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Treatises on trusts clearly state that when a trust suffers losses due to the trustee’s mismanagement, a beneficiary with a speculative future interest cannot bring an action at law against the trustee for present, individual recovery of funds that may be due to him at some future time under the terms of the trust. The appropriate remedy is compelling the trustee, in equity, to restore any losses to the trust, so that the beneficiary may enjoy the benefit of those funds at the time and to the extent dictated by the terms of the trust instrument. This equitable remedy allows the trust to be carried out according to the settlor’s intent as stated in the trust instrument and protects the trust for beneficiaries with future interests, ensuring that those beneficiaries will receive what would have been theirs absent any mismanagement. In short, the equitable remedy restores the status quo, and the trust resumes as if a breach never had occurred.

In Fortune v. First Union National Bank the Supreme Court of North Carolina, however, chose not to apply the usual equitable remedy of restoration of funds to a trust. The Fortune court prematurely terminated a testamentary trust and awarded damages directly to a contingent remainderman for losses resulting from a breach of fiduciary duty by the executor of the estate. This unusual remedy, in violation of accepted tenets of trust law, left the trusts created by the testator unfunded, so that alternative beneficiaries entitled to the entire remainder under certain circumstances instead would receive nothing at all. Both the supreme court and the lower courts failed to appoint a guardian ad litem for the issue of the remainderman who would take in the event the remainderman failed to survive his mother, a life income beneficiary. The court, consequently, terminated the trust without considering the interests of unborn parties who conceivably could have received the entirety of the trust.

This Note criticizes the Fortune decision for its failure to follow a well-settled principle of trust law by prematurely terminating a trust without the consent of all possible beneficiaries and for its failure to appoint a guardian ad litem to protect the interests of unborn beneficiaries. It also examines previous case law and searches for a rationale behind the Fortune opinion. This Note concludes that perhaps the difficult fact situation explains the court’s distorted application of the law. Finally, this Note contemplates the possible effects of this decision.

2. See id.
3. See id.
5. See id. The only mention of appointing a guardian ad litem appeared in the defendant’s motion for judgment notwithstanding the verdict. The trial court denied the motion and did not appoint a guardian. Defendant’s Motion for Judgment Notwithstanding the Verdict, Record at 83-86, Fortune, 323 N.C. 146, 371 S.E.2d 483 (1988) (No. 552PA87).
In 1977 Robert Fortune died unexpectedly, survived by his wife Betty and young son Dale. The major asset of his estate was all the outstanding stock of Royal Dodge, Inc., a car dealership that he had owned and operated. His will provided that, after certain gifts of personal property and payment of his debts, the residuary of the estate passed into two trusts: a marital deduction trust for the benefit of his wife Betty and a family trust funded with any property remaining after funding of the marital deduction trust.

The family trust instrument provided that during Betty Fortune's life the trustee could, in its absolute discretion, distribute income or principal from the family trust to Betty, their son Dale, or Dale's issue. On Betty Fortune's death, the remainder, if any, was to pass to Dale, but if Dale predeceased Mrs. Fortune, then the remainder was to pass to Dale's issue.

The will named the defendant First Union National Bank as executor of the

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6. Plaintiff Appellee’s New Brief at 2, Fortune, 323 N.C. 146, 371 S.E.2d 483 (1988) (No. 552PA87). Dale was 10 years old at the time of his father’s death, and he was 18 by the time this case reached the North Carolina Supreme Court. Id.

7. Id. The marital deduction trust is an estate planning device that takes advantage of the marital deduction allowed upon transfer of property from one spouse to another under the federal gift tax. See I.R.C. § 2056 (1986). In large estates, $600,000 of property may be transferred outside the marital deduction trust to capitalize on the $600,000 exemption from estate and gift tax. The rest of the estate may be used to fund the marital deduction trust. This arrangement takes full advantage of the $600,000 exemption upon the death of each spouse. See J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 1038-40 (3d ed. 1984).


9. Id. The Fortunes argued that Dale's interest was a vested remainder subject to complete divestment in the event Dale failed to survive his mother. Plaintiff-Appellee's New Brief at 9 n.5. For a complete discussion of the nature of this type of interest, see T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 62-80 (2d ed. 1984) [hereinafter BERGIN & HASKELL]. The difference between a contingent remainder and a vested remainder often depends merely on the word order in the trust instrument. For example, when the instrument provides an interest to A for life, then to B and his heirs, but if B does not survive A, then to C and his heirs, B has a vested remainder subject to complete divestment, and C has an executory interest. The survivorship requirement in this example is a condition subsequent that operates to divest the vested interest. In contrast, if the instrument leaves property to A for life, then if B survives A to B and his heirs, otherwise to C, B and C have alternative contingent remainders. The conditional language preceding the creation of B's remainder interest makes the condition a condition precedent. As a result, B's interest is not vested. Id. at 71-73.

