

**[J-30B-2023 and J-30C-2023] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

JESSICA SHIRLEY, INTERIM ACTING SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ACTING CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD : No. 85 MAP 2022
: Appeal from the Order of the Commonwealth Court at No. 41 MD 2022 dated June 28, 2022

v.

PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, VINCENT C. DELIBERATO, JR., DIRECTOR OF THE LEGISLATIVE REFERENCE BUREAU, AND AMY J. MENDELSON, DIRECTOR OF THE PENNSYLVANIA CODE AND BULLETIN

APPEAL OF: CITIZENS FOR PENNSYLVANIA'S FUTURE, SIERRA CLUB, AND CLEAN AIR COUNCIL

Possible Intervenors

JESSICA SHIRLEY, INTERIM ACTING SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ACTING CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD : No. 87 MAP 2022
: Appeal from the Order of the Commonwealth Court at No. 41 MD 2022 dated July 8, 2022

v.

PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, VINCENT C. DELIBERATO, JR., DIRECTOR OF THE LEGISLATIVE REFERENCE BUREAU, AND AMY J. MENDELSON, DIRECTOR

ARGUED: May 24, 2023

OF THE PENNSYLVANIA CODE AND
BULLETIN

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APPEAL OF: CITIZENS FOR
PENNSYLVANIA'S FUTURE, SIERRA
CLUB, AND CLEAN AIR COUNCIL

Possible Intervenors

CONCURRING OPINION

JUSTICE DONOHUE

DECIDED: July 18, 2024

I join the Majority in full and write only to speak to the role the Nonprofits' assertion of the Environmental Rights Amendment ("ERA"), found in Article I, Section 27 of the Pennsylvania Constitution, plays in resolving the intervention question before the Court.

The ERA provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.

The ERA "establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries." *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 931–32 (Pa. 2017). Nonprofits' members, as residents of this Commonwealth, are beneficiaries under this trust. See Application for Leave to Intervene, 4/25/2022, ¶¶ 40-42, 58. The ERA imposes upon all agencies and entities of our government, in their role as trustee, the duty to prohibit the degradation, diminution, and depletion of the public natural

resources, as well as the duty to act affirmatively through legislative action to protect the environment. *Id.* at 933. This Court has previously established that the ERA trust is governed by the principles applicable to private trusts. *Id.* at 932-33; *see also Pa. Env't Def. Found. v. Commonwealth*, 255 A.3d 289, 308 n.12 (Pa. 2021).

Fundamentally, a trust is a “relation between” persons, wherein one (the trustee) holds property for the benefit of others (the beneficiaries). *In re Passarelli Fam. Tr.*, 242 A.3d 1257, 1269 (Pa. 2020). While a trustee holds legal title to the property of which the trust is comprised, the beneficiaries hold an equitable interest in the trust property. *Jones v. Jones*, 25 A.2d 327, 329 (Pa. 1942) (holding that a beneficiary has equitable in rem interest in trust property). For instance, an income beneficiary possesses an equitable right in the trust property that generates the income, although she has no legal right to that property at all. *Tr. Under Will of Augustus T. Ashton*, 269 A.3d 81, 91 (Pa. 2021).

This equitable interest is legally enforceable. We long ago held that “in addition to rights against the trustee, the beneficiary also has rights in rem, an actual property interest in the subject-matter of the trust, an equitable ownership of the trust res.” *Jones*, 25 A.2d at 329. The equitable interest in the trust res entitles a beneficiary to enforce the trust, to have a breach of trust enjoined, and to obtain redress for a breach of trust. *Id.*; *see also Commonwealth v. Stewart*, 12 A.2d 444, 447 (Pa. 1940), *aff'd sub nom. Stewart v. Commonwealth*, 312 U.S. 649 (1941) (“By virtue of th[e] equitable interest in the trust property] he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach.”). We reaffirmed this principle more recently in *Trust Under Will of Augustus T. Ashton*, 269 A.3d 81, 91 (Pa. 2021) (explaining that beneficiaries have equitable interest in “entire trust res” and that interest allows beneficiaries to enforce the trust in addition to rights against a trustee).

Pursuant to their status as beneficiaries of the public trust established by the ERA, Nonprofits' members possess a legally enforceable interest in the trust res: the natural resources of our Commonwealth. In my view, this legally enforceable interest in the existing natural resources which, according to Nonprofits, stand to be altered, if not diminished or destroyed, as a result of the efforts to enjoin the RGGI Regulation, suffices to establish a right to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327(4).¹ See *Citimortgage, Inc. v. Comini*, 184 A.3d 996, 998 (Pa. Super. 2018) (holding that proposed intervenors' right to first refusal was "an interest legally enforceable pursuant to standard principles of contract construction" thereby establishing a right to intervene pursuant to Pa.R.C.P. 2327(4)). Nonetheless, as explained by the Majority, even when a petitioner establishes a legally enforceable interest that would permit intervention, a court may deny intervention if the petitioner's interest is already adequately represented. Pa.R.C.P. 2329(2). Here, where DEP has failed to assert the ERA and its obligations thereunder in defense of the RGGI regulations, it is difficult, if not impossible, to conclude that it is representing the beneficiaries' interests at all, let alone to a standard that could be called "adequate."

Justice Brobson concludes that Nonprofits have failed to establish a legally enforceable interest in this litigation that would warrant their intervention pursuant to Rule 2327(4). Although he acknowledges that Nonprofits pursued intervention to assert their rights as beneficiaries under the ERA, Justice Brobson ignores the import of this status, resting his conclusion that Nonprofits lack a legally enforceable interest on his view that they seek only to advance policies that align with their interests. Concurring & Dissenting

¹ This conclusion is in harmony with then-Judge Brobson's pronouncement that "[t]he [ERA's] protections may be enforced by citizens bringing suit in the appropriate forum, including the courts." *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462, 468 (Pa. Commw. 2015), *aff'd*, 135 A.3d 580 (Pa. 2016).

Op. at 11-12 (Brobson, J). This non sequitur misses the significance of beneficiary status, as it is by virtue of the trustee/beneficiary relationship that Nonprofits (by way of their members' rights)² possess a legally enforceable interest that provides the basis for intervention. See *Ashton*, 260 A.3d 81, 91 (Pa. 2021) (explaining that beneficiaries have equitable interests in “entire trust res” and that interest allows beneficiaries to enforce the trust to obtain redress, in addition to in personam rights against a trustee); *Jones*, 25 A.2d at 329; *Commonwealth v. Stewart*, 12 A.2d 444, 446-47 (Pa. 1940). Whether Nonprofits have preferred environmental policies plays no part in determining whether they may intervene in this litigation as beneficiaries seeking to vindicate the rights granted to them under the trust.

Chief Justice Todd joins this concurring opinion.

² The Majority explains that Nonprofits have associational standing as representatives of their members. Majority Opinion at 30 (citing *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 922 (Pa. 2013)).