Title

Can an executed agreement purporting to settle nonjudicially a trustee's accounts be final and binding absent compliance with the material-purpose doctrine, a.k.a Claflin doctrine?

Text

An irrevocable fully discretionary inter vivos trust was established to fund the college educations of five named individuals. They were and are fully competent in all respects. Title to the remainder-in-corpus ultimately passes to a charity. In violation of the trust's material purposes, see §8.15.7 of *Loring and Rounds: A Trustee's Handbook* (2023), the trustee purchased with entrusted funds five expensive sports cars and then distributed a vehicle outright and free of trust to each individual. The individual beneficiaries and the charity executed a nonjudicial settlement agreement (hereinafter "agreement") approving the trustee's report (hereinafter "accountings"). The distributions were fully disclosed in the accounting documentation, affixed to which was a copy of the governing instrument. No individual has considered even applying to college. Is this agreement final and binding on all persons? The settlor is seeking to have the agreement judicially voided, the accounts re-opened, and the breach of trust judicially remedied.

Things do not look promising for our settlor. A perusal of UTC §813, which regulates the trustee's duty to inform and account, says nothing about accounting to nonbeneficiaries. Our settlor retained no beneficial interest and no powers. But wait. Am I barking up the wrong tree? This is a trust-modification issue, not a trust-accounting issue. The terms of the trust have been constructively modified via a nonjudicial settlement agreement approving the trustee's accountings. The UTC, specifically §411(a), provides that a trust may be judicially modified upon consent of the settlor and all the beneficiaries, even if the modification is inconsistent with a material purpose of the trust. In our fact pattern, the court has not been asked to ratify the agreement, nor was the settlor a party to it. Ergo, the settlement is void *ab initio*, unless there has been compliance with UTC §111, which regulates nonjudicial settlement agreements generally.

The settlor, via UTC §111(a), would have standing to judicially contest the agreement's enforceability in that he qualifies as an "interested person." For purposes of §111, an interested person is a person whose consent would be required in order to achieve a binding settlement were the settlement approved by the court. Under UTC §411(a), the material-purpose doctrine may only be judicially neutered if the beneficiaries *and the settlor* all consent. Under UTC § 111(c), however, all *nonjudicial* settlement agreements must comply with the material-purpose doctrine. This even captures an agreement to which the settlor is a party.

Assuming the settlor manages to get the agreement's voidance judicially confirmed, the court would have a follow-up duty, *sua sponte*, to remedy the trustee's breaches of trust and to compel the unjustly enriched beneficiaries to make restitution to the trust estate. UTC §111(d) proffers a nonexclusive list of matters resolvable via nonjudicial settlement agreement. The top two are "the interpretation and construction of the terms of the trust" and "the approval of a trustee's report or accounting." The takeaway: The material-purpose doctrine may not be neutered nonjudicially via agreement to approve/settle a trustee's accounts.

As to the UTC §1005(c) five-year statute of ultimate repose applicable to beneficiary-brought breach-of-trust actions. First, our settlor was not a beneficiary. Second, as trustee's disposition of the automobiles constituted a fraud on the trustee's special fiduciary powers, the statute of repose would have been unenforceable as against our settlor in any case, the trustee's hands being unclean. Fraud on a special fiduciary power is a subject of §8.15.26 of *Loring and Rounds: A Trustee's Handbook* (2023), which section is reproduced in appendix below. Handbook available for purchase at Loring and Rounds: A Trustee's Handbook, 2023 Edition | Wolters Kluwer Legal & Regulatory].

Appendix

§8.15.26 *Fraud on a Special Power Doctrine* [from *Loring and Rounds: A Trustee's Handbook* (2023), available for purchase at Loring and Rounds: A Trustee's Handbook, 2023 Edition | Wolters Kluwer Legal & Regulatory].

