Who Should Terminate or Modify Irrevocable Trusts?

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Bradley E.S. Fogel, *Terminating or Modifying Irrevocable Trusts by Consent of the Beneficiaries—A Proposal to Respect the Primacy of the Settlor's Intent*, 50 **Real Prop., Tr. & Est. L.J.** 337 (2016).

Professor Bradley E.S. Fogel persuasively argues that "courts and legislatures should abandon trust termination by consent of the beneficiaries." (P. 378.) He proposes that they should instead apply the doctrine of equitable deviation, in which irrevocable trusts (hereinafter "trusts") are modified or terminated only in the case of "relevant circumstances not anticipated by the settlor" and when the court determines that "such modification furthers the settlor's intent." (P. 378.) Professor Fogel notes that several commentators "have encouraged facilitating trust termination by the beneficiaries to assure that the trust meets the beneficiaries' needs and to allow for more efficient use of trust assets." (P. 342.) However, courts and legislatures, he argues, "need to respect the primacy of the settlor's intent"; conversely, giving preference to "the living beneficiaries before the court . . . fails to properly respect freedom of disposition and the settlor's right, under American law, to place whatever conditions she likes on the gift she made." (P. 343.)

Professor Fogel first summarizes the common law of trust termination by consent of the beneficiaries. He notes that many early U.S. cases followed the English law that "a vested beneficiary could terminate a trust and receive the assets outright regardless of the settlor's intent or the terms of the trust." (P. 344.) Over time, courts rejected easy trust termination, and the case *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889), "evolved into the common law rule that a trust cannot be terminated by the consent of the beneficiaries if 'continuance of the trust is necessary to carry out a material purpose of the trust.'" (P. 347.) The most common "material purposes" found for trusts were spendthrift provisions, discretionary distribution provisions, and provisions delaying a beneficiary's enjoyment of the property (such as to a certain age). (Pp. 347-48.)

Courts, in determining whether a trust has an unfulfilled material purpose, have sometimes faced situations in which the settlor has joined the beneficiaries in seeking trust termination. (P. 348.) Professor Fogel asks, because the goal of the material purpose doctrine is "to assure that the settlor's intent in creating the trust is carried out," then, if the settlor is seeking to terminate a trust that the settlor created, "what should be the role of the material purpose inquiry?" (P. 348.) Professor Fogel notes that, on the one hand, the settlor (unless also a trustee or a beneficiary) has no interest in the trust the settlor created, and it is the settlor's intent when the trust was created that governs trust administration. (Pp. 348-49.) Accordingly, the fact that a settlor "changes her mind and wishes to revoke the trust should be irrelevant." (P. 349.) On the other hand, "if the settlor and all of the beneficiaries want the trust to be terminated, it is unclear why the court should prevent such termination." (P. 349.)

Per Professor Fogel, there are, therefore, "dueling policies regarding trust termination by consent of the beneficiaries: freedom of disposition versus the professed interests of the beneficiaries. If the settlor is one of the parties urging trust termination, both of these policies arguably militate toward termination." (P. 349.) Professor Fogel notes that "this reasoning has carried the day" such that, if the settlor consents to the termination of the trust created by the settlor, "then all of the beneficiaries acting together may terminate the trust regardless of any unfulfilled material purpose." (Citing the Restatement (Second) of Trusts, P. 349.)

I return to Professor Fogel's question that, if the settlor is seeking to terminate a trust that the settlor created, "what should be the role of the material purpose inquiry?" (P. 348.) Although Professor Fogel writes later in his article that application of the equitable deviation doctrine makes the "frequently haphazard search for the trust's 'material purpose' unnecessary," (P. 379) I wonder if there is an implicit application of the equitable deviation doctrine in a

"material purpose" inquiry that militates towards termination, as follows. If there is no material purpose of the trust left unfulfilled, then the "early" fulfillment of all material purposes of the trust was a circumstance unanticipated by the settlor when the settlor created the trust. Alternatively, if there is a material purpose of the trust left to be fulfilled, then there are, currently, other circumstances unanticipated by the settlor when the settlor created the trust. In sum, to me, the trust termination allowed to beneficiaries when they are joined by the settlor who created the trust (regardless of any unfulfilled material purpose) is an implied recognition and application of the equitable deviation doctrine.