The Fortune family trust provided “after the death of my wife ... [the trust corpus] shall be delivered and conveyed to my son [Dale], or if he should be deceased to his living issue per stirpes.” Record at 17 (Robert Fortune's will). The wording of this provision suggests Mr. Fortune intended either a contingent or vested remainder for Dale. The plaintiff argued Dale's interest was vested, but the supreme court never defined specifically Dale's interest in terms of a vested or contingent interest. The court merely referred to the certainty or uncertainty of the amount owed to Dale. Fortune, 323 N.C. at 150-51, 371 S.E.2d at 485-86. Because of the firmly established constructional preference for vested interests, most courts probably would denominate Dale's interest as a vested remainder subject to complete divestment. See Bush v. Hamill, 273 Ill. 132, 112 N.E. 375 (1916); Hersey v. Purinton, 96 Me. 166, 51 A. 865 (1902); explanation and cases cited in Annotation, First National Bank of Cincinnati v. Virginia Tenney, 61 A.L.R.2d 470, 475 (1958); BERGIN & HASKELL, supra, at 134. The difference between the contingent remainder and the vested remainder subject to complete divestment is of little significance today (except for purposes of the rule against perpetuities). Thus, the determination of the correct terminology for the interest is not absolutely necessary. BERGIN & HASKELL, supra, at 135. It is only necessary that the uncertain nature of the remainderman's interest be understood. Clearly, Dale did not have the sole beneficial interest in the funds. When the settlor's intention appears to have been “that the beneficiary should take the principal only if he should live until the expiration of the period, he has not the whole beneficial interest in the trust property.” 2 SCOTT, supra note 1, § 128.2.
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will and trustee of both trusts.\textsuperscript{10} Despite offers to buy the car dealership, the Bank retained the dealership, which suffered a significant decline in value before it was finally sold.\textsuperscript{11} The Bank received a time extension on administration of the estate and finally sold the dealership at a great loss, with payments to be made in installments.\textsuperscript{12} The estate still was not closed at time of trial, and the trusts were funded with only one dollar each.\textsuperscript{13}

The Fortunes sued First Union for a breach of its fiduciary duty as executor.\textsuperscript{14} Though Mrs. Fortune's claim was barred because the statute of limitations had run, Dale succeeded in his claim for damages.\textsuperscript{15} At trial the jury found that First Union had breached its fiduciary duty as executor. Based on evidence that First Union had retained the dealership knowing that much of its success was based on Mr. Fortune's management, the jury concluded that the bank as executor should have sold it as soon as possible after Mr. Fortune's death. The jury awarded damages to Dale Fortune individually in the amount of $413,744.76.\textsuperscript{16} This amount was based on a theory that Dale was entitled to one half of the total damages to the trust as a "joint beneficiary."\textsuperscript{17}

The court of appeals accepted First Union's argument that the award of damages individually to Dale was erroneous because the losses due to First Union's breach as executor were owed to the trusts, rather than to Dale.\textsuperscript{18} The court of appeals affirmed the ruling on liability against First Union, but remanded with respect to remedy. Stating that the amount Dale would receive from the trust was speculative, the court of appeals concluded that this uncertainty regarding the amount of damages precluded an award to Dale individually. The court of appeals held that a plaintiff whose benefit under the trust is merely speculative is entitled only to the equitable remedy of restoration of the money lost to the trust so that the plaintiff is in the same position as he was before the breach. The court of appeals, however, incorrectly calculated the

\textsuperscript{10} Fortune, 323 N.C. at 147-48, 371 S.E.2d at 484.
\textsuperscript{11} Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 4, 359 S.E.2d 801, 803 (1987), rev'd, 323 N.C. 146, 371 S.E.2d 483 (1988). The dealership suffered losses of nearly $400,000 during the time it was managed by First Union. \textit{Id}.
\textsuperscript{12} Plaintiff-Appellee's New Brief at 2-3. At the time of the litigation First Union still had failed to collect any payments. \textit{Id} at 4.
\textsuperscript{13} Fortune, 323 N.C. at 148, 371 S.E.2d at 484.
\textsuperscript{14} \textit{Id}. at 147, 371 S.E.2d at 484. An executor who breaches his fiduciary duty in the administration of an estate is liable for damages resulting from the breach to the same extent and in the same way as a trustee of an express trust. N.C. GEN. STAT. § 28A-13-10(c) (1984); RESTATEMENT (SECOND) OF TRUSTS § 6 comment b (1959); 1 SCOTT, supra note 1, § 6.
\textsuperscript{15} Fortune, 87 N.C. App. at 4, 359 S.E.2d at 804. The trial court applied the three-year statute of limitations for actions for breach of contract and dismissed Mrs. Fortune's claim on the ground that Mrs. Fortune had known of the trustee's mismanagement for some time and had failed to take any action within the three-year statute of limitations. Plaintiff-Appellee's New Brief at 6; Defendant-Appellant's New Brief at 4, Fortune, 323 N.C. 146, 371 S.E.2d 483 (1988) (No. 552PA87). Dale's action was not dismissed, because the statute had been tolled during his minority. Fortune, 87 N.C. App. at 6-7, 359 S.E.2d at 805.
\textsuperscript{16} Fortune, 87 N.C. App. at 4-6, 359 S.E.2d at 804-05.
\textsuperscript{17} \textit{Id}. at 7, 359 S.E.2d at 805. Having concluded that Mrs. Fortune had no right to recovery, the trial court categorized Dale's interest as a one-half interest in the family trust and awarded Dale one half the amount that the evidence indicated was lost due to the defendant's breach. \textit{Id}. at 9-10, 359 S.E.2d at 807.
\textsuperscript{18} \textit{Id} at 7-9, 359 S.E.2d at 806-07.
amount to be restored to the trust. The court merely shifted the jury award, calculated on the basis of individual damages, from Dale back to the trust.\(^1\)