It is said that "the case law relating to fraud on a power stretches back as far as *Aleyn v. Belcher* in 1758, but the most recent leading case is the decision of the Privy Council in *Vatcher v. Paull* [1915]."[663]

Fiduciary discretionary powers in the trustee. "The notion of a fraud on a power itself rests on the fundamental juristic principle that any form of authority may only be exercised for the purpose conferred, and in accordance with its terms."[664] In this context, the term *fraud* has a particular meaning, namely, "it denotes an improper motive in which a power given for one purpose is improperly used for another purpose."[665] Where there has been a fraud on a power, the exercise that gave rise to the fraud is invalidated: "Public policy does not permit the creator of a trust to deprive the court of all control. Thus, the court will interpose if a trustee takes a bribe for making an investment. So also, the court will set aside a payment to a beneficiary if the trustee receives consideration for making the payment, even if the terms of the trust give the trustee broad discretion in distributing the trust property among various beneficiaries."[666]

The motive to benefit a nonobject of a power can be benign, *e.g.*, compassion. An example of a compassionate fraud on a power might be discretionary distributions made by a trustee for the direct or indirect benefit of orphaned children, the governing instrument having made provision only for their deceased parents.[667] We have already given an example of a not-so-benign fraud on a power, namely, a discretionary distribution to a permissible beneficiary that is conditioned on a bribe. A kickback of a certain percentage to the trustee also would not be a good idea.[668] Unauthorized social investing would be an example of a fraud on a discretionary administrative power.[669] Another example would be the trustee of a discretionary support trust who makes a distribution to a beneficiary while on actual or constructive notice that the beneficiary intends to gift away the property to a nonbeneficiary, a fact pattern that is discussed in §3.5.3.2(a) of this handbook. A discretionary fiduciary decanting to a new trust for the benefit of nonbeneficiaries, that is for the benefit of nonobjects of the trustee's discretionary power under the old trust,

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[663]Ryan Myint, *Trustee Powers: Honest Fraud?*, 63 Tr. & Est. L. & Tax J. 8 (Jan./Feb. 2005) (citing to Aleyn v. Belcher (1758) 1 Eden 132 (Eng.) and Vatcher v. Paull [1915] AC 372 (Eng.)). *See also* Kerry Ayers, *Fraud on a power revisited*, 16(10) STEP J. 54–55 (Nov. 2008).

[664]Wong v. Burt [2004] NZCA 174 (N.Z.).

[665]Wong v. Burt[[2004] NZCA 174 (N.Z.).

[666]3 Scott & Ascher §18.2.3 (When Trustee Acts Dishonestly). *See also* §6.1.3.4 of this handbook (unauthorized social investing having some of the characteristics of a fraud on an administrative power).

[667]*See, e.g.*, Wong v. Burt [2004] NZCA 174 (N.Z.).

[668]*See generally* Restatement (Third) of Trusts §87 cmt. c.

[669]*See generally* §6.1.3.4 of this handbook (indirect benefit accruing to the trustee).

also may implicate the fraud on a power doctrine.[670] Such discretionary fiduciary distributions in further trust (decanting) are discussed generally in §3.5.3.2(a) of this handbook as well.

Nonfiduciary special/limited/nongeneral powers of appointment. The expression *fraud on a power* applies not only to trustee discretions but also to nonfiduciary special/limited/nongeneral powers of appointment. "If, in making an appointment to a permissible appointee, the donee's purpose was to circumvent the donee's scope of authority by benefitting an impermissible appointee (a nonobject), the donee has acted impermissibly."[671] An appointment under such a power to a person who is not a permissible object of the power, *i.e.*, to an impermissible appointee or nonobject,[672] is invalid, unless there has been an equitable election.[673] That having been said, a valid appointment to a trustee who is nominally not a permissible object of the power does not implicate the fraud on a special power doctrine absent special facts, the trustee receiving no beneficial interest incident to the exercise in further trust.[674]

