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Almost a quarter of a century ago John Gaubatz wrote about "grantor" standing in "one private law setting" (trust law),[1] ending the introductory paragraphs by observing that a comprehensive treatment of "standing in the private law setting . . . must wait for another time, and perhaps another author."[2] I write, at the risk of being presumptuous, to accept my friend's invitation—at least as it relates to our shared field of trust law. As a relevant aside, I mention that John served as one of the advisers for The American Law Institute's ongoing project to produce a Restatement (Third) of the Law of Trusts, the fourth (and final) volume of which is being developed and will include a lengthy section stating rules of standing. (As the reporter, I was pleased to receive a supportive telephone response from John in the spring of 2007 regarding my plans for the preliminary draft of that section on standing.) The analyses of settlor standing in his 1984 article, and the broader insights they offer on standing in general, have been influential not only in my work but also in a recent, unprecedented period of scholarly discussion and legislative activity, as well as in reported cases, on matters of standing to prevent or remedy breaches of trust.[3]

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1. John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N.C. L. REV. 905 (1984).

2. *Id.* at 907.

3. Perhaps most significant of the recent activity is the Uniform Trust Code, notably broadening settlor standing in several sections. *E.g.*, UNIF. TRUST CODE § 405(c) (amended 2005), 7C U.L.A. 486 (2006); *id.* § 410(b), 7C U.L.A. 495–96; *id.* § 706(a), 7C U.L.A. 575. Also of special importance is the ongoing American Law Institute project, *Principles of the Law of Nonprofit Organizations* (Tentative Draft No. 1, 2007). The project reporter, Evelyn Brody, discusses the 1984 article in one of her recent works. *See* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1204–06 & n.54 (2007); *see also, e.g.*, Ronald Chester, *Grantor Standing To Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37 REAL PROP. PROB. & TR. J. 611, 629–30 & n.88 (2003); Charles E. Rounds, Jr., *Social Investing, IOLTA and the Law of Trusts: The Settlor's Case Against the Political Use of Charitable and Client Funds*, 22 LOY. U. CHI. L.J. 163, 167, 186 & n.105 (1990). Citations to Professor Gaubatz's article continue to appear in treatises. *See, e.g.*, RONALD CHESTER, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 413, at 45 n.2 (3d ed. 2005) [hereinafter BOGERT'S TRUSTS AND TRUSTEES]; WALTER

The inquiry in this essay goes beyond the 1984 article and essentially asks: Who, aside from trust beneficiaries, and attorneys general in charitable trust matters, has standing to maintain a suit against a trustee to prevent or remedy a breach of trust or otherwise to enforce the trust? The initial paragraph of the article noted the "paucity of literature discussing when and how the grantor can enforce . . . a trust,"[4] and a subsequent introductory paragraph added: "Enough of these situations [of settlor enforcement] exist to prove false the overstatement, common in the treatises, that a grantor who is not a beneficiary lacks standing to enforce a trust. An analysis of the differences between successful grantor enforcement actions and those in which the grantor was denied standing, however, has been lacking."[5] The article went on to express concern over, inter alia, the "Inadequacy of Beneficiary Analysis" (largely in the definition of "beneficiaries")[6] and the "inadequacy" of efforts at the time to define the "fiduciaries" or "representatives" who may act on behalf of one or more beneficiaries or instead of attorneys general.[7] As we shall see, developments in the years since the 1984 article's publication offer greater clarity in these matters, at least in many states as well as in principle; also, some significant trends are currently discernible in the rules of standing not only for settlors but also for others.

The discussion in this essay examines questions of standing in the trust context, including standing to intervene in, as well as standing to initiate and maintain, enforcement proceedings (as comprehensively defined for these purposes).[8] In the course of the discussion, attention is given at appropriate points to the rationale underlying restrictions on standing in trust-enforcement cases, and to the advantages and disadvantages of granting standing for various purposes to various categories of

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L. NOSSAMAN & JOSEPH L. WYATT, JR., TRUST ADMINISTRATION AND TAXATION §§ 1.05, 34.13 (2007); 4 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 24.4.1 (5th ed. 2007). And discussion of the 1984 article appears in cases. *See, e.g.*, Morse v. Bank One, No. 03-2638, 2005 WL 3541037, at *8 (E.D. La. Nov. 1, 2005), Sanders v. Citizens Nat'l Bank of Leesburg, 585 So. 2d 1064, 1066 (Fla. 5th Dist. Ct. App. 1991).

4. Gaubatz, *supra* note 1, at 905.

5. *Id.* at 906–07 (footnote omitted).

6. *Id.* at 908–09.

7. *Id.* at 909–26.

8. "Enforcement" often refers to efforts not only to enjoin or redress a breach of trust but also to petitions for instruction, *see* RESTATEMENT (THIRD) OF TRUSTS § 71 (2003), for removal of a trustee, *id.* § 37, for equitable deviation, *id.* § 66, for *cy pres*, *id.* § 67, and to divide or combine trusts, *id.* § 68. On the other hand, the term does not refer (and the rules limiting standing in this essay do not apply) to proceedings seeking to set aside or reform a trust brought by settlors or their successors in interest for fraud, undue influence, and the like, *id.* § 62, as these are not proceedings to *enforce* a trust; nor are proceedings brought by a person to protect an individual interest in a parcel of land or other specific asset in which both the person and a trust hold undivided (or successive) interests.

potential litigants. Because these potentially relevant considerations are most apparent and best introduced in the charitable-trust context, rules of standing are discussed first in that setting, then in the context of private trusts, and finally in regard to trusts that have both charitable and private purposes.

I. CHARITABLE TRUSTS

The authority and "primary" responsibility for the enforcement of charitable trusts reside in the attorney general or other appropriate public official of the jurisdiction involved.[9] Similarly well established, however, is the standing of a trustee or successor trustee to maintain a suit against a co-trustee or predecessor trustee to prevent or remedy a breach of trust.[10] In addition, modern cases and statutes generally recognize that, despite some difficulties of definition, persons having a "special interest" in a trust have standing to enforce that trust.[11]

A. *Attorneys General and Trustees*

Charitable trusts ordinarily do not have the definite beneficiaries that are required for the validity of private trusts.[12] The community interest in the enforcement of charitable trusts is represented in most states by the attorney general, or in a few by some other designated public officer, such as the local district or county attorney.[13] (For simplicity, such officials are hereafter included in references to the "attorney general.") Although not exclusive,[14] the attorney general's standing to enforce charitable trusts is "primary" in the sense that the attorney general must normally be joined as a party even in an enforcement suit

9. This jurisdiction is generally said, perhaps overly simplistically, to be the jurisdiction "in which the charitable trust is to be administered." RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. a (1959).

10. *See infra* text accompanying notes 17–21.

11. *See infra* Part.II.B.

12. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 28 (2003), *and especially* cmt. c, *with id.* §§ 44–46, *and id.* § 47.

13. RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

14. Despite continued (unsuccessful) arguments by litigants and some careless language in opinions and trust literature, it is and long has been clear that an attorney general's enforcement standing is not exclusive. *See infra* notes 17–21 and accompanying text. For an oft-quoted discussion by Judge Traynor, see *Holt v. College of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 934–35 (Cal. 1964), pointing out that

> the Attorney General does not have exclusive power to enforce a charitable trust and that a trustee or other person having a sufficient special interest may also bring an action for this purpose. . . . Nothing in [the California Corporations Code] suggests that trustees are precluded from bringing an action to enforce the trust. The Uniform Supervision of Trustees for Charitable Purposes Act similarly authorizes the Attorney General to supervise charitable trusts, and likewise fails to preclude suits by trustees.

brought by a trustee or other person having standing to do so.[15] Furthermore, where suit may be brought on behalf of an attorney general on the relation of a third person (usually called a "relator"), the attorney general may refuse to allow the suit or may, if the suit proceeds, control the conduct of the suit, or even terminate it.[16]

If a charitable trust has multiple trustees, a suit to enforce the trust can be maintained by one or more of the co-trustees against one or more of the other co-trustees,[17] based on the duty of even an innocent trustee to act reasonably to prevent or remedy a breach of trust by a co-trustee.[18] Similarly, if a trustee has committed a breach of trust and thereafter is removed or otherwise ceases to serve as trustee, a successor trustee has standing to sue that former trustee (or third parties) to redress the breach of trust.[19] (Given that petitions for instruction, equitable deviation, modification *cy pres*, and the like, are forms of "enforcement" proceedings,[20] it is appropriate to view *any* trustee as having standing for such purposes.[21]) Trustee standing, unlike the role of relator (above), does not depend on authorization of, and is not subject to control by, the attorney general.

If a sole trustee who has committed a breach of trust is not precluded from continuing to serve as trustee,[22] suit for redress may be brought by the attorney general or by a person having special-interest

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15. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. a (1959).

16. *Id.*

17. *Id.* cmt. b. Comment g notes that, as in this essay as well, "the power of visitors of a charitable corporation is not within the scope of . . . this Subject." *See also* BOGERT'S TRUSTS AND TRUSTEES, *supra* note 3, § 413, at 45 ("[S]tandard trust doctrine allows trustees or successor trustees to sue cotrustees or [prior] trustees of the same trust. As specifically pertaining to charitable trusts, . . . [at least] one court has permitted a charitable corporation's board of directors to bring suit against the corporation's board of trustees. . . . [And] even where the Attorney General did not grant relator status to minority trustees for an action to enjoin, a court has held that such minority had power to bring the action.") (footnotes omitted). Also, on fiduciary-interest standing, see MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 334 (2004).

18. RESTATEMENT (THIRD) OF TRUSTS § 81 (2003).

19. *Cf.* Restatement (Second) of Trusts § 200 cmt. f (1959); *see, e.g.*, CHARLES E. ROUNDS, JR., LORING: A TRUSTEE'S HANDBOOK § 7.1 (2007 ed.). This standing is supported by the normal duty as stated in RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. d (2003), to take "reasonable steps to uncover and redress [a breach] by a predecessor fiduciary."

20. *See supra* note 8.

21. *See, e.g.*, *In re* Estate of Russell, 866 N.E.2d 604, 605 (Ill. App. Ct. 2007) (co-trustees petitioning and counter-petitioning for one another's removal); *see also In re* Riddell, 157 P.3d 888 (Wash. Ct. App. 2007) (involving a trustee's successful petition for a modification under the modernized rule of equitable deviation as stated in RESTATEMENT (THIRD) OF TRUSTS § 66 (2003) (on which compare UNIF. TRUST CODE § 412(a) (amended 2005), 7C U.L.A. 507 (2006)).

22. Ordinarily a breach of trust is not a sufficient ground for removal in the absence of flagrant or repeated misconduct by the trustee. *See* RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. e (2003).

standing.[23]

B. *Standing Based on "Special Interest"*

A charitable trust may not be enforced by a person who, merely as a member of the public, may be said to benefit from the performance of the trust. That degree of community or public interest is to be represented by the attorney general and therefore, without more, is insufficient to support another's claim to standing.[24] Even the fact that a person is a potential recipient of benefits under a charitable trust is not, alone, sufficient to entitle the person to maintain a suit to enforce the trust.[25] On the other hand, modern authority, supported by leading treatises and by a large and growing body of cases and statutes,[26] recognizes that a person who has a "special interest" in the performance of a charitable trust has standing to sue the trustee to prevent or remedy a breach of trust, or otherwise to enforce the trust.

Widespread recognition of the special-interest concept, however, has not necessarily led to ease of application—or even to consistency from place to place and perhaps from time to time.[27]

This is particularly true, and understandable, in the more challenging types of situations in which there is a need for case-by-case balancing of policy concerns and objectives. In these situations, the requirement that there be a finding of "special interest" provides a fundamentally important safeguard for trustees and charitable resources by limiting the risk, and frequency, of potentially costly, unwarranted litiga-

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23. *See infra* Part I.B. Also, although not universally accepted, the better view is that a court may act on its own motion if it becomes aware of a possible breach of trust by a trustee. *See* RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. h (1959); *see also* UNIF. TRUST CODE § 706(a) (amended 2005), 7C U.L.A. 575 (2006). A court so acting may find it appropriate to appoint a special or temporary trustee, perhaps best designated for this purpose as a "trustee *ad litem*." *See* RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(1), reporter's note (2003).

24. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 & cmts. b, c (1959).

25. *Id.*

26. *See generally* UNIF. TRUST CODE § 405(c) (amended 2005), 7C U.L.A. 486 cmt (2006); BOGERT'S TRUSTS AND TRUSTEES, *supra* note 3, § 414.

27. In addition to cases cited throughout *Hooker v. Edes Home*, 579 A.2d 608 (D.C. 1990), which is discussed at length in text *infra* notes 36–45, and in BOGERT'S TRUSTS AND TRUSTEES, *supra* note 3, § 414, see, for example, among the few cases that have rejected the concept, *Weaver v. Wood*, 680 N.E.2d 918 (Mass. 1997), and *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007) (discussed *infra* note 48, basing its decision on a strained interpretation of recent legislation), while some cases, like *State ex rel. Nixon v. Hutcherson*, 96 S.W.3d 81 (Mo. 2003), appear still to require a "present" claim to benefits. Among cases at the more expansive end of the spectrum are those cited *infra* note 49. *See generally* Mary Grace Blasko et al., *Standing To Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 61–78 (1993) (reviewing then existing cases to assess likelihood that a court will find a special interest for standing purposes). A later (not particularly surprising) case denying standing to an association (comprised primarily of alumni) for lack of "special interest" is *In re Milton Hershey School*, 911 A.2d 1258 (Pa. 2006).

tion. In appropriate circumstances, however, a recognition of special-interest standing reflects society's interest not only in enhancing the enforcement of charitable trusts but also in honoring the reasonable expectations of settlors and the donor public. It is important in the balancing of these considerations to take account of the inherent limitations of attorney-general enforcement, essentially, limitations of resources, information, and the constraints of other responsibilities, as well as conflicting duties and real-world influences.[28] Special-interest standing, properly understood, is neither dependent on the approval nor subject to the control of the attorney general.[29]

The concept of "special interest" should not be, and increasingly is not,[30] limited to rights or potential rights to receive benefits under a charitable trust. The nature of a person's special interest, however, may affect the *extent* of the person's standing (that is, the types of trustee misconduct the person may bring suit to enjoin or redress, or the types of trustee-initiated proceedings the person may intervene to oppose).

