

evidence.¹²

Remand.

A case may be remanded to the trial court for further proceedings.¹³

§ 586 Costs

If trustees bring suits against strangers, or strangers bring suits against trustees, with respect to trust funds, costs will be awarded against the losing party the same as in other suits.

Research References

West's Key Number Digest, Trusts ⇨268

A trustee stands in the same position as any other litigant with respect to costs,¹ the general rule being that if trustees bring suits against strangers, or strangers bring suits against trustees, with respect to trust funds, costs will be awarded against the losing party the same as in other suits.² The fees and costs of the proceedings are properly chargeable to the trust fund, where it becomes necessary to convert land held in trust into money.³ Where an order appealed from is one which operates to improve the trust estate, by substituting legal investments for securities in doubt, the trustee is not required to bear the expense of resisting the attack on the order, but can pass the burden on to the estate.⁴ A trustee will not be awarded costs where an appeal by the trustee does not work to the advantage of the cestui que trust and is not prosecuted for his or her benefit.⁵

Reimbursement of third persons from trust estate.

Unless of a class permitted by statute to be reimbursed out of the trust estate,⁶ persons who intervene or bring suit for a purpose not derivative of benefit to the trust estate, whether or not successful, are chargeable with the expenses of the litigation outside of strictly taxable costs.⁷ So, an unsuccessful party bringing suit against the trust estate is not reimbursed therefrom for his or her costs of litigation.⁸

Attorney fees.

Under some statutes, attorney fees may be paid as part of the costs in trust proceedings,⁹ but the services must be for the common benefit of all before such a fee may be allowed.¹⁰ Furthermore, the court may have discretionary power, apart from a statute, to make an allowance to attorneys for nonfiduciary parties who have been helpful to the court in the solution of problems essential to the proper administration of the trust.¹¹

VI. ACCOUNTING AND SETTLEMENT

A. GENERAL CONSIDERATIONS

§ 587 Duty to account generally

A trustee is under a strict duty to keep and render a complete and accurate record and accounting as to its trusteeship to the beneficiary.

Research References

West's Key Number Digest, Trusts ⇨289

¹²Cal.—*Tognazzini v. Tognazzini*, 125 Cal. App. 2d 679, 271 P.2d 77 (2d Dist. 1954).

¹³Ohio—*Berry v. McCourt*, 1 Ohio App. 2d 172, 30 Ohio Op. 2d 203, 204 N.E.2d 235 (10th Dist. Franklin County 1965).

[Section 586]

¹Ill.—*Brown v. Commercial Nat. Bank of Peoria*, 94 Ill. App. 2d 273, 237 N.E.2d 567 (3d Dist. 1968), judgment aff'd, 42 Ill. 2d 365, 247 N.E.2d 894 (1969).

²U.S.—*Walsh v. National Sav. & Trust Co.*, 247 F.2d 781 (D.C. Cir. 1957).

³Pa.—*In re Bosler's Estate*, 378 Pa. 333, 107 A.2d 443 (1954).

⁴N.J.—*Brown v. Fidelity Union Trust Co.*, 135 N.J. Eq. 404, 39 A.2d 120 (Ch. 1944).

⁵N.J.—*Brown v. Fidelity Union Trust Co.*, 135 N.J. Eq. 404, 39 A.2d 120 (Ch. 1944).

⁶Wis.—*In re McNaughton's Will*, 138 Wis. 179, 118 N.W. 997 (1908).

⁷Wis.—*In re McNaughton's Will*, 138 Wis. 179, 118 N.W. 997 (1908).

⁸Me.—*Strout v. Strout*, 117 Me. 357, 104 A. 577 (1918).

⁹Ala.—*Penney v. Pritchard & McCall*, 255 Ala. 13, 49 So. 2d 782, 22 A.L.R.2d 1430 (1950).

¹⁰Ala.—*Penney v. Pritchard & McCall*, 255 Ala. 13, 49 So. 2d 782, 22 A.L.R.2d 1430 (1950).

¹¹U.S.—*Burgess v. Williamson*, 506 F.2d 870 (5th Cir. 1975).