The North Carolina Supreme Court reinstated the trial court’s decision and held that Dale was entitled to bring the action in his individual capacity.\(^2\) Thus, the court awarded damages directly to Dale, rather than applying the equitable remedy of restoring funds to the trust. The *Fortune* majority, in an opinion authored by Justice Webb, found that the court of appeals decision did not hold that an individual cannot recover, but simply that Dale could not because his interest was too speculative.\(^3\) The court then disagreed with the court of appeals, concluding that Dale’s damages could be proved with sufficient certainty. In reaching this conclusion, the court relied on a number of factors. It looked at the amount that could have been put into the trusts if not for the breach, it concluded that because of Betty Fortune’s interest in the marital deduction trust there would never be a need for the trustee to distribute to her out of the family trust,\(^4\) and it relied on mortuary tables to calculate the value of Dale’s remainder interest.\(^5\)

Although it reinstated the trial court’s decision to allow Dale to recover individually, the supreme court held that the trial court incorrectly calculated Dale’s individual damages on the theory that he had a one-half interest in the family trust.\(^6\) The court recognized that he did not have a one-half interest in the trust, but that his recovery should reflect the fact he had only a remainder, an interest that could result in his getting all or nothing as circumstances developed. Thus, the court ordered a new trial to determine the amount of individual damage to Dale only.\(^7\)

Justice Meyer’s strong dissent argued that the remedy should be restoration

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19. *Id.* Justice Meyer pointed out in his dissent the error in entering a judgment in favor of the trust when the case was neither argued nor defended on the basis of liability to the trust. According to Justice Meyer, although the court of appeals came much closer to the correct remedy than either the trial court or the supreme court, it did not have the authority simply to shift the theory of liability without giving the parties an opportunity to argue and defend based on that theory of liability. *Fortune*, 323 N.C. at 152, 371 S.E.2d at 486 (Meyer, J., dissenting).


21. *Id.*

22. Mrs. Fortune’s interest in the family trust raised a further complication hindering the remedy of restoration of funds to the trust. Summary judgment was granted against Betty Fortune’s claim for individual damages on the grounds that the statute of limitations had run, Plaintiff-Appellee’s New Brief at 6, whereas Dale’s claim was allowed only because the court found the three-year statutory period was tolled during his minority. *Fortune*, 87 N.C. App. at 4, 359 S.E.2d at 804. Based on the theory that Mrs. Fortune no longer had any right to recover for loss to the trusts, confusion might arise as to her right to benefit from the trust as the named life beneficiary if Dale’s remedy consisted of restoring lost funds to the trust. The dissenting opinion in the supreme court decision correctly pointed out that if the court appointed a substitute trustee and restored the losses to the trusts as a remedy, Mrs. Fortune would not be barred from receiving benefits under those trusts. *Fortune*, 323 N.C. at 158, 371 S.E.2d at 490 (Meyer, J., dissenting).

23. *Fortune*, 323 N.C. at 150-51, 371 S.E.2d at 485. The majority’s argument that the amount of Dale’s interest could be computed easily with mortuary tables was countered effectively by the dissent’s suggestion of many contingencies, including the possibility Dale would never receive anything, making the present value of his interest very speculative. Compare *Fortune*, 323 N.C. at 150-51, 371 S.E.2d at 485-86 with *Fortune*, 323 N.C. at 156-57, 371 S.E.2d at 489 (Meyer, J. dissenting).


25. *Id.*
of damages to the trust, a remedy that treatises uniformly state is the proper one on these facts.26 The dissenting opinion observed that the court of appeals erred in allowing the amount of the jury verdict to stand when it awarded recovery to the trust rather than to Dale. Because the case was argued at trial based on a theory of individual recovery, Justice Meyer stated that it was incorrect for the court of appeals simply to shift the jury award to the trust.27 Hence, the dissenters agreed that the case should be resubmitted to the jury for recalculation of damages.

The dissenting opinion, however, argued that the court of appeals correctly held that Dale should not recover individual damages. The dissent argued that Dale had a mere speculative interest while his mother lived so he should not receive the corpus of the trust before her death. These justices argued that the remedy should instead be to restore the loss to the trust so that Dale could receive his share, if and when circumstances arose such that he was the proper recipient.28 The dissenters listed several factors supporting the argument that damages to Dale were too speculative to be determined and argued that, even if he were the proper party to sue, the uncertainty of damages would preclude his recovery. These factors included the following: Dale's income interest rested in the uncontrolled discretion of the trustee; the amount of distributions to Mrs. Fortune remained uncertain;29 Dale could fail to survive his mother, and the remainder could pass to his issue without his ever receiving anything under the trust.30

Arguing in favor of restoration to the trust, the dissenting opinion recognized the need for a substitute trustee to effectuate this remedy.31 The dissenters stated that a clear conflict of interest existed between First Union in its role as the executor who committed a breach of duty in estate administration and First Union as trustee with a duty to sue the executor for losses due to the breach on behalf of the beneficiaries.32 For the trust to recover funds without appointment of a substitute trustee, First Union in its role as trustee would have to seek recovery from itself as executor. Thus, the dissent observed that a substitute