Special interest in charitable benefits. Many charitable trusts are so designed that a particular charitable institution or purpose is entitled to receive a benefit from the trust, or that one or more individuals are or will become identifiable as individuals entitled to receive a payment under the terms of the trust. Thus, in some circumstances an intended recipient is readily identifiable and clearly has standing (with notice to the attorney general) to enforce the trust. For example, the terms of a charitable trust may direct that its income be distributed periodically to a particular charitable corporation (school, hospital, church, or the like); that corporation can maintain a suit against the trustee for enforcement

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28. See, for example, criticism and reports of devastating consequences of *inaction* throughout SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST (2006) (on the notorious Bishop Estate controversy), and of attorney-general *action* in Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. pt. D (forthcoming May 2008) ("The evidence is also strongly consistent with the widely-held belief that supervision of charitable trusts by state attorneys general is deficient. Indeed, in this case the attorney general's intervention was counterproductive. . . . [O]ur findings imply agency costs arising from the Trust's charitable trust form on the order of $850 million."). *See also* Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937 (2004); Jill R. Horwitz & Marion R. Fremont-Smith, *The Common Law Power of the Legislature: Insurer Conversions and Charitable Funds*, 83 MILBANK Q. 225 (2005).

29. *Cf., e.g.*, Horwitz & Fremont-Smith, *supra* note 28, at 227, 237, 242 (criticizing the "anomaly" of the New York Attorney General's "unprecedented" conduct in the course of the proceedings in *Consumers Union of U.S., Inc., v. State*, 777 N.Y.S.2d 444 (App. Div. 2004) for opposing (unsuccessfully) the court's grant of standing to others whose participation appeared obviously important as a matter of fairness, as well as appropriate based on their apparent special interest).

30. *See infra* text accompanying notes 40–45, 65–66, 102–05.

of the trust.[31] Also, if a provision in the terms of the trust further designates a particular charitable organization to receive benefits in the event that particular circumstances should occur, that organization has standing to enforce the trust in order to protect (or eventually, perhaps, assert) its interest under that provision.[32] Similarly, if the purpose of a charitable trust is to pay the salary of the president of a particular college or the pastor of a particular church, the president or pastor has special-interest standing to enforce the trust, as does the college or church.[33]

More difficult questions of standing arise when a trust is created to provide charitable benefits to the members or selected members of a described class or group that is reasonably limited, yet "indefinite" in the sense required to qualify the trust purpose as charitable rather than private.[34] To understand whether, to what extent, and why a court should allow one or more members of such a described group to maintain a suit to enforce the trust on behalf of the group members, the opinion in the leading case of *Hooker v. Edes Home*[35] is uniquely instructive.

This 1990 District of Columbia case involved a trust to establish and maintain "a free Home for aged and indigent Widows, residing, or to reside," in Georgetown, where the Edes Home was to be located.[36] Because the home "has never achieved full capacity" of widows eligible under admission criteria established by the board of trustees, the trustees sought court approval (essentially, *cy pres*) to close the home and to transfer its sale proceeds and other assets to a different home at a different location, with "continuation of the [trust] functions . . . at that location."[37] Several members of the class of "eligible potential residents of Edes" sought to intervene in the proceeding initiated by the trustees.[38] In reversing the lower court's denial of standing, the appellate court acknowledged "the traditional rule" that would deny standing and the rule's "rationale" that was based on "the recurring burdens on the trust res and trustee of vexatious litigation that would result from recognition

31. Compare the example in RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c, para. 1 (1959). *See also* UNIF. TRUST CODE § 1001 (amended 2005), 7C U.L.A. 644 cmt. (2006) ("[T]hose with standing include the state attorney general, *a charitable organization expressly designated to receive distributions under the terms of the trust*, and other persons with a special interest.") (emphasis added).

32. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 413 cmt. b (1959); *cf.* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b. para. 2 (2003). It does not matter that the enjoyment of the interest of a clearly identified organization (or other beneficiary) is postponed and uncertain. *See* RESTATEMENT (THIRD) OF TRUSTS § 48 cmt. a (2003); Gaubatz, *supra* note 1, at 908.

33. Compare the first example in RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c. (1959).

34. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmts. a, a(1) (2003).

35. 579 A.2d 608 (D.C. 1990).

36. *Id.* at 609.

37. *Id.* at 610.

38. *Id.* at 608 n.1.

of a cause of action by any and all of a large number of individuals who might benefit" from the trust, but went on to recognize an "exception to the general rule . . . where an individual seeking enforcement of the trust has a 'special interest' in continued performance of the trust distinguishable from that of the public at large."[39] Because "special interest" is a term of "uncertain scope," the opinion explained that it applies most readily to "situations where the trust was created to benefit *identified* persons" while those "for whose benefit the Edes trust was created are not identified with that degree of particularity, but instead categorically," acknowledging that "[o]lder cases treat persons who fairly represent a class of *identifiable* (but not identified) beneficiaries as mere 'possible' beneficiaries, denying them standing."[40] The opinion, however, went on to point out that *Restatement (Second) of Trusts* § 391, comment c, provides that "where a charitable trust is created for the *members of a small class of persons, a member of the class can maintain a suit on behalf of himself and the other members of the class*,"[41] adding that this

> may reflect what Professor Bogert identifies as a modern trend in cases . . . 'permitting persons deemed to represent a class of actual *or prospective* beneficiaries to bring suit to enforce the charitable trust.' These [modern] decisions recognize that application of the strict traditional rule denying standing to 'potential' beneficiaries of a charitable trust may be inimical to trust purposes in cases where a suit to enforce the trust does not present the dangers the rule was intended to guard against.[42]

The court thereafter mentioned a case from another state that had emphasized the importance of avoiding "a multiplicity of lawsuits challenging a trustee's discretionary day-to-day administration" of a trust;[43] but, after rejecting the "current beneficiary" restriction proposed by the trustees, the *Edes* decision went on to "adopt another limiting factor" because "[e]ven when a class of potential beneficiaries is small and distinct enough . . . to have an interest distinguishable from the public's, the problem of . . . recurring vexatious litigation may exist" so that "we think it necessary—in the case of potential beneficiaries—also to consider the nature of the challenge to the trustees' acts in deciding whether to apply the special interest exception," citing a New York Court of Appeals opinion that had observed that the action before it would involve "the complete elimination of the individual plaintiffs' status as

39. *Id.* at 612.
40. *Id.* (emphasis added).
41. *Id.* at 613.
42. *Id.* (citation omitted).
43. *Id.* at 614 (citing Kania v. Chatham, 254 S.E.2d 528, 530 (N.C. 1979)).

preferred beneficiaries" so that the "policy reasons for limiting standing" did not apply.[44] *Edes* also distinguished the danger of recurring litigation in challenges to "ordinary exercise of discretion" (in, for example, selecting among potential recipients) from the situation before the court, observing that a "suit by a representative of a class of potential beneficiaries should aim to vindicate the interests of the entire class and should be addressed to trustee action that impairs those interests, not the interests of a given individual."[45]

Based on the unusually comprehensive and refined, and fundamentally sound, reasoning of the foregoing case, one can identify illustrative situations in which special-interest standing of this type should be appropriate. For example, if a charitable trust is created to contribute to the costs of medical care for "needy residents" of a particular town or village, a reasonably qualified member of that community should be able to maintain a suit against the trustee to prevent, or to compel restitution for, a diversion of trust funds to a different purpose without a judicial grant of *cy pres*.[46] In a special-interest case of this type, however, it is reasonable for a court to determine that the special interest would not support standing with respect to ongoing or day-to-day matters of trust management.[47] Similarly, if the terms of a trust direct that its income be used each year to provide college scholarships to selected students from a particular high school, based on a prescribed procedure and set of criteria, one or more of the current students who might reasonably expect to meet the criteria would have standing to compel the trustee to adhere to a trust's designated purpose, as a matter of common concern to all potential scholarship recipients. In addition, if, as has become common in recent years, a conservation easement is granted to a governmental entity or other nonprofit organization to be held upon charitable trust or the equivalent (usually, for tax reasons, perpetually), owners of adjoining or perhaps nearby land, and in some circumstances others, such as downstream land owners, who benefit more than the public generally should be recognized as having special-interest standing to compel adherence to the easement's charitable purpose.[48]

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44. *Id.* (internal quotation marks omitted) (quoting Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 765 (N.Y. 1985)).