A trustee is under a strict duty to keep and render a complete and accurate record and accounting as to its trusteeship to the beneficiary.¹ Failure to properly account is a defalcation.² Accounting, as an obligation and function of a trustee, has two meanings; that of merely informing the cestui que trust of all things which he or she is entitled to know, and actually responding to such liability as may be incurred by the fiduciary in the management of the trust.³ Trustees have a duty to give beneficiaries upon request complete and accurate information as to the nature and amount of the trust property.⁴ Beneficiaries are entitled to such information as is reasonably necessary to enable them to enforce their rights under the trust or to prevent or redress a breach of trust.⁵ It is the duty of a trustee to afford all reasonable facilities for the examination and inspection of accounts.⁶ The rendition and the settlement of accounts are distinct matters.⁷

Trustees are under an obligation to keep accounts in readiness to be rendered,⁸ and, at the proper time, to account to the

beneficiaries.⁹ The general rules as to accounting should apply to trusts as well as to estates.¹⁰ The accounting must show what gains have accrued, what losses have occurred, receipts, and expenditures.¹¹ The trustee has the burden of showing that the account rendered and the expenditures made are correct, just, and necessary.¹² The primary purpose of an accounting is to enable the court to determine whether the fiduciaries have complied with their duties with respect to the assets entrusted to their charge.¹³ The right to enforce an accounting from the trustee does not rest on fraud or bad faith,¹⁴ although, if fraud or overreaching is proven, stricter accountability exists.¹⁵ Nor does the circumstance that in fact there is no property in the trustee's hands whereon the trust is impressed,¹⁶ or that the trustee believes that on a fair statement of his or her accounts nothing would be found owing,¹⁷ affect the right to an accounting. A trustee's failure to submit an account is not excused on the ground that such accounting would be very expensive, where the trustee has only himself or herself to

[Section 587]

¹Fla.—*Bravo v. Sauter*, 727 So. 2d 1103 (Fla. Dist. Ct. App. 4th Dist. 1999).

Mich.—*In re Goldman Estate*, 236 Mich. App. 517, 601 N.W.2d 126 (1999).

Wis.—*In re Spengler*, 228 Wis. 2d 250, 596 N.W.2d 818 (Ct. App. 1999).

²U.S.—*In re Little*, 163 B.R. 497, 25 Bankr. Ct. Dec. (CRR) 329 (Bankr. E.D. Mich. 1994).

³Ala.—*Miller v. Smoot*, 238 Ala. 14, 189 So. 67 (1939).

Or.—*Wood v. Honeyman*, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 (1946).

⁴U.S.—*Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 20 Employee Benefits Cas. (BNA) 2493 (4th Cir. 1996).

⁵U.S.—*Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 20 Employee Benefits Cas. (BNA) 2493 (4th Cir. 1996).

Ill.—*Corsi v. Corsi*, 302 Ill. App. 3d 519, 236 Ill. Dec. 82, 706 N.E.2d 956 (1st Dist. 1998).

Copies of trust and schedule of assets transferred to trust

Va.—*Fletcher v. Fletcher*, 253 Va. 30, 480 S.E.2d 488 (1997).

⁶Ill.—*Wylie v. Bushnell*, 277 Ill. 484, 115 N.E. 618 (1917).

⁷Or.—*Wood v. Honeyman*, 178 Or. 484, 169 P.2d 131, 171 A.L.R. 587 (1946).

⁸Cal.—*Bruns v. State Bar of Cal.*, 18 Cal. 2d 667, 117 P.2d 327 (1941).

Mass.—*Rugo v. Rugo*, 325 Mass. 612, 91 N.E.2d 826 (1950).

Sufficiency and propriety of accounts, see § 636.

⁹Mo.—*Morrison v. Asher*, 361 S.W.2d 844 (Mo. Ct. App. 1962).

¹⁰Iowa.—*In re Lunt*, 235 Iowa 62, 16 N.W.2d 25 (1944).

¹¹U.S.—*Pueblo of San Ildefonso v. U.S.*, 35 Fed. Cl. 777 (1996).

¹²Mo.—*Pazdernik v. Stemler*, 804 S.W.2d 789 (Mo. Ct. App. E.D. 1990).

¹³N.Y.—*In re Heubach's Will*, 165 Misc. 196, 300 N.Y.S. 802 (Sur. Ct. 1937).

¹⁴N.Y.—*Jersawit v. Kaltenbach*, 256 A.D. 580, 10 N.Y. S.2d 689 (1st Dep't 1939), judgment aff'd, 281 N.Y. 773, 24 N.E.2d 23 (1939).

¹⁵Mo.—*Pazdernik v. Stemler*, 804 S.W.2d 789 (Mo. Ct. App. E.D. 1990).

¹⁶Cal.—*Green v. Brooks*, 81 Cal. 328, 22 P. 849 (1889).

Receipt of moneys after beneficiaries' maturity

Under trust agreement obligating trustee to pay certain moneys to beneficiaries on reaching maturity, fact that trustee did not receive moneys thereunder until after beneficiaries' maturity did not relieve trustee of duty to account.

Ill.—*Crimp v. First Union Trust & Sav. Bank*, 352 Ill. 93, 185 N.E. 179 (1933).