26. Id. at 152-55, 371 S.E.2d at 486-88 (Meyer, J., dissenting, joined by Exum, C.J. and Whichard, J.). See 3 SCOTT, supra note 1, §§ 197-98; G. BOGERT, LAW OF TRUSTS § 157 (5th ed. 1973); RESTATEMENT (SECOND) OF TRUSTS § 198 comment c (1959) (all consistent with the dissenting opinion in Fortune).
27. Fortune, 323 N.C. at 152, 371 S.E.2d at 486 (Meyer, J., dissenting).
29. The dissenting opinion suggested that a long-term illness or accident could have occurred requiring expensive medical care for her that might have led to depletion of both trusts for her needs. Id. at 156-57, 371 S.E.2d at 489 (Meyer, J., dissenting).
30. Id. (Meyer, J., dissenting).
31. Id. at 157, 371 S.E.2d at 489 (Meyer, J., dissenting).
32. Id. (Meyer, J., dissenting). The trustee's fiduciary duty requires the trustee to ensure that the trust receives all the assets owed to it. When the executor does not deliver all the assets to the trust, the trustee's duty may include bringing suit against the executor to recover assets that should have been delivered to the trust. A conflict develops if the same entity serves as both executor and trustee, because the trustee then has a duty to bring suit against itself in the role of executor. See In re First Nat'l Bank of Mansfield, 37 Ohio St. 2d 60, 307 N.E.2d 23 (1974) (bank in its role as trustee held liable to beneficiaries for not taking action to recover trust funds lost by bank in its role as executor due to a breach of trust).
trustee was clearly necessary to apply the remedy of restoration of funds to the
trust. The dissent argued that this is the preferable remedy because it would
further the testator's intent for distribution of funds and it would ensure fair
distribution of funds in accordance with the terms of the trust. Furthermore,
restoring losses to the trust with a new trustee in place more adequately would
compensate the family as a whole. Damages to the trust probably would exceed
Dale's individual award, and Betty Fortune would have the opportunity to share
in any funds restored to the trusts.\(^{33}\)

Restoration of funds to the trust, however, would not guarantee any imme-
diate payments to Dale or Mrs. Fortune.\(^{34}\) Until Mrs. Fortune's death, they
would only be entitled to receive what the trustee, in his absolute discretion,
chose to distribute to them. The Fortunes apparently preferred receiving funds
immediately, regardless of whether the trust could recover a larger amount. The
choice to seek individual damages perhaps was a result of having already suf-
fered losses and economic hardship at the hands of First Union, the present
trustee. These sympathetic circumstances also probably led to the court's deci-
sion to award damages directly to Dale as he requested.

Numerous North Carolina cases and the leading treatises have differed
from the Fortune holding and have established that a trust beneficiary should
not recover damages for a breach of trust unless the trustee owes him a sum
certain at the present time.\(^{35}\) When the beneficiary's interest is uncertain, his
remedy should be an equitable one to have the loss restored to the trust.\(^{36}\) An
award of damages when no payments are due to the beneficiary constitutes a
premature termination of the trust. Termination generally is not permitted
before all the beneficiaries are known, because premature termination may result
in a distribution quite different from the distribution that would result in the
absence of a breach of trust.\(^{37}\)

\(^{33}\) Fortune, 323 N.C. at 158-59, 371 S.E.2d at 489-90 (Meyer, J., dissenting). Although Betty
Fortune might have been precluded from bringing an individual action because the statute of limita-
tions had run, there was nothing to prevent her from sharing in the trust as a beneficiary if funds
were restored to the trust in a suit brought by either another beneficiary or a new trustee. Id. at 158,
371 S.E.2d at 489-90 (Meyer, J., dissenting) (citing Restatement (Second) of Trusts § 176
(1959)). Because the court based the amount of Dale's individual award on the portion of trust
funds he was likely to receive, a remedy restoring the total loss to the trusts probably would have
forced First Union to pay a greater sum. See Fortune, 323 N.C. at 158-59, 371 S.E.2d at 490 (Meyer,
J., dissenting).

\(^{34}\) Betty and Dale would not be guaranteed any immediate payment if the funds were restored
to the family trust because the distribution during Betty's life was in the trustee's absolute discretion.
Fortune, 323 N.C. at 147, 371 S.E.2d at 484. An absolute discretionary trust is one in which the
trustee has complete discretion to determine whether to pay trust income or principal to the benefi-
The trustee may, in its discretion, choose to withhold the trust income and principal altogether from
the beneficiaries during the life of the trust. Id.

\(^{35}\) See, e.g., Restatement (Second) of Trusts §§ 197-98 (1959); G. Bogert, supra note
26, § 157; 3 Scott, supra note 1, §§ 197-98. See infra notes 38-50 and accompanying text for discus-
sion of North Carolina cases.

\(^{36}\) See Restatement (Second) of Trusts §§ 197-98 (1959); G. Bogert, supra note 26,
§ 157; 3 Scott, supra note 1, §§ 197-98.

\(^{37}\) See Freeman v. Cook, 41 N.C. (6 Ired. Eq.) 373, 379 (1849) (per curiam) (stating that in
giving relief for a breach of trust, a court should always endeavor to return the parties to the situa-
tion they would have been in if no breach had taken place).
Over a century ago in *Dick v. Pitchford* the North Carolina Supreme Court established that premature termination of a trust is improper when all the interests are not yet certain and money is not yet due to the beneficiary. In *Dick* the testator left property in trust and directed the trustee to distribute the income to the testator’s son for his life, with the remainder passing to any of the testator’s three grandsons living at his son’s death and to the issue of any grandson not then living. Because the income beneficiary was deeply in debt, he sought to have the trusts terminated immediately and the trust property distributed to him. The court, however, concluded that the living beneficiaries were not entitled to disbursement from the trustee. The court stated that the income beneficiary was entitled to no more than current profits, and even if the grandsons concurred with their father in demanding termination of the trust, premature termination should not be granted. The court recognized that the trust created valuable contingent interests in the great-grandchildren of the settlor and the purpose of the trust included protecting those interests as well as the interests of the beneficiaries then living. The court stated that it is the duty of the trustee and the court to protect the settlor’s intended distribution of property, including contingent interests.

