Title

An action brought by a trust beneficiary to remedy a breach of fiduciary duty ought not to trigger the trust's in-terrorem clause, assuming there is one, unless brought in bad faith

Text

A court should not enforce a trust *in terrorem* clause if its enforcement under the particular facts and circumstances would frustrate settlor intent. Assuming that the settlor intended to impress a trust upon the property, not to make a gift to the "trustee," then it is inconsistent with the fiduciary principle for a court to apply a "no contest" clause to good-faith actions brought by beneficiaries to remedy breaches of trust, particularly intentional breaches of trust. The breach of the duty of loyalty particularly comes to mind. Accountability, after all, is the glue that holds the institution of the trust together. A truly unaccountable "trustee" is indistinguishable from the donee of a completed gift. Equity should not enforce an *in terrorem* clause if to do so would effectively void the very trust the clause was intended to protect. By "unaccountable" we mean free of fiduciary constraints. See, e.g., Salce v. Cardello, 301 A.3d 1031 (Conn. 2023).

All this having been said, a trust beneficiary who, in the face of an *in terrorem* clause, vexatiously and relentlessly challenges in the courts not the validity of the trust but the trustee's authority and/or performance may still risk having his or her equitable interest forfeited. Equity may look upon such behavior as an indirect attack on the trust itself. Recall the maxim that equity deals in substance rather than in form. Equity's maxims applicable in the trust context are taken up generally in §8.12 of *Loring and Rounds: A Trustee's Handbook* (2025), the relevant portions of which section are reproduced in the appendix below.

Consider the case of Barry v. Barry, 851 S.E.2d 119 (Ga. App. 2020). Deceased father's inter vivos trust instrument provided for equal terminal distributions to his three children. There was an associated pour-over will. Both instruments contained in-terrorem clauses. His only son (Thomas), a resident of Maine, was trustee of the trust and personal representative of the probate estate. A daughter (Cynthia), who was a practicing attorney and resident of Florida, filed a lawsuit seeking "enforcement" of the will and an "accounting" of Thomas' administration of the trust. Following an extensive evidentiary hearing, the trial court determined that Cynthia was not actually seeking enforcement of the will or an accounting of the trust, but instead was engaging in unwarranted vexatious litigation designed to contest the authority that had been granted to Thomas in the governing instruments. The trial court enforced the in-terrorem clause against Cynthia. The intermediate appellate court affirmed.

There was incontrovertible evidence that Thomas had done everything humanly possible to openly, competently, diplomatically, exhaustively, and expeditiously carry out the terms of the trust and the pour-over will, while every step of the way Cynthia had been doing everything she could to gum up the works. Thomas, for example attempted to hire two different local lawyers in

the father's small Georgia town for the purpose of offering the will for probate. Cynthia, however, had already contacted each and provided just enough information to preclude them from representing Thomas without creating a conflict of interest. She would retain neither. She would frustrate his efforts to effect distribution of Perth Mint Certificates by failing to establish a personal account to receive her share, this though Thomas had duly provided her with all the necessary paperwork. Thomas attempted to schedule a time for the three siblings to meet at the father's residence in order to divvy up the personal property. Cynthia refused to participate, and then insisted that Thomas failed to provide her with an inventory of the home's contents. "As stated by the trial court, '[Cynthia] was given an opportunity to literally walk through the house and get what she wanted from it. She waived any right to object by her overt inaction." One could go on and on. The trial court did just that. "Faced with this evidence, the trial court did not err in concluding that Cynthia, at least indirectly, contested the validity of the provisions of the Trust that named Thomas trustee and granted him the authority to value and divide the trust. Because its finding in this regard are supported by the record, the court did not err by holding that Cynthia invoked the in terrorem clause."

