Title

Amending or terminating the revocable inter vivos trust by proxy: The trustee-liability issues lurking in the tangle of law-reform initiatives

Text

Advisory: This posting assumes knowledge of the difference between a power of attorney and a power of appointment.

A legally incompetent trust-settlor cannot exercise a reserved right of amendment or revocation. Recall that each reserved right qualifies as an equitable nonfiduciary general inter vivos *power of appointment*. May, however, the settlor's agent acting under a valid statutory durable *power of attorney* exercise either reserved right? Yes, provided either the terms of the power of attorney or the terms of the trust so provide. See Rest. (3rd) of Trusts, § 63, cmt. l; Unif. Trust Code §602(e).

The Unif. Power of Attorney Act (2006), see §201(a)(1), however, requires that there must be express authority in the power of attorney to amend or revoke by proxy. Authority, however, would still be lacking if the trust's terms were to prohibit such proxy activity. The Act, see §211(b)(3), further provides that "general authority" in a power of attorney "with respect to trusts" authorizes the agent to "exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal."

An *agent* is subject to fiduciary constraints in the exercise by proxy of a right to amend or revoke a trust; so is the *trustee* when it comes to acquiescing to such an exercise. To complicate matters, there is a "growing state legislative trend" to impose statutory tort liability for the "unreasonable refusal of a power of attorney." See Unif. Power of Attorney Act §120 and the accompanying commentary. The trustee's lot is not an easy one. But it gets worse. The Rest. (Third) of Property (Wills and Other Donative Transfers), see §19.8, cmt. d, would arm the agent-fiduciary with an "assumption" of authority to exercise a right of amendment or revocation, subject, however, to the limitations that the exercise must be "for the benefit of the donee to the same extent the …agent could make an effective transfer of similar owned property for the benefit of the donee." The "similar owned property" condition presumably refers to property owned outright *by the principal*, although this is not confirmed in the Reporter's Notes. Nor do the notes shed light on how directly the settlor needs to be "benefited" by the proxy exercise for the "benefit" condition to be satisfied. In any case, in the face of these possible limitations on the scope of the agent's authority the trustee is bound by the fiduciary principle not to blindly honor such proxy exercises. Luckily, this is all default law

that can up to a point be rationalized or negated altogether in the terms of the governing instruments.

Cross reference. Not only is the trustee-fiduciary exposed to potential tort liability when it comes to declining to honor an amendment or revocation by proxy, but also when it comes to investigating incident to a trust-to-trust transaction the bona fides of a trustee of another trust, particularly when the investigation should extend beyond the four corners of the other trust's certification. See §6.2.3 of *Loring and Rounds: A Trustee's Handbook* (2026), the relevant portion of which section is reproduced in the appendix below.

Appendix

§6.2.3 *Duty of Confidentiality Owed to Each Beneficiary by Trustee in Trustee's Dealings with Third Parties and/or the Other Beneficiaries* [from *Loring and Rounds: A Trustee's Handbook* (2026)]

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The "certification of trust" concept. A third party may not *knowingly* participate in a breach of trust. Even a non-transferee third party who knowingly participates in a breach of trust may not escape liability to the beneficiary for any loss occasioned by the breach of trust.[488] UTC §1012(b) purports to relieve prospective third-party service providers of the need to request and examine a copy of the entire trust instrument, which they would ordinarily want to do for purposes of ascertaining the trustees' powers and the propriety of their exercise. Instead, third parties may rely on a so-called certification of trust as provided in UTC §1013. Disclosure is limited to the following information: (1) that the trust exists and the date the trust instrument was executed; (2) the identity of the settlors; (3) the identity and address of the currently acting trustee; (4) the powers of the trustee; (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust; (6) the authority of the cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; (7) the trust's taxpayer identification number; and (8) the manner of taking title to trust property. On the other hand, a third party who has actual knowledge that the trustee is exceeding or improperly exercising the trustee's powers may not rely on such a certification.[489]

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[488] *See generally* §7.2.9 of this handbook.

[489] *See, e.g.*, Plains Com. Bank v. Beck, 986 N.W.2d 519 (S.D. 2023); *see generally* §7.2.9 of this handbook.

UTC §1013(h) provides that a third person "making a demand for the trust instrument in addition to certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument." As a practical matter, a third party, say, a financial institution, who demands to see, for whatever reason, a copy of the entire trust instrument is unlikely to be deterred from doing so by the ultra-remote prospect of being a defendant in a *very public* UTC §1013(h) action in tort initiated by the trustee *at trust expense*.[490] A trustee who would go down that road would run a serious risk of being held personally liable for squandering trust assets,[491] not to mention for frivolously compromising the privacy of the parties to the particular trust relationship. First, bad faith is hard to prove.[492] Second, damages are likely to be nominal. Third, should the trustee not have simply sought the services of a third party who was prepared to rely only on a certification of trust? Let's assume that such a provider could not be found. Why not then have resorted to a simple *contract-based* non-disclosure arrangement between the trustee and a third party who was unwilling to rely on a certification of trust alone but whose services were indispensable to a proper administration of the trust?

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[490] *See generally* Mel M. Justak & Anne-Marie Rhodes, *Maintaining Client Privacy in an Increasingly Public World*, 47 ACTEC L. J. 65 (Fall 2021).

[491] *See generally* §6.2.1.3 of this handbook.

[492] *See generally* §8.15.81 of this handbook.