Apples and Oranges, Or Trusts and Wills.

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Deborah Gordon, *Forfeiting Trust*, 57 **William & Mary L. Rev.** 455 (2015).

Wills and many trusts have the same fundamental purpose: to transfer property at death. This raises perennial questions about the extent to which the law should treat these estate planning vehicles as functionally equivalent. I liked Deborah Gordon's *Forfeiting Trust* because it reminds readers that consequences flow from the simple but fundamental distinction between wills and trusts. Trusts have trustees, beneficiaries, and the accompanying rules of fiduciary duty. Wills do not. Therefore not all rules that work well for wills can be applied to trusts.

No contest clauses—also known as forfeiture clauses—are Gordon's subject. In wills, testators have long used these clauses to deter litigation. The testator leaves property to individuals who may be inclined to challenge the will on the ground that it was executed without capacity or compliance with statutory requirements, or that it was the product of undue influence, or that it is otherwise invalid. Then the testator inserts a clause providing that anyone who challenges the will forfeits her bequest. A beneficiary can still challenge the will, but only at considerable risk. If the court enforces the will, it also enforces the no contest clause.

Gordon explains that forfeiture clauses are beginning to show up in trusts. But, unlike in wills, settlors are not seeking to disinherit beneficiaries who challenge the validity of the trust instrument. Rather, settlors and the forfeiture clauses they write "purport to disinherit beneficiaries who challenge trustee decision-making." (Pp. 459-60.) This strikes right at the heart of traditional trust law, because the threat of a beneficiary's suit is the law's primary means of incentivizing trustees to comply with fiduciary duty.

When a no contest clause appears in a will, the law is settled. In a minority of states, courts strictly enforce the clause and the challenger takes nothing if the will is deemed valid. A majority of states use a probable cause standard, whereby a challenger gets to keep her bequest even if the will is ultimately deemed valid, provided that a reasonable person would have concluded that the challenge was substantially likely to be successful. Both approaches respect the testator's desire to deter spurious litigation, with probable-cause jurisdictions hedging against the risk that forfeiture clauses may deter beneficiaries from raising well-grounded claims about a will's validity. But what if the forfeiture clause appears in a trust instead of a will, and the beneficiary is alleging that the trustee invested imprudently, or failed to account, or did not treat the beneficiary impartially, or violated other fiduciary obligations?

As Gordon documents, the law about forfeiture clauses in trusts is anything but settled. The Uniform Trust Code says nothing about these clauses. The Restatement (Third) of Trusts has a provision in draft form that absolutely prohibits no contest clauses aimed at beneficiaries who challenge trustee decision-making, but the comments state that courts may choose to enforce clauses in "extreme circumstances" where "certain disappointed or difficult beneficiaries might pursue unwarranted and unreasonable litigation against a trustee." (P. 504, quoting Restatement (Third) of Trust § 96 cmt.) Recently a growing number of appellate courts have confronted trust forfeiture clauses, with results that have been "increasingly inconsistent and haphazard." (P. 460.) Several jurisdictions have deemed forfeiture clauses in trusts contrary to public policy because they "immunize fiduciaries from [state] law governing the actions of such fiduciaries." (P. 485, quoting Callaway v. Willard, 739 S.E.2d 533, 539 (Ga. Ct. App. 2013)). In contrast, other jurisdictions "have either divested litigious beneficiaries of the right to inherit trust property or acknowledged that the law may allow for such a disinheritance." (P. 492.)

Gordon recognizes that sensible treatment of trust forfeiture clauses must take into account what the settlor is trying to

accomplish and what a normal, well-functioning trust requires. She explains that no contest clauses "reflect the respective trust creator's desire to confer a legacy of sustained, functioning, and non-litigious interactions among the parties to the trust relationship." (P. 512.) But, Gordon writes, "the differences between how trusts and wills operate mean that trust forfeiture clauses are fundamentally different than their narrower testamentary counterparts." (P. 505.) Thus, she argues, the treatment of no contest clauses in wills is not the only relevant legal reference. Courts also should look to the law governing exculpatory clauses, which protect trustees from liability stemming from poor decision-making. (P. 507.) These clauses—like no contest clauses—"are intended to make a fiduciary's job smoother (and more desirable) and both impact trustee accountability." (P. 508.)

Taking her cue from the law on exculpatory clauses, Gordon suggests that courts take a burden shifting approach to forfeiture clauses in trusts. Under Gordon's framework, forfeiture clauses are presumed invalid. Trustees, however, can rebut that presumption by proving that "(a) the settlor included the clause to address a particular concern, rather than simply as boilerplate and (b) the purpose for which the clause was included is, in fact, occurring." (P. 509.) If the trustee makes this showing (and here Gordon returns to the law of wills), the burden would shift to the beneficiary to prove that the trustee actually violated fiduciary duties or that the beneficiary at least had probable cause to challenge the trustee's actions.

Gordon's burden-shifting approach is complex, but it balances the interests of the settlor against the realities of the trustee-beneficiary relationship. Settlors include forfeiture clauses to decrease the risk of meritless litigation and all its attendant costs—risks that can be very real. At the same time, however, the beneficiary's ability to bring suit against a trustee is the legal mechanism for ensuring that trustees fulfill their fiduciary obligation. Because Gordon considers the fundamental distinction between wills and trusts as well as what settlors seek to accomplish with forfeiture clauses, she offers a sensible approach to an estate planning device whose use is on the rise.

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