Appendix

§8.12 English Equity; Equity's Maxims; Where the Trust Is Recognized Outside the United States [from *Loring and Rounds: A Trustee's Handbook* (2025)]

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Maxims. Equity is also an application of maxims that were formulated in decisions of England's chancery courts. These maxims are as relevant today as they were when separate courts of law and equity were the norm.[17] Equity's maxims have many jurisprudential functions, one critical function being to sinew the equitable principles that regulate the law of trusts. A court that is saddled with sorting out the rights, duties, and obligations of the parties to a particular trust relationship that fails to appreciate this sinewing function risks crafting a decision that is doctrinally incomplete at best, incoherent at worst. That the drafters of the UTC sensibly elected not to codify, partially codify, or otherwise mess with equity-maxim jurisprudence has, however, perversely rendered, as a practical matter, this still vital corner of the Anglo-American legal tradition, for all intents and purposes, invisible. What follows is a list of the aforementioned maxims. Their applications in the trust context are addressed in the footnoting.

- Equity will not suffer a wrong to be without a remedy.[18]
- Equity follows the law.[19]

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[17]*See generally* Charles E. Rounds, Jr., *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 U. Tol. L. Rev. 673 (2011).

[18]Snell's Equity ¶5-02 through ¶5-04. Today, the letter of this maxim is certainly overly comprehensive as a matter of general Anglo-American equity jurisprudence. Not so, however, when it comes to fiduciary matters. The maxim, for example, is what undergirds the comprehensiveness of the regime of breach-of-trust remedies that equity makes available to trust beneficiaries, remedies that are the subject of Chapter 7 of this handbook.

[19]Snell's Equity ¶5-05 through ¶5-07.

- Where there is equal equity, the law shall prevail.[20]
- Where the equities are equal, the first in time shall prevail: *qui prior est tempore, potior est jure*.[21]
- He who seeks equity must do equity.[22]
- He who comes into equity must come with clean hands.[23] [The public policy that underpins the unclean-

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[20]The maxim's application is best exemplified by equity's forbearance when it comes to bona fide purchasers for value or BFPs, a topic that is covered in §§5.4.2, 8.3.2, and 8.15.63 of this handbook:

> Undoubtedly, the reason why the chancellors refused to give relief to a cestui que use against a bona fide purchaser derived from considerations of conscience. Equity refused to give a remedy unless there was an affirmative reason in point of justice for giving it. The cestui que use and the bona fide purchaser were equally innocent, and the chancellor refused to interpose. 3 Scott & Ascher §13.1.

Unjust enrichment doctrine, however, may trump the maxim's application when it comes to fraudulent conveyances/transfers in trust. See §8.15.99 of this handbook.

[21]Snell's Equity ¶5-08. Assume a trust beneficiary transfers for full value his equitable interest to *X*, a transferee in good faith, and then later purports to transfer for full value the same equitable interest to *Y*, who is also wholly innocent. *X* will generally prevail in equity, the transfer to him being the prior one. *See* §8.15.63 of this handbook (doctrine of bona fide purchase). *See generally* Rock Springs Land & Timber, Inc. v. Lore, 75 P.3d 614, 622 (Wyo. 2003).

[22]Snell's Equity ¶5-09 through ¶5.14. This maxim is closely related to the clean-hands maxim, but looks to the future rather than to the past. For an example of the application of the maxim "He who seeks equity must do equity," *see* §3.3 of this handbook (involuntary trustees), specifically the discussion of remedial constructive trusts. For other trust-related applications of the maxim, *see* 4 Scott & Ascher §§22.1.3 (trustee in default) (noting that "there is no reason why a trustee who has properly incurred an expense and made good any loss that has resulted from a breach of trust should not be entitled to indemnity"), 25.2 (liability of beneficiary to trust estate) (noting that "[t]he interest of a beneficiary who is under a liability to pay money into the trust is subject to a charge for the amount of the liability," that is "a person entitled to participate in a fund and also bound to contribute to the same fund cannot receive the benefit without discharging the obligation"). *See, e.g., In re* Stout Tr., No. 323535, 2015 Mich. App. LEXIS 2386 (Dec. 15, 2015) (unpublished) (trust beneficiaries may not retain overpayments; but should there remain a deficiency once overpayments have been redistributed, the trustee shall be personally liable for distributions that should have been made but in breach of trust were not).