45. *Id.* at 615.

46. *Cf.* RESTATEMENT (SECOND) OF TRUST § 391 cmt. c (1959) ("Thus, where a charitable trust is created for the poor members of a particular church, any such member of the church can maintain a suit against the trustees for the enforcement of the trust.").

47. *Cf. supra* text accompanying notes 43–45; *infra* text accompanying note 68.

48. "Perpetual conservation easements encumbering land were not used on a widespread basis until the mid-1980s and courts are only now beginning to hear cases involving their substantial modification or termination." Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 676 (2007) (footnotes omitted). McLaughlin went on to observe

Some more liberal cases have been willing to allow special-interest standing in other circumstances when there appears to be a need to consider a serious breach-of-trust allegation, especially when the attorney general is supporting the trustee's position or simply declines to bring suit.[49]

Special-interest standing: noncharitable beneficiaries. Many trusts today have both charitable and private purposes, such as "charitable lead" or "charitable remainder" trusts. Issues of standing in these situations are addressed in Part III.[50]

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that "the donation of a perpetual conservation easement to [or purchase by] a municipality or land trust . . . creates a charitable trust relationship," as a result of which the trustee "should not be permitted to terminate or modify the . . . stated purpose without . . . a *cy pres* proceeding." *Id.* at 677 (introducing her elaborate examination of case law, relevant restatements, and legislation, including uniform acts). On the matter of standing, see *Grabowski v. City of Bristol*, 780 A.2d 953, 955 (Conn. App. Ct. 2001) (standing granted because, as owners of *adjoining land*, the individuals had interests greater than the public generally in the restricted use of the trust property). On standing in environmental controversies generally, compare Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. (forthcoming 2008). But in *Hicks v. Dowd*, 157 P.3d 914, 920–21 (Wyo. 2007), the court denied special-interest standing to plaintiffs seeking to enforce what the court readily concluded was a charitable trust in their attempt to prevent extinguishment of the conservation easement for the purpose of allowing coal bed methane development; the decision was based on a tortured interpretation of 2006 legislation based on the Uniform Trust Code, which clearly calls for a different result. *See, e.g.*, UNIF. TRUST CODE § 405 (amended 2005), 7C U.L.A. 486 cmt. (2006) (charitable purposes; enforcement) ("[The statute's] grant of standing to the settlor does not negate the right of . . . persons with special interests to enforce [a charitable trust.]"); *id.* § 1001, 7C U.L.A. 644 cmt. (remedies for breach of trust) ("[T]hose with standing [to remedy a breach] include . . . a charitable organization expressly designated to receive distributions under the terms of the trust, and other persons with a special interest."); *see also* Nancy A. McLaughlin, *Could Coalbed Methane Be the Death of Conservation Easements?*, WYO. LAW., Oct. 2006, at 18 (published while *Hicks* was pending before the Wyoming Supreme Court). In addition to special-interest authorities cited *supra* notes 24–48, see authorities cited in note 49 *infra*.

49. *See, e.g.*, *Grabowski*, 780 A.2d at 450 (the attorney general had declined to participate); Kapiolani Park Pres. Soc'y v. City of Honolulu, 751 P.2d 1022, 1025 (Haw. 1988) ("Where a trustee of a public charitable trust is a governmental agency . . . [that] will not seek instructions of the court as to its duties, . . . and where . . . the attorney general as parens patriae, has actively joined in supporting the alleged breach of trust, the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court. Were we to hold otherwise, the City . . . would be free to dispose . . . [of] the trust comprising Kapiolani Park . . . without the citizens of the City and State having any recourse to the courts. Such a result is contrary to all principles of equity and shocking to the conscience of the court."); Fitzgerald v. Baxter State Park Auth., 385 A.2d 189, 195–96 (Me. 1978) (attorney general disabled, as ex officio member of park authority; several citizen users had standing to prevent a breach of trust that would have violated a trust requirement that the land be kept in its natural state); City of Patterson v. Patterson Gen. Hosp., 235 A.2d 487, 495 (N.J. Super. Ct. Ch. Div. 1966) (city and two residents had "special interest" in preventing relocation of a hospital; the opinion noted the general recognition in the state and elsewhere of "neglected" and "sporadic" supervision, and stated that, while this continues, a "liberal rule as to the standing . . . seems decidedly in the public interest").

50. *See infra* Part III and accompanying notes 113–18.

Other trusts may have remote, uncertain private beneficial interests, although the trusts are otherwise entirely for charitable purposes. Most common are the implied reversionary (that is, potential "resulting trust") interests that result from the possibility that the trustee will need to apply for *cy pres* at some future time, with the second step in the *cy pres* process under traditional doctrine requiring the court to determine whether the settlor had a "general charitable intent"; if not, the trust property would revert to the settlor (or successors in interest).[51] Modernized default rules in many states now eliminate that second step (and thus the private reversionary interest) absent some contrary provision expressed in the trust instrument.[52] The other type of noncharitable-beneficiary situation might result, for example, from an express gift over on particular circumstances, such as failure of the charitable trust.[53] Despite apparent assumptions of some to the contrary, it seems clear that the potential takers by reversion or gift over are entitled, as a matter of due process, to notice and participation in *cy pres* or other proceedings that might adversely affect their interests.[54] This should suggest that special-interest standing is appropriate to protect (or assert) the noncharitable future interests in such trusts, but implied reversions clearly have not generally been accorded that treatment (or usually even been recognized) in cases in the context of either charitable or private trusts.[55]

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51. On the traditional doctrine of *cy pres*, see RESTATEMENT (SECOND) OF TRUSTS §§ 399 & 340 (1959), and on associated resulting trusts, see *id.* §§ 413, 432.

52. *E.g.*, UNIF. TRUST CODE § 413(b) (amended 2005), 7C U.L.A. 509 (2006) ("the power . . . to apply cy pres [is subject to a contrary provision in the terms of the trust that would result in distribution to a noncharitable beneficiary] only if . . . fewer than 21 years have elapsed since . . . the date of the trust's creation"); *see also* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003).

53. Compare the discussion of an expressed gift over to another charity, *supra* text accompanying note 32, although it should be noted that *remainders* or *executory interests* in noncharitable situations are subject to rules relating to perpetuities.