Contracts to appoint. The donee of a presently exercisable nongeneral power of appointment may not enter into an enforceable contract to exercise the power if the promised appointment confers a benefit on an impermissible appointee.[675] "A contract confers a benefit on an impermissible appointee if the consideration given by the promisee for the contract inures to the benefit of an impermissible appointee. The promised appointment inures to the benefit of an impermissible appointee whenever the property appointed pursuant to the terms of the contract would be an appointment in fraud of the power."[676] It should be noted that the section of the Restatement (Third) of Property (Wills and Other Donative Transfers) that is devoted to the intersection of powers of appointment and contract, namely §21.1, is miscaptioned. The caption reads "Enforceability of Contract to *Appoint* a Presently Exercisable Power." It should read contract to *exercise*, not to appoint. A power is exercised. It is the subject property that is appointed. In the trust context, that would generally be the property to which the trustee has the legal title. The identical error is repeated in the captioning of §21.2, which deals with contracts to exercise powers that are not presently exercisable.

Cross-references. The doctrine of equitable election is taken up in §8.15.82 of this handbook, powers of appointment generally in §8.1.1 of this handbook. The fraud on a special power doctrine is not to be confused with the rule that equity will aid the defective exercise of a power of appointment, a topic that is covered in §8.15.88 of this handbook. Usually worth exploring is whether a timely application of the doctrine of selective allocation (marshalling), which is discussed in §8.15.79 of this handbook, might serve to mitigate the adverse consequences of an impermissible appointment.[677] The failure altogether to exercise a nongeneral *nonfiduciary* power of appointment as a violation *by the donee* of the power-in-trust doctrine

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[670]*See, e.g.*, Kain v. Hutton [2008] 3 NZLR 589 (N.Z.) (finding that a particular exercise of a fiduciary power in further trust (decanting) was not a fraud on the power as the trustee and primary beneficiary of the new trust was a permissible beneficiary under the old trust).

[671]Re*statement (Third) of Property (Wills and Other Donative Transfers) §19.16 cmt. a. See* Fournier v. Sec'y of Exec. Office of Health & Hum. Servs., 170 N.E.3d 1159, 1168–1173 (Mass. 2021).

[672]*See* Restatement (Third) of Property (Wills and Other Donative Transfers) §17.2(d) (defining an impermissible appointee or nonobject as anyone who is not a permissible appointee).

[673]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.15 ("An appointment that benefits an impermissible appointee is ineffective.").

[674]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.15 cmt. e. *See generally* §8.1.2 of this handbook (exercises of powers of appointment in further trust).

[675]*See* Restatement (Third) of Property (Wills and Other Donative Transfers) §21.1. *Cf. In re* Tigani, No. 7339-ML, 2016 Del. Ch. LEXIS 26 (Del. Ch. Feb. 12, 2016).

[676]Restatement (Third) of Property (Wills and Other Donative Transfers) §21.1 cmt. f.

[677]*But see In re* McDowell Revocable Tr., 894 N.W.2d 810 (Neb. 2017) (a fraud-on-special-power case in which the court expressly declined to "judicially adopt the doctrine of selective allocation," thus dooming the power's exercise).

is taken up in §8.15.90 of this handbook.

Some common applications of the fraud on a special power doctrine. Here are some common applications of the fraud on a special power doctrine:

- "Appointment to permissible appointee conditioned on permissible appointee conferring benefit on impermissible appointee.
- Appointment to permissible appointee subject to a charge in favor of impermissible appointee.
- Appointment to permissible appointee in trust for the benefit of an impermissible appointee.
- Appointment to permissible appointee in consideration of benefit conferred upon or promised to impermissible appointee.
- Appointment primarily for the benefit of impermissible appointee-creditor of a permissible appointee."[678]

A hypothetical. An appointment the purpose of which is to circumvent the terms of the power, such as incident to an agreement between the donee and appointee that the appointee shall divert some or all of the appointed property to a nonobject of the power, is void.[679] Let us assume that under a trust *C* is given a limited/special/nongeneral power to appoint the trust property to one or more of a class of people consisting of *X*, *Y*, and *Z*. Let us assume that *C* appoints the property to *X* in consideration of *X*'s bestowing benefits on *C* or a third party. Under the fraud on a power doctrine, the exercise would be ineffective.[680] The reason? "[A]n element is injected into the motivation of the exercise of the power which is foreign to the intent of the donor in creating the power for the benefit of the objects."[681]