[23]Snell's Equity ¶5-15. *See, e.g.*, Fumo Irrevocable Children's Tr., 2014 PA Super. 235, 104 A.3d 535 (Pa. Super. Ct. 2014) (U.S.); Overton v. Banister (1844) 3 Hare, 503; 8 Jur. 906; 67 Eng. Rep. 479; 28 Digest (Repl) 494, 118 (an infant who had fraudulently hid from the trustees his infancy, and in so doing received an improper distribution from the trust estate, unsuccessfully sued the trustees for a duplicate distribution upon his attaining the age of majority, his unclean hands having deprived him of the usual protections equity affords infants). Note, however, that a trustee's own misconduct ordinarily does not prevent the trustee from maintaining a suit against a cotrustee to remedy a breach of trust. This is because the purpose of the suit is not to benefit the trustee but to benefit the beneficiaries. *See generally* 4 Scott & Ascher §24.4.2. On the other hands, the clean hands doctrine may well mean that a trustee who commits a breach of trust in bad faith is entitled neither to contribution nor indemnity from his cotrustees. *See generally* 4 Scott & Ascher §24.32.3; Rest. (Third) of Trusts §102(2). *Cf*. Rest. (Third) of Restitution and Unjust Enrichment §63 (Equitable Disqualification (Unclean Hands)) ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability."). On the other hand, "[i]f a trustee from whom contribution is sought *also* acted in bad faith, contribution is required .... A bad-faith trustee may not hide behind another's unclean hands." Rest. (Third) of Trusts §102 cmt. d.

hands maxim is taken up in §5.5 of this handbook].

- Delay defeats equities.[24]
- Equality is equity.[25]
- Equity looks to the intent (substance) rather than to the form.[26]
- Equity looks on that as done which ought to be done.[27]

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[24]Or equity aids the vigilant and not the indolent: *vigilantibus, non dormientibus, jura subveniunt*. Snell's Equity ¶5-16 through ¶5-19. *See* §§3.6 of this handbook (in part discussing statutes of limitation and laches in contract and tort actions by the trustee and/or trust beneficiaries against third parties and in equitable actions by beneficiaries against third parties for participating with the trustee in breaches of trust), 7.1.3 of this handbook (trustee's defense that beneficiary failed to take timely action against trustee), 7.2.10 of this handbook (limitation of actions by beneficiary against trustee: (laches and statutes of limitation)), and 8.15.70 of this handbook (laches doctrine generally).

[25]Snell's Equity ¶5-20 through ¶5-23. In England, when a court is compelled to take over the work of the trustee of a discretionary trust because of the trustee's nonexecution, the court will be inclined to invoke the equality is equity maxim and effect an equal division. Lewin on Trusts ¶29-96. In the United States, the spirit of the maxim often manifests itself in the context of the apportionment of tax obligations (1) between and among classes of takers under a will, (2) between and among classes of trust beneficiaries, (3) between a trust and a probate estate, and (4) between a trust and other trusts. *See generally* §§8.15.62 (doctrine of equitable apportionment) and 8.20 of this handbook (tax apportionment within and without trust). The "equality is equity" maxim also informs tracing doctrine, particularly in cases where the assets of multiple trusts are wrongly commingled in a single fund. *See, e.g.*, *In re* Mich. Boiler & r Co., 171 B.R. 565 (Bankr. E.D. Mich. 1993).