54. See "Mullane doctrine," originating in a case involving a trustee's accounting for a common trust. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312–13 (1950) (refusing to distinguish between cases in personam and cases in rem or quasi in rem). Included in its progeny is *Tulsa Professional Collection Services, Inc., v. Pope*, 485 U.S. 478, 491 (1988), which requires notice to creditors in probate proceedings. A settlor's right to notice is implicitly recognized in MASS. GEN. LAWS ch. 214, § 10B (2005), allowing courts to exercise jurisdiction in the *cy pres* cases, *after* the settlor's death, without joinder of the settlor's successors in interest (although, even with respect to the successors, it should be remembered that state notice legislation, and the like, has frequently been found—as in *Mullane* and *Tulsa Collection Services*—not to satisfy the mandates of *federal* due process). For a recent, if rare, case *allowing* a settlor's successors standing to assert a reversionary right in a *cy pres* situation, contending (unsuccessfully) that the settlor had no general charitable purpose, see *Obermeyer v. Bank of America*, 140 S.W.3d 18 (Mo. 2004).

55. This is despite the statement in RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. b (1959) that if "the settlor retains an interest in the trust property, he can of course maintain a suit against the trustee to protect that interest." See, however, general denial of settlor standing in situations discussed immediately below (often involving decisions in which resulting-trust interests exist), and compare discussion of settlors of private trusts beginning *infra* note 108. On standing (or lack

Do settlors have special-interest standing? Even without retention of an expressed or implied reversionary interest[56] or the expressed reservation of such powers as one to enforce the trust[57] or one to direct or advise the trustee in matters of administration,[58] it would seem readily apparent that a living settlor has an expectation[59] that the designated trust purpose will be carried out, and has, in normal usage, a "special" interest in its performance.[60] It therefore seems counterintuitive that traditional trust doctrine generally insists that the settlor, as such, lacks

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of standing) for counterpart *beneficiaries* of private trusts, see *infra* note 82 and accompanying text.

Similar nonrecognition of a due-process requirement for legally implied reversionary interests can be seen in legislation specifically concerning parties to *cy pres* proceedings. See, for example, recent UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(c), 7A Pt. III U.L.A. 20 (Supp. 2007), and comments thereto on "Cy Pres" and "Notice to Donors" (although this may assume, a bit casually, a nontraditional rule of *cy pres* like that of UNIF. TRUST CODE § 413 (amended 2005), 7C U.L.A. 509 (2006), with no valid contrary provision in the terms of the trust). *Cf.* MASS. GEN. LAWS ch. 214, § 10B (2005).

56. Considered *supra* text accompanying notes 50–54, and compare, in the private trust context, *infra* text accompanying notes 102–105.

57. See frequent, implicit judicial recognition of standing based on reserved power of enforcement in, for example, *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 997 (Conn. 1997) ("At common law, a donor . . . had no standing . . . to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so."). *Cf.* Smithers v. St. Luke's–Roosevelt Hosp. Ctr, 73 N.Y.S.2d 426 (App. Div. 2001); *infra* note 105. ROUNDS, *supra* note 19, § 9.4.2, concludes:

> Faced with the stark reality that public oversight of charitable trusts is often illusory, sometimes even subversive of donor intent, more and more prospective settlors are . . . including express "donor control" provisions in their governing instruments. For more on such countermeasures, the reader is referred to Section 4.1.1.2 of this handbook [mentioning, inter alia, powers of enforcement]. While a donor control provision should take care of the standing problem, it needs to be carefully drawn so as not to cause . . . a tax problem. . . . [See] Alan F. Rothschild, Jr.'s article entitled *The Do's and Don'ts of Donor Control* [30 ACTEC J. 261 (2005)].

58. *E.g.*, IND. CODE ANN. § 30-4-5-12(c) (West 2008) (standing, inter alia, for persons holding *advisory or supervisory powers* and others with an interest in the benefits or administration of charitable trusts). Despite this statute, *In re Public Benevolent Trust*, 829 N.E.2d 1039, 1042 (Ind. Ct. App. 2005), held that an animal welfare coalition lacked the interest required for standing. The standing of holders of powers to direct or advise is further considered (in the private-trust context) *infra* notes 102–05.

59. Compare the emphasis on "expectation interests" in Gaubatz, *supra* note 1, at 921–24, a concept that is recognized and discussed in ROUNDS, *supra* note 19, § 4.1.2.

60. "It is hard to argue that grantors do not have a stake in the charitable operations they fund . . . ." Ronald Chester, *Improving Enforcement Mechanisms in the Charitable Sector: Can Increased Disclosure of Information Be Utilized Effectively?*, 40 NEW ENG. L. REV. 447, 471 (2006). For arguments that favor settlor standing, see Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 609–10 (1981) (pointing out that the risk of frequent, unwarranted claims from multiple sources is insignificant in the matter of settlor standing), John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 628–29, 646–47, 664 (1995) (analogy to promisee of third-party beneficiary contract), Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 668–69 (2004) (agency-cost advantage of settlor enforcement).

standing to enforce a charitable trust, even to enjoin or seek restitution to the trust for a trustee's disregard of the settlor's stipulated charitable purpose or purposes.[61] Intense reactions to highly visible refusals, or inability, of attorneys general to properly enforce charitable trusts,[62] and calls for alternative, improved methods of enforcement,[63] are producing some results (although there remain legitimate concerns that need to be taken into account[64]). The most significant of these results (if perhaps less than ideal in its details) is a legislative trend to recognize the special interest of settlors by statutory grant of standing to enforce charitable trusts.[65] Comparable tendencies are recognizable in case law, although an observation last year may be overly optimistic in stating: "Recent judicial decisions, however, have granted donors standing, changing the landscape of charitable trust jurisprudence and injecting uncertainty into the state of the law."[66]

An appropriate direction for common-law evolution (or even for statutes), absent a contrary trust provision that is more expansive or more restrictive, should essentially reflect the analogous, carefully qualified recognition of special-interest standing for members of potential-recipient groups in *Hooker v. Edes Home*.[67] Specifically, a counterpart rule for settlors would allow them special-interest standing with three qualifications, beginning with a definitional requirement that, if numerous donors contribute to the funding of the trust, only donors who are major contributors relative to the total funding would qualify as "settlors." In addition, standing should be "personal" to a settlor, although exercisable by a deceased settlor's personal representative during a rea-

61. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 391, *and especially id.* cmt. e; IVA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS § 391 (4th ed. 1989).

62. *See supra* notes 28–29; *see also* Stephanie Strom, *Donors Gone, Charitable Trusts Veer From Wishes*, N.Y. TIMES, Sept. 29, 2007, at A1.

63. *E.g.*, Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 647 (1999) (suggesting, inter alia, "more flexible standing rules for persons with 'special interests'" and observing that the "most promising way to increase the involvement of private citizens in enforcing fiduciary duties appears to be the use of relators . . . [although] only the most dedicated observers of charity are likely to take the step of suing a charity as a relator"); Iris J. Goodwin, *Donor Standing To Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1160 (2005) (making a case for a *personal* donor standing). *See generally* Chester, *supra* note 60.

64. *See, e.g.*, *infra* text accompanying notes 67–69.

65. Most prominent is UNIF. TRUST CODE § 405(c) (amended 2005), 7C U.L.A. 486 (2006) ("The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.").

66. Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors To Reserve the Right To Enforce a Gift Restriction?*, 42 REAL PROP. PROB. & TR. J. 245, 296 (2007) (with legislative proposal answering his question in the affirmative but within limits that are stringent and detailed). The article reviews various cases, with varying circumstances, in which settlor standing has been recognized. *See id.* at 254–59, 265–89.

