Title

May a mentally incapacitated trustee be held personally liable for his breaches of trust?

Text

Assume sole trustee of an irrevocable discretionary trust for benefit of deceased settlor's descendants living from time to time suffers a sudden unforeseen mental disability that causes trustee to imprudently administer the trust property. The direct consequence of the breach of trust is a material impairment of the economic value of the trust estate. Beneficiaries' only recourse for being made whole is an action in equity against the trustee personally, all imprudent transactions having been made with BFPs. As between the innocent trustee and the innocent beneficiaries, who should bear the burden of the loss, assuming the equities under these circumstances are equal? Recall the equity maxim that "where there is equal equity, the law shall prevail." While the law is not directly implicated in this fact pattern, the trust being a creature and ward of equity not the law, perhaps the law should be implicated by analogy.

Consider the operator of a motor vehicle who suffered a sudden unforeseen mental disability that caused him to negligently collide with another vehicle. The Restatement (3rd) Torts, *Liability for Physical and Emotional Harm* § 6 provides that "an actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable." Section 11(c) provides that "an actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child." This is in keeping with mainstream national public policy when it comes to the deemed rationality of the mentally disabled. The theory of deinstitutionalization, for example, "implies that even persons with severe mental disorders can adequately comply with society's norms; while reality may fall short of theory, deinstitutionalization becomes more socially acceptable if innocent victims are at least assured of opportunity for compensation when they suffer injury." At law, in other words, for liability purposes the victim of a tortious act is more innocent than the mentally disabled tortfeasor.

Back to equity. In the trust fact pattern that introduces this posting can it really be said that there are any equities on the trustee's side of the scale? The trustee being a fiduciary, all duties run from the title-holding trustee to the beneficiaries; the beneficiaries owe the trustee no duties back. In our fact pattern some beneficiaries have yet even to be conceived. A trustee's equitable liability during bouts of mental incapacity should come with the territory, just as legal liability in tort should come with the territory when it comes to the deinstitutionalized mentally incapacitated person. Trusteeships of the type that are the subject of this posting are totally voluntary. There are many opportunities at the instrument-drafting stage for a competent prospective trustee to mitigate the liability risk of his future mental incapacity, the most obvious being insisting on having legal title to the entrusted property being held by multiple trustees jointly, rather than by one human trustee. The yet-to-come-into-existence beneficiary should not have to bear the economic burden of the prospective trustee having imprudently and voluntarily acquiesced to serving alone. This even more so applies to the trustee who is to be compensated for his services.

Had the trust been for the benefit of a fixed class of individuals of full age and legal capacity, there is a range of equitable defenses that might have been available to our mentally incapacitated trustee, depending upon the particular facts and circumstances. See *Loring and Rounds: A Trustee's handbook* (2025) §7.1.2 (defenses against loyalty breaches); §7.1.3 (laches and statutes of

limitation); §7.1.4 (consent, release, ratification); and §7.1.9 (the beneficiary whose hands are unclean). And now there is the amorphous Equitable Excuse, see §7.1.8 of the *Handbook*, which section is reproduced in the appendix below. Time will tell whether this "good faith" escape hatch has serious utility in the trust context.

Appendix

§7.1.8 *The Equitable Excuse (for a Breach of Trust)* [from *Loring and Rounds: A Trustee's Handbook* (2025)].

The general rule has been that a trustee who breaches his trust is not absolved of liability merely because he did so in good faith. As we explain in §8.15.81 of this handbook, under the UTC the good faith of the trustee may well now be an effective defense, at least in some situations. The Restatement (Third) of Trusts would seem to be more or less in accord with the UTC in this regard. The Restatement (Third), specifically the commentary to §95, talks in terms of the equitable excuse: "If, however, the court concludes that, in the circumstances, it would be unfair or unduly harsh to require the trustee to pay, or pay in full, the liability which would normally result from a breach of trust, the court has equitable authority to excuse the trustee in whole or in part for having to pay the liability."[216] It proffers some examples of trustee behavior that might warrant a particular breach of trust being equitably excused:

- Good faith reliance on overruled precedent
- Good faith observance of "typical fiduciary practice"
- Good faith selection and monitoring of agents[217]
- Good faith purchase of trust property out of apparent necessity "to further interests of beneficiaries"[218]
- Good faith reliance on advice of counsel[219]
- Good faith/"sincere" effort to ascertain applicable facts and law
- Good faith ignorance of the complaint/petition for instructions option[220]

[216]Rest. (Third) of Trusts §95 cmt. d. *See, e.g.*, Orange Catholic Church Found. v. Arvizu, 239 Cal. Rptr. 60 (Ct. App. 2018) ("In affirming the judgment … [in favor of the defendant]…, we certainly do not mean to suggest the trial court was *required* to excuse … [defendant-trustee's]… conduct, or that a trustee who has acted reasonably and in good faith must *always* be relieved from liability for committing a breach of trust, or that a trustee *always* has free reign [sic] to ignore trust terms in the name of doing the 'right thing.'") (italics in original).

[217]*See generally* §6.1.4 of this handbook (delegation).

[218]*See generally* §6.1.3.3 of this handbook (trustee benefiting as buyer).

[219]*See generally* §8.32 of this handbook (reliance on advice of counsel as a defense to a breach of trust allegation).

[220]*See generally* §8.42 of this handbook (the complaint for instructions and the complaint for declaratory judgment).