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Reviving the Dead Hand After Repeal of the Rule Against Perpetuities

By Sergio Pareja

Sergio Pareja, Reviving the Dead Hand After Repeal of the Rule Against Perpetuities, JOTWELL TRUSTS & ESTATES (April 25, 2016), <http://trustest.jotwell.com/>.

Reid Kress Weisbord, *Trust Term Extension*, 67 Fla. L. Rev. 73 (2015).

Over the past few decades, most states have repealed the Rule Against Perpetuities or significantly extended the time period during which trusts may continue to exist. As a result of these changes, estate planners frequently attempt to extend the terms of trusts that were originally created to comply with the Rule Against Perpetuities. They primarily do this through modification doctrines, such as equitable deviation.

In this article, Dean [Reid Kress Weisbord](#) argues against the use of modification doctrines to extend the duration of trusts beyond the Rule Against Perpetuities period that was in effect when the trust was created. In addition, he recommends that the drafters of the Uniform Trust Code (the “UTC”) modify the UTC to clarify that modification doctrines do not permit the addition of beneficiaries to the trust who were not identified in the original trust instrument.

In Part I of his article, Dean Weisbord discusses the reasons for opposition to “dead hand control” and the historic application of the Rule Against Perpetuities to minimize long-term dead hand control. In this section, he notes that there are three primary arguments against dead hand control. First, long-term dead hand control creates inflexible restrictions that fail to account for a change of circumstances. Second, the large number of beneficiaries that could exist if a trust were allowed to exist for many generations would create an unmanageable administrative task for the trustee. Third, long-term trusts contribute to the concentration of wealth in upper class families, worsening the gap between rich and poor in our society.

In Part II, Dean Weisbord explores the considerations that a trustee should weigh in deciding whether to file a petition to extend the duration of an irrevocable trust. These considerations include the settlor’s intent, whether the jurisdiction retroactively repealed or abrogated the Rule Against Perpetuities, the transfer tax consequences of extending the trust’s duration, whether there are fraudulent transfer law implications to extending the trust duration, and the trustee’s potential for a conflict of interest in seeking to extend the duration of the trust.

In Part III, Dean Weisbord examines the doctrine of equitable deviation and focuses on how it can be applied to extend the duration of an irrevocable trust. As a general matter, equitable deviation permits the modification of a trust if circumstances arise that the settlor did not anticipate and if modification will further the purpose of the

trust. The rationale for this doctrine is that, based on our knowledge of the settlor's intent, the settlor would have selected different trust terms if he or she had been aware of current circumstances.

The reasons that support using the doctrine of equitable deviation to extend the duration of a trust include the following: (1) a settlor may have intended to create a perpetual trust but failed to consider the possibility that the Rule Against Perpetuities would be repealed or abrogated, (2) there is a related doctrine that allows the modification of a trust to achieve the settlor's tax objectives, (3) a jurisdiction that retroactively repeals the Rule Against Perpetuities has in effect nullified the requirement that a trust have an ascertainable beneficiary, (4) the law should not discriminate against a settlor who intended to create a perpetual trust but created an irrevocable trust before repeal of the jurisdiction's Rule Against Perpetuities, and (5) the jurisdiction's repeal of the Rule Against Perpetuities shows a public policy favoring perpetual trusts.

The reasons against using the doctrine of equitable deviation to extend the duration of a trust include the following: (1) trust term extension hurts current beneficiaries by converting their remainder interests into lifetime interests, (2) equitable deviation exists to implement the settlor's intent as it existed when the trust was created but it might be used in this case to reconsider the settlor's original intent, (3) creating new future beneficiaries undermines the core trust law requirement of definite, ascertainable beneficiaries, and (4) there is too much risk of misinterpreting a deceased settlor's intent.

After analyzing the reasons for and against utilizing the doctrine of equitable deviation to extend the terms of a trust, Dean Weisbord concludes that the arguments against extension outweigh the reasons in favor. The strongest consideration appears to be that current beneficiaries are hurt by converting their remainder interests into lifetime interests.

In Part IV, Dean Weisbord analyzes broader issues with trust term extension and its potential for misuse by corporate fiduciaries. The main issue he sees is the financial incentive of corporate trustees to lobby for trust term extension. The existence of more long-term trusts means more business for corporate trust companies, and they have a huge financial incentive to advocate for repeal of the Rule Against Perpetuities. This repeal not only extends their business interests in current trusts, but it helps their state to attract additional trust business. As mentioned, Dean Weisbord concludes that the UTC should be modified to prohibit the addition of beneficiaries who were not in the original trust instrument.

Dean Weisbord has written an interesting and thought-provoking piece. I find the argument that trust modification to extend the duration of a trust hurts current beneficiaries to be particularly compelling. At a minimum, it seems that the only time when trust modification to extend trust duration should be allowed is when all the beneficiaries provide informed consent.