Professor Fogel next discusses the difficulty of obtaining the consent of *all* beneficiaries of a trust, including addressing situations in which the beneficiary is a minor or unborn and unascertained. (P. 351.) Summarizing Professor Fogel's thorough analysis is beyond the scope of this jot, but it is worthwhile to note that Professor Fogel considers one of the advantages of applying the equitable deviation doctrine to be "the elimination of the outsized importance sometimes given to non-consenting beneficiaries with remote interests." (P. 379.)

Professor Fogel argues that, "[p]artially in response to the difficulty of terminating trusts by consent of the beneficiaries under common law, states enacted statutes that facilitated trust termination by the beneficiaries." (P. 360.) Although the statutes generally accomplish their goals of making trust termination by consent of the beneficiaries easier, Professor Fogel submits that "they do not properly respect the settlor's intent." (P. 360.) Professor Fogel thoroughly analyzes the statutes from several states and the Uniform Trust Code; I highlight the few UTC provisions relevant to this jot.

The UTC, following the common law, "requires the consent of all beneficiaries for trust termination, regardless of whether the settlor also consents"; the "beneficiaries" include "vested and contingent, as well as unborn and unascertained beneficiaries." (P. 361.) The UTC, however, allows consent by a guardian ad litem for a beneficiary. (P. 361.) The UTC differs from the common law in allowing trust termination even if not all beneficiaries consent as long as the non-consenting beneficiary's interests are "adequately protected" through payment of cash or an annuity. (Pp. 361-62.) Professor Fogel aptly notes that "the UTC allows beneficiaries of a trust to force an objecting beneficiary to surrender her interest in the trust," which termination "conflicts with the settlor's intent" because "the settlor gave that interest [in the trust] to the objecting beneficiary." (P. 362.)

Professor Fogel's focus on the settlor's intent grounds his support for the equitable deviation doctrine replacing beneficiary-originated modification or termination of a trust. As he concisely notes, "The settlor's intent—not the beneficiaries' desires—is paramount." (P. 369.) Trust termination occurring by consent of the beneficiaries allows the beneficiaries: (1) to deviate from the trust document, (2) to alter the settlor's plan in the trust document, and (3) to escape conditions set by the settlor. (Pp. 369-70.) Trust modification or termination under the equitable deviation doctrine, on the other hand, "respects the settlor's intent." (P. 371.)

Per Professor Fogel, most states and the UTC allow under the equitable deviation doctrine "for modifications to dispositive provisions and even trust termination," if it will "further the purposes of the trust." (Pp. 370-71.) The court assesses "the settlor's probable intention, if possible, in light of the unanticipated circumstances"; then, the court allows modification of the trust that the settlor would have done under the circumstances, thereby better effecting the settlor's intent (Pp. 371-72)—which intent, but for the modification, is thwarted by circumstances unanticipated by the settlor when the settlor created the trust. Instead of focusing on the beneficiaries of the trust, the goal of the equitable deviation doctrine is "to effect, rather than thwart, the settlor's intent." (P. 372.)

This jot does not address the breadth of issues discussed in Professor Fogel's article. He thoroughly analyzes the history and disadvantages of modification and termination of trusts by consent of the beneficiaries and forcefully argues in favor of the equitable deviation doctrine. He also applies the equitable deviation doctrine to cases, conceding that it is "possible that a beneficiary's interest might be reduced or eliminated without his consent in an equitable deviation proceeding" because such reduction results from "the court's attempt to effect the settlor's intent." (P. 376.) In sum, I enjoyed reading how the equitable deviation doctrine should replace modification and termination of trusts by consent of the beneficiaries because, as Professor Fogel elegantly summarizes, the "point of a trust is not to give the

beneficiaries the interest they want", but, rather, the "point of a trust is to give the beneficiaries what the settlor intended." (P. 377.)

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