Similarly, in *Battle v. Petway* the court held that a trust beneficiary is “not entitled to call for the legal estate when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat or put it in his power to defeat or endanger a legitimate ulterior limitation of the trust.” In *Battle* the trust provided for payment of income to a life beneficiary followed by a remainder interest. The court held that equity clearly would not allow the trustee to convey the principal to the life beneficiary, but would require the trustee to hold the principal for the remainderman. Indeed, the court stated that while there was any contingent interest in the trust property, the trustee had to retain the property, and the court of equity would not order the trustee to transfer the legal title.
The North Carolina Supreme Court emphasized the importance of carrying out the trust in accordance with the settlor's intent when it again refused to terminate a trust prematurely in *Penick v. Bank of Wadesboro*. In *Penick* a charitable trust provided for the beneficiary to receive the principal at the end of ninety-nine years. Until that time all income was to be accumulated and nothing distributed to the beneficiary. In refusing to terminate the trust prematurely, the court acknowledged its duty to protect the testator's purpose except in cases of emergency or to preserve the trust property. Applied to the facts of *Fortune*, *Penick* indicates that even if there were not contingencies affecting Dale's interest, the court should have respected the time and manner of distribution that Mr. Fortune sought to achieve by setting up the family trust.

Consistent with these North Carolina cases, the *Restatement of Trusts* clearly states that, in general, the remedies of a beneficiary against a trustee are exclusively equitable. The beneficiary, therefore, has no cause of action for damages and can merely seek to be restored to the position he was in before the trustee's breach. Thus, under the *Restatement* view, Dale's claim should have been a suit in equity to compel First Union to restore the lost funds to the trust. The beneficiary's remedy suggested by the *Restatement* also has been followed consistently by the leading treatises in the field. Thus, formulations

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49. 218 N.C. 686, 690, 12 S.E.2d 253, 257 (1940).
50. Id. at 690-91, 12 S.E.2d at 257.
52. Id. § 198 comment c. "If the trustee is not under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary cannot maintain an action at law against him." *Id.* Section 198 of the *Restatement* provides that the beneficiary may recover damages directly from the trustee only when the trustee is under an unconditional duty to pay the beneficiary immediately and fails to do so in breach of trust. First Union's breach of trust did not fit this exception because First Union had no duty to distribute funds to Dale until his mother's death, and even then Dale's taking was contingent on surviving his mother.
53. See *id.* § 198. The *Fortune* court apparently either misunderstood section 198 of the *Restatement* or chose to ignore it. The court correctly noted that illustration d of Section 198 indicates that "the beneficiary's remedy in such a case is a suit in equity to compel the trustee to restore the money." *Fortune*, 323 N.C. at 149, 371 S.E.2d at 485 (1988). The court did not, however, further address the *Restatement* view. The court then cited several cases factually quite different from *Fortune* for the proposition that a beneficiary may recover damages from an executor or trustee, and summarily concluded: "We see no reason why a beneficiary may not sue an executor or trustee for damages if the executor or trustee has mismanaged the property he holds in a fiduciary capacity . . . we hold that such a claim may be maintained." *Id.* A discussion of the cases cited in support of awarding damages to the beneficiary follows infra notes 61-64 and accompanying text.
54. See 3 SCOTT, supra note 1, §§ 197-98; G. BOGERT, supra note 26, § 157. Furthermore, numerous cases in other jurisdictions also support the view that it is erroneous to terminate prematurely a trust and allow a contingent beneficiary to recover the trust's losses. For example, a Massachusetts court clearly stated the law regarding a trust beneficiary's remedies as follows:

> It is well settled that a [trust beneficiary] cannot bring an action at law against a trustee to recover for money had and received while the trust is still open; but when the trust has been closed and settled, the amount due the [beneficiary] established and made certain, and nothing remains to be done but to pay over money, such an action may be maintained.


More recently, the Supreme Court of Colorado also discussed when a beneficiary may bring an
of black-letter law and prior North Carolina cases conflict with the holding in Fortune.55

Another procedure or remedy that is firmly established in North Carolina and throughout the United States provides that a trust may be terminated prematurely when all the beneficiaries and the trustee agree to termination.56 When there are unborn or unascertained contingent beneficiaries as in Fortune, however, all of the beneficiaries are not able to consent to termination. Under these circumstances, termination of the trust is viewed as improper.57 The court generally will appoint a guardian ad litem to represent the interests of unborn or unascertained beneficiaries in a suit for termination. The guardian may approve a termination or modification of the trust on behalf of the unborn beneficiaries.58 Courts, however, usually will not permit termination of the trust despite consent by a guardian ad litem if it would defeat the settlor’s intention in creating the trust.59 In Fortune no guardian ever was appointed to represent the contingent interests in Dale’s issue.60

Despite the clarity of the treatises in this area and the number of cases action at law against a trustee for breach of trust in Kaitz v. District Court, 650 P.2d 553 (Colo. 1982). The court cited the Restatement in stating that an action by a beneficiary against a trustee in an existing trust is generally, but not always, equitable in nature. Id. at 555 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 197-98 (1959)). The Kaitz court noted that only when money is immediately and unconditionally owed to the beneficiary may a beneficiary bring an action at law. The court concluded that because there was no failure to pay a sum certain owed to the beneficiaries, the general rule that an action by a beneficiary is equitable in nature applied. Id.