[26]Snell's Equity ¶5-24. *See, e.g.*, Pizarro v. Reynoso, 10 Cal. App. 5th 172 (2017) ("It would elevate form over substance to reject the financing agreement as a violation of trust provisions when the transactions achieved an end permissible under the trust."); *In re* Fumo Irrevocable Children's Tr., 2014 PA Super. 235, 104 A.3d 535 (Pa. Super. Ct. 2014) ("Since paragraph 14 expressly proscribes Father from appointing himself as successor trustee, this provision implicitly prohibits the appointment of Father's alter egos to this position."). As employed by the Pennsylvania court in the *Fumo* case, the term *alter ego* is essentially a synonym for agent. The rule that equity will aid the defective exercise of a power of appointment, a specific application of the general maxim that equity looks to substance (intent) rather than to form, is taken up in §8.15.88 of this handbook. In Inglis v. Casselberry, 137 So. 3d 389 (Fla. Dist. Ct. App. 2013), the court, invoking the maxim that equity will not countenance an argument that elevates form over substance, ruled that the trustee had voluntarily submitted to the court's jurisdiction by participating in the litigation, such as by moving the court to grant requests materially beneficial to himself and the trust beneficiaries. Since equity looks to the intent rather than the form, "there is no need for any technical expression to be used in order to constitute a trust." Philip H. Pettit, Equity and the Law of Trusts 48 (12th ed. 2012). Conversely, a recitation of the word trust in a statute or elsewhere will not necessarily give rise to a trust "in the equity sense." *Id*. n.30. The Social Security trust fund, the subject of §9.9.3 of this handbook, is a prime example of a statutory regime that is a trust in name only. For another example of one see Bd. of Trs. of Tobacco Use Prevention & Control Found. v. Boyce, 941 N.E.2d 745 (Ohio 2010).

[27]Snell's Equity ¶5-25. For the maxim's application in the context of delayed trust terminations and distributions, *see* §8.2.3 of this handbook (termination and distribution issues). The doctrine of equitable conversion has been offered as another of the maxim's applications, a topic that is discussed in §8.15.44 of this handbook (equitable conversion doctrine) and §9.9.11 of this handbook (a contract to convey land is not a trust). *See, however*, 3 Scott & Ascher 13.1.1 (suggesting that the maxim "equity regards as done that which ought to be done" is a "fictitious" explanation of the equitable conversion doctrine). In the trust context, the equitable conversion of land that the trustees have been directed to sell is an application of the maxim "Equity sees as done that which ought to be done." The word "ought" is employed not in the moral sense but in the legal/equitable sense. The rights to the land having already been re-ordered by the terms of the trust,

- Equity imputes an intention to fulfill an obligation.[28]
- Equity acts *in personam*.[29]
- Equity will not aid a volunteer.[30]
- Equity will not suffer a trust to fail for want of a trustee.[31]
- Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made.[32]

equity sees to it that "the land will devolve as personalty irrespective of the precise time at which the sale takes place, thus preventing the devolution of beneficial interests from being altered by failure or delay on the part of the trustees in executing this duty to sell." Hanbury & Maudsley, Modern Equity 277 (10th ed. 1976). A direction to purchase also might implicate equitable conversion doctrine.

[28]Snell's Equity ¶5-26.

[29]Snell's Equity ¶5-27 through ¶5-28. A judgment in an action at law creates rights in the plaintiff, whereas a decree in equity imposes duties on the defendant. *See generally* 1 Scott on Trusts §1.

[30]Though a court of equity generally will not enforce a gratuitous promise to create a trust, it will enforce a present gratuitous declaration of, or transfer in, trust. 1 Scott & Ascher §3.3.2.

[31]2 Scott & Ascher §11.4. *See, however*, 2 Scott & Ascher §11.4.1 (noting that the maxim is inapplicable if the settlor intends for the trust to continue only so long as the designated trustee continues as trustee).

[32]Richard Francis, Maxims of Equity 44 (London, Bernard Lintot 1728) (maxim no. 12). This maxim is cited in support of the proposition that a court may not assess punitive damages against a trustee in an equitable action for breach of trust. *See generally* §7.2.3.2 of this handbook (punitive or exemplary damages). A legal action in contract or tort brought by a third party against the trustee would be another matter. Equity's disfavor of forfeitures also has been said to underpin the principle that *in terrorem* (no-contest) clauses are to be strictly construed. *See, e.g.*, Heslin v. Lenahan, 836 S.E.2d 793 (S.C. Ct. App. 2019); Sandstead-Corona v. Sandstead, 415 P.3d 310 (Colo. 2018), Ruby v. Ruby, 2012 Il App (1st) 103210, 973 N.E.2d 361 (Ill. App. Ct. 2012). *In terrorem* (no-contest) clauses are taken up generally in §5.5 of this handbook.