Quasi-antilapse. In the future, however, there may be some appointments to nonobjects that are enforceable. We have in mind the radical departure from the settled law proposed by the Restatement (Third) of Property (Wills and Other Donative Transfers), specifically §19.12(c).[682] In a triumph of faux logic over common sense, it would afford the donee of a nongeneral power of appointment default authority to exercise the power directly in favor of a descendant of a predeceasing permissible appointee, *even though the descendant himself was not a permissible appointee under the express terms of the power grant*.[683] The predeceasing appointee apparently need not even be a relative protected by some antilapse statute. Here is the logic: "If an antilapse statute can substitute the descendants of a deceased appointee, the donee of the power should be allowed to make a direct appointment to one or more descendants of a deceased permissible appointee."[684] It should be noted that the Restatement (Third) proposes that even when an antilapse statute fails to expressly address an appointment to a deceased appointee, its "purpose and policy" should still apply to such an appointment *as if the appointed property were owned by either the donor or the donee*.[685] For the policy debate over whether antilapse should be applied to equitable interests under trusts generally, the reader is referred to §8.15.55 of this handbook.

An exercise in further trust that ran afoul of the doctrine. In one case, the holder of a special/limited

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[678]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.16, Comments b through f.

[679]*See, e.g., In re* Carroll's Will, 8 N.E.2d 864 (N.Y. 1937).

[680]Restatement (Second) of Property (Wills and Other Donative Transfers) §20.2.

[681]Restatement (Second) of Property (Wills and Other Donative Transfers) §20.2 cmt. f.

[682]California has had such a statute since 1982. *See* Cal. Prob. Code §674 (Death of permissible appointee before exercise of special power).

[683]The deceased permissible appointee, however, would have to have survived the execution of the instrument that created the power.

[684]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.12 cmt. f.

[685]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.12(b).

testamentary power to appoint entrusted property to a defined class of permissible appointees exercised it in favor of another trust, namely the holder's own inter vivos trust.[686] The recipient trust had been revocable by the powerholder during the powerholder's lifetime and thus its property was subject to the claims of the powerholder's postmortem creditors. Though the successor beneficiary of the recipient trust qualified as a permissible appointee, the court voided the exercise as a fraud on the special/limited power in that a special/limited power of appointment may not be exercised in favor of the powerholder's creditors. To no avail the successor beneficiary of the recipient trust suggested to the court that there were two equitable doctrines that could rescue the power's exercise: The doctrine of selective allocation (see §8.15.79 of this handbook) and the doctrine of substantial compliance (see §8.15.53 of this handbook).

Certain exercises of nongeneral powers in further trust may be exempt from the doctrine's application. In the case of a nongeneral equitable power that may be exercised in further trust (Special Power #1), any grant of *another nongeneral power of appointment* incident to the exercise in further trust (Special Power #2) must be for the benefit of the permissible appointees of Special Power #1.[687] Under the Restatement (First) of Property, only a permissible appointee of Special Power #1 could be a grantee of Special Power #2.[688] The topic of exercising powers of appointment in further trust is taken up in §8.1.2 of this handbook.