55. See 3 SCOTT, supra note 1, §§ 197-98; G. BOGERT, supra note 26, § 157. Scott, in his treatise on trusts, states, “modern courts have not permitted the beneficiary of a trust to maintain an action at law for tort against the trustee for breach of trust.” 3 SCOTT, supra note 1, § 197.1. He further states that the rule limiting a trust beneficiary to equitable remedies has been relaxed in cases where nothing remains to be done by the trustee but to transfer and deliver the property to the beneficiary. Scott gives no indication, however, of any exception to the rule that the beneficiary’s remedy is equitable when a sum certain is not yet owed to the beneficiary.

56. See Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957); Wachovia Bank & Trust Co. v. Laws, 217 N.C. 171, 7 S.E.2d 470 (1940); Fisher v. Ladd, 47 N.C. App. 587, 268 S.E.2d 20 (1980); P. HASKELL, supra note 39, at 223. If there is no material purpose involved in the trust, all the beneficiaries, even without the trustee’s consent, may be able to terminate the trust. A material purpose is defined as a purpose other than mere successive enjoyment and may include purposes such as insuring the beneficiary has ongoing income or protecting a beneficiary who is not capable of handling the money. P. HASKELL, supra note 39, at 223-27.

57. Starling v. Taylor, 1 N.C. App. 287, 161 S.E.2d 204 (1968); R. Lee, NORTH CAROLINA LAW OF TRUSTS § 33f (6th ed. 1977); 4 SCOTT, supra note 1, § 340.

58. 4 SCOTT, supra note 1, § 340; see In re Flexner’s Trust, 56 Misc. 2d 336, 288 N.Y.S.2d 494, aff’d without opinion, 30 A.D.2d 1049, 294 N.Y.S.2d 669 (1968). In Flexner a woman created an inter vivos trust for herself, her daughter, and then her grandchildren. The daughter died leaving the settlor to support her grandchildren. The Flexner court held that, with the consent of the guardian ad litem, the settlor could revoke the trust in part and give part of the money to her grandchildren. Id. at 336-37, 288 N.Y.S.2d at 495. Thus, revocation was allowed because the interests of the minor beneficiaries were represented, and they received compensation for their potential loss.


60. See Fortune, 323 N.C. 146, 371 S.E.2d 483 (1988). In First Union’s motion for judgment notwithstanding the verdict, the bank pointed out that potential ultimate beneficiaries were not represented in the action by a guardian ad litem. Defendant’s Motion for Judgment Notwithstanding the Verdict, Record at 83-85. First Union argued that without representation of all beneficiaries, Dale could sue only for the benefit of the trust. The trial court, however, denied the motion for judgment notwithstanding the verdict, and neither the court of appeals nor the supreme court addressed the failure to appoint a guardian. It appears that the courts completely failed to recognize the interests of the unborn potential beneficiaries.
following the rules set forth in the treatises, the *Fortune* court concluded that premature termination was appropriate although the unborn beneficiaries had no opportunity to consent. The court also ignored black letter law in concluding that Dale, a remainderman with no present right to receive principal from the trust, should recover individual damages. The majority cited a number of cases in support of its conclusion that a remedy of damages to the individual beneficiary is appropriate. These cases, however, differ factually from *Fortune* such that they do not constitute adequate authority for its holding.

*Ingle v. Allen* 61 is the principal case cited by the North Carolina Supreme Court in support of its conclusion that Dale should recover individually for damages caused by First Union's breach of fiduciary duty. In *Ingle* the court awarded the plaintiff, Mrs. Ingle, monetary damages for a breach of fiduciary duty by the trustee named in Mr. Ingle's will. The will gave Mrs. Ingle a life estate in the parsonage where she lived and required the trustees to pay for repairs on the parsonage and to pay Mrs. Ingle $125 per month from the trust income or from principal if necessary. The trust never was funded, and the trustees made no payments to Mrs. Ingle for eight years after her husband's death. The trustees consequently owed the plaintiff for the monthly $125 payments that were past due and for substantial repairs that the parsonage needed due to the trustees' failure to provide maintenance. The court awarded individual damages. The damages awarded, however, represented a sum certain already owed to her by the trustees. 62 This case clearly differs substantially from *Fortune*, in which the trustee did not yet owe a definite sum. Providing an individual damages remedy in *Ingle* is entirely consistent with the principles expressed in the *Restatement*, as is providing only the equitable remedy of recovery to the trust in *Fortune*. 63 The *Restatement* allows recovery of damages for a sum certain already owed, but provides only an equitable remedy when there are still contingent interests and uncertainty regarding amounts of those interests. 64

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62. Id. at 194-95, 317 S.E.2d at 2.
63. *See Restatement (Second) of Trusts* § 198 (1959).
64. *Id.; see also Work v. County Nat'l Bank and Trust Co.*, 4 Cal. 2d 532, 51 P.2d 90 (1935) (cited by the *Fortune* court in support of its holding; however, like *Ingle*, the court awarded damages to a beneficiary for a breach of trust when money was currently and absolutely owed to the beneficiary).