67. *See* discussion *supra* notes 35–45.

sonable period of estate administration or by an incapacitated settlor's conservator (or other personal fiduciary, including an agent so authorized under a durable power of attorney). The final qualification should, in the case of a nonprofit organization that receives a restricted gift that applicable state law treats as a charitable trust,[68] so limit special-interest standing as to enable the settlor to maintain a suit against the trustee-organization only to enforce compliance with the gift restriction,[69] thereby enjoining or redressing an improper[70] diversion of trust funds. These qualifications in a default rule that would grant settlors special-interest standing probably should serve also as constructional preferences in interpreting instrument provisions that expressly, but in general terms, reserve enforcement powers to settlors.

Reasonable rules of settlor standing, with the above qualifications, can go far toward satisfying the legitimate demand for greater assurance for settlors, and for the donor public generally, of effective and informed[71] enforcement of charitable trusts, while reducing burdens on

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68. The traditional view of most cases and of the Restatements has long been that, as stated in RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003): "An outright devise[ ] or donation to a . . . charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust as that term is used in this Restatement. A disposition to such an institution for a specific purpose, however, . . . creates a charitable trust of which the institution is the trustee . . . ." *See also* UNIF. SUPERVISION OF TRUSTS FOR CHARITABLE PURPOSES ACT § 2, 7C U.L.A. 352 (2006) (stating that supervisory authority applies to "any corporation which has accepted property to be used for a particular charitable corporate purpose as distinguished from the general purposes of the corporation.").

69. This aspect of the default rule responds to the legitimate concerns that the described charities may be exposed generally to continuous monitoring, or intrusion into day-to-day management, by their donors—leaving such matters instead to the institution's concern over adverse publicity (and thus, for many charities, the salutary influences of the potential-donor market), as well as to the attorney-general supervision that is applicable to all charitable trustees.

Constructive "diversion" from or abandonment of a trust purpose could be found, however, in a trustee's significant impairment of the trust estate's value via reckless management or gross disregard of fiduciary responsibilities in support of its duty to carry out the trust purpose.

70. A diversion would not be "improper" if authorized or directed by a judicial grant of *cy pres*.

71. "[T]he circumstances of this case demonstrate the need for co-existent standing for the Attorney General and the donor. . . . Indeed, there is no substitute for a donor, who has a special, personal interest in the enforcement of the gift restriction." Smithers v. St. Luke's–Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426, 435 (App. Div. 2001) (citation and internal quotation marks omitted); *see also* Holt v. Coll. of Osteopathic Physicians & Surgeons, 394 P.2d 932 (Cal. 1964). The court in *Holt* noted:

> The Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions . . . . The present case illustrates these difficulties. . . . The administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available. . . . The cotrustee is also in the best position to learn about breaches of trust and to bring the relevant facts to a court's attention.

resources of attorneys general,[72] and while also enhancing the likelihood of attentive, voluntary compliance by trustees. Furthermore, standing that is "personal" to the settlor (under the second qualification) limits the risks and burdens of potential litigation by preventing a dispersal of enforcement rights among potentially numerous successors in interest. Concern expressed by representatives of some charitable institutions regarding enforcement rights of potentially unlimited duration (when the settlor is, for example, a foundation) is unpersuasive given the limited grounds of challenge under the last of the above qualifications, plus the availability of *cy pres* to permit—when *justified*—departures from designated charitable purposes.[73]

II. PRIVATE TRUSTS

A beneficiary of a private trust is entitled to determine the duties of the trustee[74] and to compel the trustee to perform those duties.[75] Accordingly, a suit against a trustee for enforcement[76] of the trust may be maintained by any beneficiary whose rights are jeopardized by the matter(s) at issue, or by a co-trustee, successor trustee, or other person acting on behalf of one or more of such beneficiaries.[77] Reflecting some of the concerns associated with standing doctrine generally,[78] and

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Id. at 935–36 (citation and internal quotation marks omitted); *see also* Strom, *supra* note 62 ("'How are we going to find out?' said Belinda Johns, senior assistant attorney general in the charitable trusts division of the California attorney general's office. . . . '[W]e have to rely on someone telling us that there's a problem.'").

72. The concern about burdens and resources was recently illustrated by the Wyoming Attorney General's decision not to participate in a case of alleged breach of trust, believing that there were "well-represented private litigants to pursue this litigation." Hicks v. Dowd, 157 P.3d 914, 921 (Wyo. 2007) (noting that now, after the reversal of the lower court's grant of special-interest standing, "the Attorney General has the opportunity to reassess his position").

73. *See* RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). Compare provision for settlor release of some restrictions and provision for nonjudicial *cy pres* for old (suggesting—i.e., in brackets—twenty years) and small (suggesting $25,000) trusts in UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(d)(2), 7A Pt. III U.L.A. 20 (Supp. 2007), and compare also somewhat different provisions in its predecessor, UNIF. MGMT. OF INST. FUNDS ACT § 7, 7A Pt. III U.L.A. 35 (2006).

74. On the determination of what is allowed *within* an originally designated purpose, see RESTATEMENT (THIRD) OF TRUSTS § 71 (2003) (on court instructions to resolve uncertainties about trustees' duties and powers and about proper interpretation of trust provisions). *Cf. id.* § 66 (on the possibility of equitable deviation to better achieve an existing purpose).

75. *See especially id.* §§ 76–79.

76. As comprehensibly defined *supra* note 8.

77. See, however, RESTATEMENT (THIRD) OF TRUSTS § 74 (2007), recognizing that, as long as there is a competent holder of a power of revocation or of a presently exercisable general power, the normal rights and standing that the other beneficiaries would have to protect or enforce their interests are suspended.

78. Compare three sentences of text preceding note 28, *supra*, focusing on charitable trusts, for which the conflicting policy concerns—though analogous—are more weighty than in the private-trust context.

emphasizing (perhaps over-emphasizing) the proprietary nature of the interests of trust beneficiaries, courts and commentators have quite consistently concluded that other persons, including settlors, lack standing to maintain suits against trustees (including former trustees or their estates, as appropriate to the context) to enjoin or redress a breach of trust, or otherwise to enforce a trust.[79]

A. *Who are the "Beneficiaries" of a Trust?*

The 1984 article noted that "[t]he modern trust is a flexible device, and the grantor may create interests and powers not easily categorized,"[80] and that any "individual who has a vested or contingent right to require present or future distribution of trust property to himself or for his benefit" is a beneficiary,[81] including one who holds a reversionary interest by operation of law.[82] On the other hand, persons who might "incidentally" benefit from the performance of a trust are not beneficiaries.[83]

Illustrative of the flexibility of trust design, and even the effect of subsequent events, the definition of "beneficiary" includes a person who is eligible to receive distributions in the discretion of the trustee[84] and one who has succeeded to a beneficial interest by inheritance, assignment, insolvency proceedings, or otherwise.[85] Certainly a settlor holding a power of revocation[86] or the donee of a presently exercisable general power of appointment, as well as the holder of a power of withdrawal,[87] is a beneficiary. So is the donee of a testamentary general power of appointment or a special (testamentary or inter vivos) power of appointment,[88] but one who is merely a permissible appointee is not a beneficiary unless that person is also an expressed or implied taker in

79. *E.g.*, RESTATEMENT (SECOND) OF TRUSTS § 200 (1959).

