

1. Burden of Proof

§ 627 Generally

Research References

West's Key Number Digest, Trusts ⇨85.1, 106.1

Whether a trust exists is to be determined from the proof in a case.¹ The proof in this regard must not vary from the pleadings, but should be allowed on the issues as framed by the pleadings and in accordance with the law of evidence,² and findings must be based on the evidence in the case.³

In an action brought by a beneficiary charging a breach of trust, the beneficiary bears the burden to prove in what respects the trustee breached that duty.⁴ While the beneficiary has the initial burden of proving the existence of the fiduciary duty and the trustee's failure to perform it,⁵ once the trust beneficiary has established a prima facie case by demonstrating the trustees' breach of fiduciary duty, the burden of explanation or justification shifts to the fiduciaries.⁶ The trustee must show the use of due care, diligence, and skill with respect to trust investments. In short, the trustee must prove it acted with the utmost good faith toward the beneficiary and made full disclosure of all facts related to the transactions at issue.⁷

The burden of proof in a claim for undue influence is on the party asserting it.⁸ When a question arises as to the fairness of a transaction between the trustee and the beneficiary of the trust, the trustee has the burden of establishing the fairness thereof.⁹ Where the trustee seeks to escape liability for a breach of trust or improper act, transac-

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¹Trubey v. Pease, 240 Ill. 513, 88 N.E. 1005 (1909).

²Yates v. Yates, 255 Ill. 66, 99 N.E. 360 (1912).

³Johnston v. Bee, 84 W. Va. 532, 100 S.E. 486, 7 A.L.R. 252 (1919).

⁴Masters v. Bissett, 101 Or. App. 163, 790 P.2d 16 (1990), opinion adhered to as modified on other grounds on reconsideration, 102 Or. App. 289, 794 P.2d 445 (1990).

⁵LaMonte v. Sanwa Bank California, 45 Cal. App. 4th 509, 52 Cal. Rptr. 2d 861, 29 U.C.C. Rep. Serv. 2d 1263 (2d Dist. 1996).

⁶Confederated Tribes of Warm Springs Reservation of Oregon v. U.S., 248 F.3d 1365 (Fed. Cir. 2001); LaMonte

v. Sanwa Bank California, 45 Cal. App. 4th 509, 52 Cal. Rptr. 2d 861, 29 U.C.C. Rep. Serv. 2d 1263 (2d Dist. 1996).

⁷Van de Kamp v. Bank of America, 204 Cal. App. 3d 819, 251 Cal. Rptr. 530 (2d Dist. 1988).

⁸Masters v. Bissett, 101 Or. App. 163, 790 P.2d 16 (1990), opinion adhered to as modified on other grounds on reconsideration, 102 Or. App. 289, 794 P.2d 445 (1990).

⁹Peyton v. William C. Peyton Corp., 23 Del. Ch. 321, 7 A.2d 737, 123 A.L.R. 1482 (1939); In re Estate of Kaminski, 200 Ill. App. 3d 309, 146 Ill. Dec. 179, 558 N.E.2d 142 (1st Dist. 1990); Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 (1917); Wood v. Honeyman, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 (1946).

tion, or omission in the administration of the trust, on the ground of the consent or approval of the beneficiary to such act, transaction, or omission, he has the burden of proof on the issue,¹⁰ as well as the burden to show fairness on his or her part in obtaining the consent or approval of the beneficiary.¹¹ However, the burden of proof of incompetence of a beneficiary to assent, or waive an objection, to an impropriety by the trustee in the administration of a trust is on the one asserting the incompetence.¹² Thus, a trustor's guardian, as the party asserting that the trustor is incompetent, has the burden of showing the trustor's lack of capacity.¹³

The burden of proof is on a trustee to exclude personal liability on a contract allegedly entered into on behalf of beneficiaries of the trust.¹⁴ The burden of persuasion to justify the upholding of a transaction by an interested trustee rests on the fiduciary, not the beneficiary.¹⁵

§ 628 As to existence of trust, generally

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West's Key Number Digest, Trusts ⇨85.1 to 88

As a rule, the burden of proving the existence of a trust is on the party asserting its existence,¹ including proof of an express trust,² as well as trust imposed by the operation of law, such as resulting and constructive trusts.³

Generally, as to dealings between the trustee and the beneficiary, see § 355.

¹⁰White v. Sherman, 168 Ill. 589, 48 N.E. 128 (1897).

¹¹Clay v. Thomas, 178 Ky. 199, 198 S.W. 762, 1 A.L.R. 738 (1917); Herpolshheimer v. Michigan Trust Co., 261 Mich. 209, 246 N.W. 81 (1933), aff'd, 248 N.W. 610 (Mich. 1933).

¹²In re Harper's Estate, 98 Mont. 356, 40 P.2d 51 (1934).

¹³Hilbert v. Benson, 917 P.2d 1152 (Wyo. 1996).

¹⁴Nacol v. McNutt, 797 S.W.2d 153 (Tex. App. Houston 14th Dist. 1990), writ denied, (Feb. 20, 1991).

¹⁵Stegemeier v. Magness, 728 A.2d 557 (Del. 1999).

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¹In re Graham, 111 B.R. 801 (Bankr. E.D. Ark. 1990); Kinghorn v. Hughes, 297 Ark. 364, 761 S.W.2d 930 (1988); Sacre v.

Sacre, 143 Me. 80, 55 A.2d 592, 173 A.L.R. 1261 (1947); Matter of Estate of Binder, 386 N.W.2d 910 (N.D. 1986); Hall v. Pierce, 210 Or. 98, 307 P.2d 292, 65 A.L.R.2d 316 (1957); Warner v. Burlington Federal Sav. & Loan Ass'n, 114 Vt. 463, 49 A.2d 93, 168 A.L.R. 1265 (1946).

One who asserts that the ownership of property is burdened with a parol trust has the burden of establishing such trust. Somer v. Bogart, 749 S.W.2d 202 (Tex. App. Dallas 1988), writ denied, (Sept. 14, 1988) and decision approved, 762 S.W.2d 577 (Tex. 1988).

As to the burden of proof in an action for an accounting by a trustee, see § 390.

²From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 803 A.2d 548 (2002), cert. denied, 537 U.S. 1171, 123 S. Ct. 994, 154 L. Ed. 2d 913 (2003).

³§ 629.