658 (1946); MacKenzie v. Trustees of Presbytery, 67 N.J. Eq. 652, 61 A. 1027 (1905); State *ex rel.* College of Bishops v. Board of Trust of Vanderbilt Univ., 129 Tenn. 279, 164 S.W. 1151 (1914). *Contra* Fuller v. Trustees of Plainfield Academic School, 6 Conn. 532 (1827); Leeds v. Harrison, 7 N.J. Super. 558, 72 A.2d 371 (Ch. 1950).

151. For a history of visitorships, see generally 4 A. SCOTT, *supra* note 2, § 391; Pound, *Visitorial Jurisdiction Over Corporations in Equity*, 49 HARV. L. REV. 369 (1936).

152. *See, e.g.*, MacKenzie v. Trustees of Presbytery, 67 N.J. Eq. 652, 61 A. 1027 (1905).

153. *See, e.g.*, Healy v. Loomis Inst., 102 Conn. 410, 420, 128 A. 774, 777 (1925); Attorney Gen. v. Parker, 126 Mass. 216, 220-221 (1879).

154. *See* BOGERT, *supra* note 2, § 391; *but see* 4 A. SCOTT, *supra* note 2, § 391.

155. When the power is recognized, it is often held to exclude enforcement of the charity by the attorney general, because his role is visitorial in nature. *See, e.g.*, Attorney Gen. v. Dulwich College, 4 Beav. 255, 49 Eng. Rep. 337 (1841). *Contra* State v. Taylor, 58 Wash. 2d 252, 362 P.2d 247 (1961).

he to name himself a cotrustee. In many situations, as when all beneficiaries are minors, unborn, or unknown, the inability of the beneficiaries to protect their own interests is similar to that of the public to enforce a charitable trust.[156] Although in both charitable and private trust contexts, any economic relief would inure to the beneficiaries, as it would if the grantor were suing a cotrustee,[157] by appointing himself to protect those interests, the grantor indicates a sufficient interest in the outcome of the litigation to justify faith that he will litigate fully the beneficiaries' rights. His standing thus would be justified using normal standing analysis.[158]

A grantor's standing to enforce a corrective oversight power over a private trust also is explainable by analogy to the treatment of trustees. In retaining a corrective oversight or visitorial power, the grantor assumes a role somewhat similar to that which he would have had if he had appointed himself as a cotrustee but with responsibilities limited to overseeing the actions of his cotrustees. Were the grantor to have named himself as a cotrustee, he would have standing to enforce the trust,[159] perhaps even without joining the represented beneficiary as a party to the action.[160] That he wished to assume the same role without adopting the mantle of a trustee is unimportant to the question of his standing.

The difficulty with explaining the grantor's standing by analogizing his position to that of a trustee is that the explanation proves too much. Trustees have fiduciary obligations in exercising the oversight power. Cotrustees generally are liable if they negligently or wrongfully fail to bring an action that should have been brought to protect the interests of the beneficiary.[161] Mere retention of an oversight power, on the other hand, suggests only the grantor's desire that he have the right to correct trustee abuses, not the duty to do so.

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156. Recognition of the concept need not be limited to such groups, however. First, charitable trusts are generally enforceable by the attorney general, and thus the "beneficiaries" are not without representation, even without validation of the standing of visitors. Second, the concept of vesting in one person the right to enforce legal rights of another person is well recognized in other areas of the law. Indeed, in some settings, the right of representation can be exclusive of enforcement by the person whose rights are at issue, *see, e.g.*, Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962) (sole right of union to enforce arbitration right of member), subject only to a possible action for abuse of the representation. *See* Brown v. Sterling Aluminum Prod. Corp., 365 F.2d 651 (8th Cir. 1966).

157. The grantor's standing to enforce private oversight powers also could be analyzed on grounds personal to him. By naming himself to oversee trustee activity, he implies that the performance of the trustees is a significant expectation in creating the trust. Thus, he should have standing to enforce the performance, based on injury to that expectation. *See supra* notes 136-139 and accompanying text.

158. It also is not possible to limit express or implied oversight standing to charitable trusts on the ground that visitors constitute a delegation of the function of the attorney general. First, the reverse is sometimes stated: that the attorney general fulfills a visitorship role. *See, e.g.*, Attorney Gen. v. Dulwich College, 4 Beav. 255, 49 Eng. Rep. 337 (1841). Second, that analysis would make the attorney general's right to authorize *ex rel.* proceedings largely surplusage, and indeed, would undercut the attorney general's authority to represent the interest of the state. *See* State v. Taylor, 58 Wash. 2d 252, 362 P.2d 247 (1961).