80. Gaubatz, *supra* note 1, at 908.

81. *Id.* For an illustrative statute, see CAL. PROB. CODE § 24 (West 2008) ("'Beneficiary' . . . [a]s it relates to a trust, means a person who has any present or future interest, vested or contingent."). *See generally* RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. a(1), reporter's note (2007); *cf. id.* § 84 cmt. a. But, for certain of these broadly defined beneficiaries, note the limited qualifications on standing mentioned *supra* note 77.

82. RESTATEMENT (THIRD) OF TRUSTS § 48 cmt. a. (2003).

83. *Id. But cf. id.* cmt. b.

84. *See id.* § 50.

85. *Id.* § 49 cmt. a. A beneficiary's trustee in bankruptcy, for example, is mentioned in RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. g (1959) as one who has succeeded to the beneficiary's interest.

86. RESTATEMENT (THIRD) TRUSTS § 74(1) (2007).

87. *Id.* § 74(2).

88. *Id.* § 48 cmt. a; *see also* UNIF. TRUST CODE § 103(3)(B) (amended 2005), 7C U.L.A. 413 (2006). The brief general language in section 103(3) is consistent with RESTATEMENT (THIRD) OF TRUSTS § 48, but it is less detailed and explicit.

default of appointment.[89]

Increasingly, trust terms designate one or more persons to hold powers to control or advise a trustee in one or more matters of management or distribution. If the designated person holds such a power for his or her own personal benefit,[90] that person is properly viewed as a beneficiary of the trust.[91] Accordingly, that person should be recognized as having standing to enforce the trustee's duties that affect the power holder's rights or authority[92] but not with regard to other aspects of administration. *Fiduciary* powers to direct trustees are considered subsequently.[93]

B. *Co-Trustees and Successor Trustees*

If a trust has multiple trustees, one or more of them can maintain a suit against one or more others to enforce their duties to the beneficiaries.[94] Similarly, if a trustee who commits a breach of trust is thereafter removed or otherwise ceases to serve as trustee, a successor trustee can maintain a suit against the former trustee (or that trustee's estate) to obtain restitution for the breach.[95] Standing in these cases is implicit in the duties of trustees ordinarily to act reasonably to prevent or compel redress of a breach of trust by a co-trustee or to discover and seek restitution for a breach of trust by a predecessor fiduciary.[96]

If a trustee who has committed a breach of trust continues to serve as trustee,[97] a court should permit a beneficiary (instead of pursuing the matter personally) to petition for the appointment of a trustee *ad litem* or other special trustee, as locally appropriate, for the purpose of seeking restitution for the breach.[98]

C. *Others Acting on Behalf of Beneficiaries*

Suit against a trustee may be brought on behalf of a beneficiary who is under incapacity by a conservator, guardian, or similar personal fiduciary, including an agent so empowered under a durable power of

89. RESTATEMENT (THIRD) OF TRUSTS § 48 cmt. a. (2003).

90. *See id.* § 75 cmt. c.

91. *Id.* § 48 cmt. c.

92. *See id.* § 75 cmts. b, b(1).

93. *See infra* text accompanying note 104.

94. RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. e (1959).

95. *Id.* cmt. f.

96. *See* RESTATEMENT (THIRD) OF TRUSTS § 81 (2003) (on co-trusteeship); *id.* § 76 cmt. d (on duty regarding predecessor fiduciaries).

97. *See supra* note 22.

98. On the concept and role of a trustee ad litem, see RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. c(1), reporter's note (2003), and compare *supra* note 23.

attorney.[99] A creditor holding a lien on a beneficiary's interest is not a "beneficiary" but should nevertheless have a right, and standing, to maintain a suit on behalf of the beneficiary for the purpose of protecting the lien.[100]

1. FIDUCIARY POWERS RESERVED OR GRANTED BY SETTLOR

A settlor may, by the terms of the trust, reserve or confer upon others a non-beneficial power (that is, ordinarily at least, a fiduciary power[101]) to control or advise the trustee[102] or to amend the trust.[103] A power of this type should enable the holder to sue, on behalf of the beneficiaries in order to ensure the benefit intended for them, to enforce the duties of the trustee with regard to that power.[104] If the terms of the trust expressly reserve to the settlor or confer upon others a power to enforce the trust, the power holder has standing to bring suit on behalf of the beneficiaries against the trustee.[105] An express power to enforce the trust should not be limited in the manner indicated here for other fiduciary powers, nor should any of these powers be viewed as preventing a beneficiary from acting on his or her own behalf.

The breadth and character of authority sometimes reserved or granted by a trust provision to one or more persons designated, for

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99. UNIF. TRUST CODE § 1001 (amended 2005), 7C U.L.A. 644 cmt. (2006) ("A person who may represent a beneficiary's interest under Article 3 [*see especially* § 303] would have standing to bring a petition on behalf of the person represented."); *see also* RESTATEMENT (SECOND) TRUSTS § 200 cmt. a (1959); UNIF. STAT. FORM POWER OF ATTORNEY ACT § 11, 8B U.L.A. 214 (2001). A parent, as natural guardian of the person of a minor beneficiary, should have standing to enforce a trust on behalf of the minor, absent a legally *appointed* guardian (which should mean, if properly qualified, having no conflict of interest). *See* UNIF. PROBATE CODE § 1-403(3), 8 Pt. I U.L.A. 69–70 (1998); UNIF. TRUST CODE § 303(6) (amended 2005), 7C U.L.A. 470 (2006); *cf.* Gaubatz, *supra* note 1, at 920, 931. *But cf.* Richards v. Richards, 637 S.E.2d 672, 674–75 (Ga. 2006) (denying standing to the petitioner under a statutory definition of "interested person" because she sought to enforce the trust "in her individual capacity" rather than on behalf of her children).

100. A lien holder, however, is unlike a trustee in bankruptcy, who succeeds to the interest of the bankrupt beneficiary. *See supra* note 85.

101. Contrast beneficial powers. *See supra* notes 90–92.

102. *See* RESTATEMENT (THIRD) OF TRUSTS § 75 cmts. c–c(2) (2003).

103. *See id.* § 64(2) cmt. d.

104. *See id.* § 75 cmts. b, b(1) & e (together describing a trustee's duties in these situations).

105. It seems clear that such a power is valid and effective, although actual authority is understandably scarce, *see supra* note 57, given statements such as that in BOGERT'S TRUSTS AND TRUSTEES, *supra* note 3, § 415, at 70 ("Obviously the settlor may expressly reserve to himself powers and privileges with regard to acts of administration . . . ."). *See also* Patton v. Sherwood, 61 Cal. Rptr. 3d 289 (Ct. App. 2007). Furthermore, the comment to section 808 of the Uniform Trust Code recognizes the even broader concept of "trust protector," referred to *infra* note 106; aside from the twenty jurisdictions that have enacted this Uniform Trust Code section, "statutes of seven states refer expressly to the position of 'trust protector'." Jonathan C. Lurie & William R. Burford, *Drafting Flexibile Irrevocable Trusts*, 33 ACTEC J. 86, 91 (2007).

example, as "trust protector(s)"[106] are so diverse and so subject to questions of interpretation as to preclude ready generalization about the nature and extent of a power holder's standing to enforce the trust. Nevertheless, the principles and rationale are analogous to those applicable to powers, as the case may be, to amend, direct or advise, or enforce, as described in the preceding paragraph or, if beneficial, in Part II.A.[107]