The *Fortune* court also cited First City National Bank v. Haynes, 614 S.W.2d 605 (Tex. Civ. App. 1981), in support of its holding. Like *Ingle*, Haynes is not on point with the facts in *Fortune*. In *Haynes* the court awarded actual damages directly to the beneficiaries for the trustee's mismanagement of trust property. *Id.* at 607-08. The *Haynes* court, however, did not clearly state the facts or clarify the basis of the trustee's duty to pay funds to the beneficiaries. The court gave no indication that the remedy was not based on a sum certain already owed to the beneficiaries. The key question in *Haynes* was whether the beneficiaries could recover punitive damages for the trustee's breach of trust. Holding that the evidence did not support an award of punitive damages, the court nevertheless indicated that punitive damages might be awarded for breach of trust when the trustee intentionally acted with malice or heedless disregard for the rights of the beneficiaries. *Id.* at 609; *see also Hoppe v. Hoppe*, 370 So. 2d 374, 376 (Fla. Dist. Ct. App. 1978), *cert. denied*, 379 So. 2d 206 (Fla. 1979) (denying punitive damages but indicating that they might be awarded when the facts demonstrate the trustee's malicious intent to harm the trust or its beneficiaries). There was no allegation in *Fortune*, however, that Dale's individual damages were punitive damages.

The majority in *Fortune* also cited Hoppe v. Hoppe for support of its holding that a beneficiary may maintain an action at law against a negligent trustee when money is not immediately due to the
Surprisingly, neither the court nor the parties in their briefs in *Fortune* cited *Fisher v. Ladd*, a North Carolina case that perhaps provides the most support for the *Fortune* holding. In *Fisher* the life beneficiary and contingent remaindermen of a trust sought premature termination of a testamentary trust. The trust provided for a life estate for the testator's wife and a remainder to be divided equally among his children, with the issue of any child who predeceased the life tenant taking their parent's share. The widow and adult children of the testator entered a family settlement agreement and sought distribution of the trust assets. Guardians ad litem were appointed to represent the interests of the minor and unborn beneficiaries. The guardians, on behalf of the contingent beneficiaries they represented, refused to consent to termination. In accordance with the general rule, they argued that the trust should not be terminated because all parties with interests in the trust had not consented. The North Carolina Court of Appeals concluded that the children all had vested interests determined in amount at the testator's death and that no other interests existed under the trust despite the contingent interest created in the issue of any of the testator's children who predeceased the life tenant. The *Fisher* court illogically ignored the executory interests clearly created by the trust instrument, and upheld the termination of the trust. The court's failure to cite *Fisher* indicates that perhaps the North Carolina Supreme Court did not identify its remedy in *Fortune* as actually a premature termination of the trust without the consent of all the beneficiaries. *Fisher* provides precedent for premature termination in the same fact situation, but does so using logic different from *Fortune*.

Thus, the cases cited by the *Fortune* court offer scant support for its decision to award damages directly to Dale. The court failed to cite any precedent awarding damages to a beneficiary before money was due to him. Indeed, most of the cases cited in *Fortune* involved a claim for a sum certain owed to the beneficiary and already past due. These cases differ fundamentally from *Fortune*. The trustee in *Fortune* had no absolute duty to pay any money to Dale until his mother's death, an event that had not yet occurred. In addition, it was not yet certain that Dale ever would receive any money, because his issue would be entitled to the remainder if he did not survive his mother. The court did not make any effort to harmonize its decision with the Restatement view.

beneficiary. *Fortune*, 323 N.C. at 149, 371 S.E.2d at 485 (citing *Hoppe*, 370 So. 2d at 374. In *Hoppe*, however, the court only briefly stated that the beneficiary's complaint alleged sufficient facts such that, if proved, the trustee would be liable. *Hoppe*, 370 So. 2d at 375-76. The *Hoppe* court did not indicate whether a subsequent judgment would be payable directly to the beneficiary or into the trust. See id.

66. Id. at 590, 268 S.E.2d at 22.
67. Id. A court typically will appoint a guardian ad litem to represent the interests of minor or unborn beneficiaries before making a decision regarding distribution of trust assets that may affect the interests of those beneficiaries.- 4 SCOTT, supra note 1, § 340.
68. *Fisher*, 47 N.C. App. at 590, 268 S.E.2d at 22.
69. Id. at 591, 268 S.E.2d at 23.
70. Id. at 592, 268 S.E.2d at 23.
71. Id. at 593, 268 S.E.2d at 24.
72. See supra notes 61-64 and accompanying text.
The cases that do provide for premature termination of trusts with contingent interests or allowing damage awards to individual beneficiaries when money is not yet due rely on inadequate theoretical reasoning for their holdings. A large body of case law indicates that it is incorrect to terminate a trust prematurely if there are contingent future interests, and commentary uniformly supports that view. The Restatement approach of providing for distribution of trust funds only when they are currently due to a beneficiary and maintaining the trust for all contingent beneficiaries is the theoretically correct approach, for the Fortune approach terminates the interests of trust beneficiaries who are not parties to the law suit.

The Fortune court sought to justify its holding with an argument that Dale's interest in the trust could be determined without undue speculation. Considering the trustee's discretionary power to distribute to Dale or Mrs. Fortune and the contingent interest in Dale's issue, the dissenting opinion was probably more correct in concluding that damages to Dale were much too speculative. A number of North Carolina cases support the contention that a plaintiff should not recover damages when the harm he has suffered is highly uncertain. The issue of the uncertainty of Dale's damages, however, is secondary to the issue of whether Dale or the trust is the proper party to recover damages. It was the trust that was damaged by the executor First Union, and it is logical that the trust should be the proper party to recover.