¹⁷D.C.—*Richardson v. Van Auken*, 5 App. D.C. 209 (App. D.C. 1895).

blame for such fact.¹⁸

Difficulty of making proof as to the management of the estate does not relieve the trustee from the duty to account.¹⁹ Also, the trustee is not relieved of the duty by illness,²⁰ inasmuch as the account need not be prepared by the trustee personally but may be prepared by an attorney or accountant.²¹ In addition, modification or revocation of the trust does not extinguish the trustee's duty to account.²² A trustee's duty to account for funds and property is not satisfied by the rendition of a paper account showing disposition of the property, and the trustee is under a duty to deliver the property to the beneficiary.²³

It is not sufficient to relieve the trustee from the duty to account that he or she relies on the assurances of an attorney that no trust has been created,²⁴ or that the instrument creating the trust is invalid for uncertainty or other reasons, where the trustee has actually taken over and assumed responsibility for the subject matter of the trust.²⁵ A prior offer by the trustee to convey the property to the beneficiary and another does not defeat the beneficiary's right to an accounting,²⁶ nor does the trustee's tender of a portion of the fund, less than the beneficiary is entitled to demand, or a mere offer of compromise.²⁷ However, the right to an accounting is not absolute but is

one which should be accorded on principles of equity alone.²⁸ Keeping proper accounts does not require the trustee to justify the reasonableness of each transaction; it merely requires the trustee to maintain proper records of the transactions.²⁹

Revocable trust.

The trustee of a revocable trust generally has no duty to report or account to the beneficiaries, and the beneficiaries have no right to receive such accountings.³⁰

§ 588 Express exemption from duty to account

An express exemption from the duty to account may validly be made in the instrument creating the trust, but the trustee is not freed absolutely from the obligation.

Research References

West's Key Number Digest, Trusts ⇨289

An express exemption from the duty to account may validly be made in the instrument creating the trust and is, for the duration of the trust, a part of the law of the administration.¹ Thus, a trust instrument may lawfully relieve a trustee from the necessity of

¹⁸N.J.—Behrman v. Egan, 17 N.J. Super. 598, 86 A.2d 606 (Ch. Div. 1951).

¹⁹Ill.—Bennett v. Weber, 323 Ill. 283, 154 N.E. 105 (1926).

²⁰N.Y.—In re Buchanan's Estate, 171 N.Y.S. 953 (Sur. Ct. 1918).

²¹N.Y.—In re Buchanan's Estate, 171 N.Y.S. 953 (Sur. Ct. 1918).

²²Colo.—People v. Robnett, 859 P.2d 872 (Colo. 1993).

²³Cal.—Kinert v. Wright, 81 Cal. App. 2d 919, 185 P.2d 364 (2d Dist. 1947).

²⁴Mass.—Knowlton v. Fourth-Atlantic Nat. Bank, 271 Mass. 343, 171 N.E. 721 (1930).

²⁵Mass.—Knowlton v. Fourth-Atlantic Nat. Bank, 271 Mass. 343, 171 N.E. 721 (1930).

Execution in consideration of divorce

Where trust agreement between father and mother which was illegal because executed in consideration of divorce, provided for payment of income by trustee to mother for use for support, maintenance, and education of plaintiff, a minor child, plaintiff, who was not in pari delicto, was entitled to an accounting as to money paid by trustee to mother which she did not use for benefit of

plaintiff, and mother could not assert illegality of agreement as a defense and thus be unjustly enriched by retaining for herself funds never intended for her benefit and paid over to her solely for benefit of plaintiff.

N.Y.—Thompson v. Finholm, 77 N.Y.S.2d 78 (Sup. 1948), decree aff'd by, 274 A.D. 992, 85 N.Y.S.2d 314 (1st Dep't 1948).

²⁶Tex.—Home Inv. Co. v. Strange, 109 Tex. 342, 207 S.W. 307 (1918).

²⁷W.Va.—Cresap v. Brown, 82 W. Va. 467, 96 S.E. 66 (1918).

²⁸N.Y.—Woodbridge v. Bockes, 170 N.Y. 596, 63 N.E. 362 (1902).

²⁹Ariz.—John E. Shaffer Enterprises v. City of Yuma, 183 Ariz. 428, 904 P.2d 1252 (Ct. App. Div. 1 1995).

³⁰Cal.—Johnson v. Kotyck, 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 (2d Dist. 1999), review denied, (Feb. 23, 2000).

As to who may require accounting, see § 595.

[Section 588]

¹Ala.—Pinckard v. Ledyard, 251 Ala. 648, 38 So. 2d 580 (1949).

N.J.—In re Tarby's Estate, 25 N.J. Super. 236, 95 A.2d 774 (County Ct., P. Div. 1953).