159. *See* Killen v. Houser, 239 Md. 79, 210 A.2d 527 (1965).

160. *Compare id. with* Miele v. Miele, 124 Vt. 110, 197 A.2d 787 (1964).

161. *Cf. In re* Estate of Rothko, 43 N.Y.2d 305, 320, 372 N.E.2d 291, 296, 401 N.Y.S.2d 449, 455 (1977) (liability of cotrustee).

For example, visitors—whose standing to enforce a trust is similarly the result of the grantor's appointment—are not clearly liable for failing to correct abuses by the trustees of the charities for which they are appointed; evidently, they have the power to enforce the trust, but not the duty to do so.

In the end analysis, of course, the theory supporting the grantor's standing is less important than the fact that the standing exists. The grantor, by retaining the oversight power, is not attempting to create a cause of action,[162] but is merely attempting to define who could bring the matter to the court for resolution. By retaining that power, he is appointing himself as a representative of the beneficiaries for the purposes of enforcing their rights against the trustee, under circumstances which suggest that he is sufficiently concerned with their interests that his representation will be adequate for standing purposes. By his own act, he has defined his concerns as within the zone of interests to be protected by the trustee's duties.[163] Further, recognizing his right to bring the action would not adversely affect the interests of the beneficiaries, whether the grantor's position is analogized to that of the visitor or trustee. Retention of the power would not bar the beneficiary from bringing his own action to enforce the trust, because the right of cofiduciaries to redress breaches of trust is coextensive with that of the beneficiaries.[164] Nor would the power prevent the beneficiaries from consenting to the action of the trustee, and thus barring the enforcement action of the grantor; the interests being represented would be theirs, not his.

IV. CONCLUSION

Although it is occasionally and loosely stated that a grantor lacks standing to enforce a trust, that statement is clearly too broad. Courts have found a grantor to have standing to enforce a trust he created in a number of situations. Further, these situations do not all reflect the categories—beneficiary, trustee, promisee—traditionally used to determine whether an individual can enforce a trust. Rather, the grantor's standing is analyzed better on the basis of whether he has an interest, economic or otherwise, in the performance of the trustee's duties. If he possesses such an interest, and that interest is within

162. *See* Stokes v. Moore, 262 Ala. 59, 77 So. 2d 331 (1955) (questioning contractually-defined right to bring specific performance action on covenant not to compete); *see generally* Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 520-23 (1962).

163. The position of the grantor in this setting is similar to that of the plaintiffs in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), who, though not wishing to rent apartments themselves, were held to have standing to enforce the Fair Housing Act of 1968, 42 U.S.C. § 3604 (1976), as "testers." They were no more than self-appointed representatives of who would be interested in apartment rentals. In the trust context, the grantor's interest is defined by the trust instrument; in *Havens*, it was defined by statute. Further, the retention of the oversight power suggests that the grantor perceives that the beneficiaries need that protection, and thus to paraphrase the court in Griswold v. Connecticut, 381 U.S. 479, 481 (1965): "The rights of [the beneficiaries], pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 466 (1974).

164. *See* BOGERT, *supra* note 2, § 871; 3 A. SCOTT, *supra* note 2, § 200.2.

the zone of interests sought to be protected by those duties, then the grantor can bring an action to enforce the trust. In a broad sense, if the grantor has an economic, expectation, or representational interest in the trust, such that he can be trusted to fully and fairly litigate the validity of the transactions that he challenges, and his interest was foreseeable at the time the trust was created, he can maintain the action.

Second, the variety of bases for grantor standing suggests that he would have standing to enforce a trust in a number of situations that previously have not been litigated. Analysis of his foreseeable interest suggests, for example, that the grantor of a revocable trust can enforce it without first exercising his right of revocation. Similar conclusions can be drawn with respect to the right of a grantor to enforce retained consent or directory powers over trust investments.

Finally, comparison of the problem of resolving a grantor's right to enforce a trust, with the problems inherent in the public law standing cases, suggests that public law standing is not the unique area it has been thought to be, and that there may be a generalized law of standing. If there is, then analysis of the grantor-enforcement cases suggests that at least one factor in public law standing analysis—what is known as the "zone of interest" test—may have greater significance than public law scholars currently think that it possesses.