Although Fortune clearly deviated from the more established and logical line of precedent that a court should not distribute individual damages to a beneficiary unless money is currently due to him and that a court should not terminate a trust prematurely without the consent of all potential beneficiaries, the court never acknowledged that it was doing so. The court made virtually no attempt to provide reasoning for its decision that awarding individual damages to Dale was appropriate. Indeed, the Fortune majority seems to have failed entirely to understand or even acknowledge the significant body of law prohibiting premature termination of a trust and distribution to a contingent beneficiary, despite the strong dissent by justices who apparently understood the majority rule and offered the legally correct solution.

The facts and circumstances, however, provide reasons for the court's holding. One probable reason for the court's failure to recognize the appropriate remedy was the lack of any real advocate for protection of the trust resulting

73. See supra notes 65-71 and accompanying text.
74. See supra notes 38-59 and accompanying text.
75. E.g., Phillips v. Universal Underwriters Ins. Co., 43 N.C. App. 56, 257 S.E.2d 671 (1979) (all damages must be proven with sufficient certainty); see also Brown v. Guthery, 190 N.C. 822, 130 S.E. 836 (1925) (illustrating difficulty of calculating damages for a contingent interest in a trust).
76. The plaintiffs could not have obtained the consent of all the parties because no guardian ad litem ever was appointed to represent the interests of Dale's unborn children who were contingent beneficiaries. See supra note 60 and accompanying text.
77. See Fortune, 323 N.C. at 149, 371 S.E.2d at 485. The court cursorily concluded that individual damages for Dale were appropriate, and the only support for this view was a string citation of the inapplicable and weakly reasoned cases discussed supra notes 61-64 and accompanying text. Fortune, 323 N.C. at 149, 371 S.E.2d at 485.
from the trial court’s failure to appoint a guardian ad litem. Because the only parties having a real interest in preserving the trust were not joined in the action, it was predictable that the court would receive a distorted picture of the law. Mrs. Fortune’s acquiescence to the distribution of the entire principal to Dale indicates that the living beneficiaries preferred to receive the principal immediately. Although early in the litigation First Union argued unsuccessfully that Dale was not appropriate party to receive damages, First Union had little incentive to pursue that argument because it would pay the same amount whether directly to Dale or to a new trustee.

Other facts in Fortune undoubtedly contributed to the court’s distorted application of the law. Dale Fortune made a very sympathetic plaintiff. The young boy apparently had lived comfortably for the first ten years of his life. His father ran a successful car dealership lucrative enough to provide the family with luxuries such as a condominium at the beach. After his father’s unexpected death, Dale was stripped of his substantial inheritance by the negligence of his father’s trustee and at the time of trial was suffering financial hardship. The court’s sympathy for Dale is not surprising, nor is its willingness to stretch the law to find a remedy that would not risk the same damage to his inheritance at the hands of a new trustee. Though his father’s intent in creating the trust was undoubtedly to ensure long-term security for his family by having a trustee distribute their inheritance over time, the creation of the trust under his chosen trustee had quite the opposite effect. It is reasonable to assume that, if Robert Fortune had foreseen First Union’s handling of his estate, he would not have chosen to create a trust. Furthermore, if he could now choose a remedy for Dale, in all likelihood, he would prefer that Dale receive his inheritance directly to avoid risk of further damages.

An award to the trust would have raised new questions and complications regarding appointment of a new trustee. Perhaps the court wished to save Dale’s inheritance from additional legal costs. Furthermore, the undesirable possibility existed that a new trustee might be equally delinquent in its duties. Facing this sort of dilemma, courts sometimes tend to mold the law to create a just remedy. Difficult cases often produce bad law. Fortune v. First Union is a prime example of difficult facts leading the court to twist the law for a result that seems just for a plaintiff in a sympathetic situation.

The result in Fortune, however, creates unfortunate precedent for the premature termination of trusts. It gives the self-interested contingent beneficiary grounds to argue for premature termination of a trust, so that he immediately can get funds that, under the terms of the trust, might never have been his. Furthermore, a possible complication exists if the unborn and unrepresented beneficiaries later seek their share.

78. See supra notes 57-60 and accompanying text.
79. Plaintiff-Appellee’s Brief at 7.
80. Id. at 8.
81. In the event Dale predeceased his mother leaving issue, those issue might then sue to recover the loss to the trust that was now owed to them. The earlier action would not bind the issue
Because of this possible result, the rule that a beneficiary with no immediate and unconditional right to distribution can compel only an equitable action to have the trustee restore money to the trust is rational. In addition, the rule is reasonable because, almost always, a beneficiary with no immediate and unconditional right to trust proceeds cannot establish the fair amount of damages with the requisite specificity. Furthermore, if the trust provides for other interests, distribution of damages to one beneficiary is fundamentally unfair to the other beneficiaries who would stand to benefit from that money if the trust were restored.

Failure to appoint a guardian ad litem for Dale's issue was a very significant oversight. Potential recipients of the entire trust principal were deprived of any representation in this case and consequently deprived of their interest in the trust. The dissenting opinion in *Fortune* proposed the correct alternative according to the basic treatises on trust law. The remedy calls for the appointment of a substitute trustee and restoration to the trust of the funds lost by the breach of fiduciary duty. Such a solution does the most to further the testator's intent for distribution of his estate, and, in general, the testator's intent as expressed in the trust instrument should be an important consideration. Appointment of a new trustee would have avoided restoring the money to the hands of First Union, whose negligence caused the loss. Thus, the *Fortune* court ignored a remedy based on a well-established rule of law that would have avoided restoring the funds to the hands of First Union but would have approximated the wishes of Robert Fortune.

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