Title

Invoking the equitable defense of acquiescence at the inception and appellate stages of trust litigation

Text

The equitable defense of acquiescence, which rests upon the equitable doctrine of election, is available to a trustee if a beneficiary, fully apprised of all the relevant facts and law, of full age and legal capacity, and under no undue influence, "stands by" and in so doing induces the trustee to believe that the beneficiary has assented to a breach of trust. The beneficiary, for example, would be well advised not to hold back to see whether an imprudent investment appreciates or depreciates in value. The beneficiary should promptly either affirm the actions of the trustee or call the trustee to account. The doctrine of equitable election is taken up generally in §8.15.82 of *Loring and Rounds: A Trustee's Handbook* (2026), which section is reproduced in the appendix below.

Acquiescence can also choke off one's right of appeal, such as when one voluntarily assumes the burdens or accepts the benefit of a judgment one is contesting on appeal. Assume, for example, that the governing instrument expressly provides that three named individuals shall take equally the remainder in corpus upon the trust's termination. One designated remainderman, hereinafter X, brings at Uniform Trust Code §415 reformation action asserting that he has clear and convincing extrinsic evidence that the deceased settlor intended that X take not a third but a half of the remainder in corpus. The trial judge is not convinced and renders a judgment that X is entitled only to 1/3, as expressly provided in the unambiguous provisions of the governing instrument. The trustee is ordered to liquidate the portfolio and distribute the remainder in corpus in three equal shares. The trustee complies. X appeals the judgment, but in the meantime accepts and deposits the 1/3 share distributed to him in his personal bank account. The appellate court holds that X having accepted the benefits of the district court judgment is now barred from proceeding with the appeal. "In situations where one's party's 'portion' directly impacts the portions awarded to other parties—that is, where a district court's final order apportions a fixed total 'pot' among and between contending litigants—the judgments are inseparable. Acquiescing in the portion one has received necessarily implies acquiescing in the portions received by other parties." *Tharrett as Trustee of Roxine Poznich Revocable Trust v. Everett*, 573 P.3d 680 (Kansas 2025).

Appendix

§8.15.82 *Doctrine of Equitable Election* [from *Loring and Rounds: A Trustee's Handbook* (2026)]

The doctrine. The doctrine of equitable election is as follows: "A person who accepts a benefit under a deed or will must conform to the instrument in all respects, by giving effect to all its provisions, and renouncing every right inconsistent with it."[1432]

Powers of appointment. Assume the donee of a special/limited testamentary power of

[1432] John Chipman Gray, The Rule Against Perpetuities §541 (4th ed. 1942).

appointment under a trust exercises by will the power in favor of persons who are not permissible objects of the power, but devises in the same will his *own* property to the permissible objects.[1433] Assume also that the permissible objects would take *under the trust* in default of a proper exercise of the power. Under the doctrine of equitable election, the devises are impliedly conditioned upon the devisees not challenging the validity of the exercise.[1434] In other words, the devisees are "put to an election."[1435] They can either accept the devises or take in default of the power's proper exercise.[1436] They cannot, however, double dip. The somewhat related doctrine of selective allocation (marshalling) is taken up in §8.15.79 of this handbook.

In terrorem clauses. The "*in terrorem*" or "no-contest" or "anti-contest" clause in a trust instrument is taken up generally in §5.5 of this handbook. Following English tradition, American courts have enforced such provisions in wills and trusts. "The leading early precedent, *Smithsonian Institution v. Meech*, relied on the concept of equitable 'election' that required a beneficiary to elect between taking under an allegedly flawed will or seeking an abrogation of the will and thus taking nothing. The underlying presumption was that the testator had wanted to 'guard against vexatious litigation' while not punishing a beneficiary who merely sought 'to ascertain doubtful rights' through a judicial proceeding."[1437]

[1433] *See generally* §8.1 of this handbook (powers of appointment).
[1434] John Chipman Gray, The Rule Against Perpetuities §541 (4th ed. 1942).
[1435] John Chipman Gray, The Rule Against Perpetuities §541 (4th ed. 1942).
[1436] John Chipman Gray, The Rule Against Perpetuities §541 (4th ed. 1942).
[1437] Hunter v. Hunter, 838 S.E.2d 721 (Va. 2020) (the citation to *Meech* is 169 U.S. 398 (1898)).