2. GENERAL DENIAL OF SETTLOR STANDING

Under generally accepted common-law doctrine,[108] neither a settlor nor the personal representative or successors in interest of a settlor can, *as such*, maintain a suit against a trustee to enforce a trust. Despite arguments that can be advanced for a contrary rule,[109] this disability in the private-trust setting has not come under the widespread criticism and calls for reform that has been so noticeable in the charitable context. There is, however, a modest but growing statutory trend to recognize a narrow exception allowing a settlor to petition for removal of a trustee.[110]

This lack of broader concern is probably attributable to the various alternative bases upon which a settlor may be granted standing, because the generally stated prohibition does not preclude the settlor's inclusion in the above discussed situations in which a person has either a *beneficial* power or interest[111] (even by legally implied reversion) or a *fiduciary* role as trustee or power holder. Nor should the general prohibition mean that a settlor cannot obtain standing to enforce a trust on behalf of

106. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 64, cmts. b–d, reporter's notes, at 469–73 (2003); *id.* § 75, cmts. b–f, reporter's notes, at 64–66 (2007); DONOVAN W.M. WATERS ET AL., WATERS' LAW OF TRUSTS IN CANADA 126–30 (3d ed. 2005); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2006).

107. *See supra* notes 88, 90–92. The problems of attempting to ascertain the beneficial or fiduciary character of the protector's powers are much discussed, especially in "offshore trust" literature. *E.g.*, Donovan W. M. Waters, *The Protector: New Wine in Old Bottles?*, *in* TRENDS IN CONTEMPORARY TRUST LAW 63, 105–07 (A. J. Oakley ed., 1996); David Hayton, *English Fiduciary Standards and Trust Law*, 32 VAND. J. TRANSNAT'L LAW 555, 579–90 (1999).

108. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. b (1959). Contrary decisions, such as the early *Abbott v. Gregory*, 39 Mich. 68 (1878), are indeed rare.

109. For example, see concerns regarding premature termination of protective (e.g., spendthrift) and other "material purpose" trusts mentioned *infra* note 110, and compare generally observations and articles *supra* note 60.

110. *E.g.*, UNIF. TRUST CODE § 706(a) (amended 2005), 7C U.L.A. 575 (2006). Such statutes may provide a possible response, if not already too late, to concerns about improper trust terminations allowed by trustees, pursuant to beneficiary consent, in violation of a "material purpose" of the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. b (2003) (on the required unanimous consent of *all* beneficiaries); *see also id.* cmts. d–f (on the material-purpose concept); *cf.* Carr v. Carr, 171 N.W. 785 (Iowa 1919).

111. *Cf.* Gaubatz, *supra* note 1, at 920 ("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.").

incapacitated, unascertained, or unborn beneficiaries, if not otherwise adequately represented, by initiating suit either with an accompanying petition for appointment as guardian *ad litem* or, if applicable procedures allow, by acting as "next friend."[112]

III. Trusts with Both Charitable and Private Purposes

Many trusts have both charitable and private purposes,[113] usually designed so that the private and charitable interests are separated either by substantially independent shares or as successive present and future interests. Trust arrangements of the latter type are increasingly common today in some form of "charitable lead trust" (with the charitable interest followed by private remainder interests) or "charitable remainder trusts" (with one or more private interests preceding the charitable remainder).[114] The structure, and even the details, of these split-interest trusts are usually determined by tax objectives of the settlor and associated requirements of the federal income and transfer taxes.[115]

When a trust has both charitable and private interests, those interests are not only enforceable but also entitled to protection against the adverse effects of trustee misconduct,[116] such as by breach of the fiduciary duty of impartiality in making investment decisions. Despite modest authority on these matters,[117] it would seem self-evident that the charitable and private beneficiaries have standing to enforce the trust to the extent appropriate to the protection of their respective rights.[118]

IV. Some Concluding Observations

Since the publication of the 1984 article, there has been substantial clarification, plus better understanding of the relevant principles, of standing doctrine applicable to trusts. I believe that, from both John's point of view and mine (even if not identical), the general direction of

112. As mentioned, for example, in *Redstone v. O'Connor*, 874 N.E.2d 1118, 1126 (Mass. App. Ct. 2007). *Cf.* Gaubatz, *supra* note 1, at 925 ("best friend").

113. Although such trusts are valid, even if not strictly as "charitable" trusts, Restatement (Third) of Trusts § 28 (2003) cmt. e, they may present tax problems or partially run afoul of rules regulating perpetuities, conceivably even for some charitable interests. *See id.* § 29(b) cmts. g–h(2).

114. The variety of charitable lead and remainder trusts presents diverse "impartiality" concerns, with even some forms of annuity trusts or unitrusts raising income-productivity issues, as discussed in *id.* § 79 cmts. e–g(2) & reporter's notes.

115. *See, e.g.*, Conrad Teitell, *Charitable Remainder Trusts—Final Regulations*, 24 ACTEC Notes 284 (1999).

116. *See supra* note 114.

117. *E.g.*, Patton v. Sherwood, 61 Cal. Rptr. 3d 289, 290 (Ct. App. 2007) (discussing standing to enforce "charitable remainder unitrust").

118. *Cf. supra* text accompanying notes 31–33, 74–77, 80–83.

change in the trust-law rules of standing in this country represents progress, even if the pace of change is a bit slow and some specific changes are in need of refinement.

In the charitable-trust context, the concept of standing based on "special interest" has achieved a level of acceptance (though not universal) that represents real progress. And it appears that the growing judicial comfort with the concept, together with its evolving limitations,[119] is leading to less rigidity in its application. Even the common-law reluctance to allow standing to settlors is yielding, gradually and perhaps irresistibly, to legislative change. In this matter, however, the statutes granting settlor standing may be insufficiently nuanced, especially as applied to most types of nonprofit institutions.[120] Without continued progress in both special-interest and settlor standing, public and donor frustration can be expected to lead, in trust and restricted-gift instruments, to routine inclusion of enforcement provisions[121] that may well be overly broad or inadequately drafted or both.

In the private-trust context, there appears to be an evolving awareness of what the 1984 article referred to as "interests and powers not easily categorized."[122] There may be, however, a lesser degree of recognition and clarity with respect to the need to develop appropriate principles of standing not only for the owners of these diverse beneficial interests and their personal fiduciaries,[123] but also for the holders of a broad array of beneficial and fiduciary powers.[124] The modesty of the changes in common-law and statutory rules of settlor standing may be a reasonable reflection of the modest level of current dissatisfaction with traditional doctrine. Both the extent and the nature of the changes, however, are inadequate to deal with (and fail to articulate) the legitimate concerns, if only occasional problems, involving premature termination of trusts in disregard of a settlor's "material purpose"[125]—which should properly be viewed as restricting the autonomy and "proprietary rights"[126] of the beneficiaries, so that there would be no intrusion upon what has been given to them if the settlor were allowed enforcement only with regard to the material-purpose barrier.

119. *See supra* text accompanying notes 30, 39–40.
120. *See supra* notes 67–71 and accompanying text.
121. *See* ROUNDS excerpt, *supra* note 57.
122. *See* Gaubatz, *supra* note 1, at 908.
123. *See supra* notes 81–89, 99 and accompanying text.
124. *See supra* text accompanying notes 90–93, 101–07.
125. *See supra* notes 109–10.
126. *See supra* text following note 78.