Under the Restatement (Third) of Property (Wills and Other Donative Transfers), specifically §19.14, however, an impermissible appointee of Special Power #1 may be a grantee as well.[689] The impermissible appointee, however, holds Special Power #2 in "confidence" for the benefit of the permissible appointees of Special Power #1. Unexplained in the commentary and Reporter's Notes to §19.14 is whether the impermissible appointee assumes any fiduciary duties incident to his stewardship of Special Power #2. Here is the only guidance proffered, guidance that is fraught with ambiguity: "Because the donor has imposed confidence in the donee to select which permissible appointees to benefit by an appointment, the donee is authorized to grant the selection power to any other person."[690]

By definition, the original donee of an equitable nonfiduciary nongeneral power is unconstrained by the fiduciary principle. The status of the donee's surrogate, however, is another matter. Loaded words like "confidence" and "benefit" suggest that the donee's surrogate may well be holding the Special Power #2 itself in trust for the benefit of the Special Power #1's permissible appointees. If what we have here is essentially the conversion of an equitable nonfiduciary power into some kind of a fiduciary one, then there is nothing in the Restatement (Third) of Property about how the fiduciary duties of the surrogate are to be coordinated with those of the express trustee in whom the title to the trust property resides, or even what the scope of those duties might be. Recall the discussion in §3.2.6 of this handbook of the ambiguous status of the trust protector vis-à-vis the express trustee, at least in certain situations. In any case, presumably a breach of the surrogate's duty of confidence would constitute in the first instance and at minimum a fraud on Special Power #1.

Constructive receipt and assignment versus fraud. Assume a *permissible appointee* constructively receives appointive property incident to the exercise of a nongeneral power of appointment. Possession, however, remains back with the trustee. The permissible appointee is free to turn around and assign the legal property interest to an impermissible appointee without running afoul of the fraud on a special power doctrine. The express trustee is merely acting as the ministerial agent of the permissible appointee/assignor in honoring the assignment. The Restatement (Third) of Property is in accord, although its explanation is flawed: "The appointment directly to the impermissible appointee in this situation is effective, being treated

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[686]*See In re* McDowell Revocable Tr., 894 N.W.2d 810 (Neb. 2017).

[687]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.14.

[688]Restatement (First) of Property §359(2) ("The donee of a special power can effectively exercise it by creating in an object an interest for life and a special power to appoint among persons all of whom are objects of the original power, unless the donor manifests a contrary intent.").

[689]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.14 cmt. g(4).

[690]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.14 cmt. g(4).

for all purposes as an appointment first to the permissible appointee, followed by a transfer by the permissible appointee to the impermissible appointee."[691] The appointment itself is not to the impermissible appointee. Not even indirectly. The appointment of the legal title is to the permissible appointee. It is only mere possession that is the subject of a direct transfer from the express trustee to the impermissible appointee.

The fraud on a special power doctrine, however, would be implicated if, in making an appointment to a permissible appointee, the *donee's* purpose is "to circumvent the donee's scope of authority by benefiting an impermissible appointee (a nonobject)."[692] Admittedly, the distinction between a constructive receipt followed by assignment and a fraud on a special power is a subtle one.[693] Ultimately, it hinges on the subjective intent of the donee of the power, not the final destination of the appointive property itself.[694]

Postreceipt expenditures benefiting impermissible appointees. It is unlikely that the postreceipt expenditure of appointed property by a permissible appointee for the benefit of an impermissible appointee would trigger a retroactive invalidation of the power exercise. This would even be the case had the donee been given advance notice of the permissible appointee's postreceipt plans for the appointed property. Take a permissible appointee's application of appointed property towards the purchase price of a house in which his impermissible-appointee-grandchildren will be residing. Such an expenditure is unlikely to implicate the doctrine, absent special facts.[695] Most donees (and donors, as well) would subjectively view such a postreceipt application as benefiting the permissible appointee first and foremost.[696] "It is only when the evidence establishes that the donee's essential purpose was to confer direct benefits on impermissible appointees that the appointment fails …."[697]

The liability of a trustee who honors a fraudulent appointment. A trustee who transfers trust property to a permissible appointee for the benefit of an impermissible appointee such that the fraud on a special power doctrine is implicated incurs no liability as a consequence, unless the trustee knew or should have known of the *donee's* (powerholder's) fraud.[698] If the trustee knew or had reason to know of the donee's fraud, then the transfer would constitute a breach of trust.[699] In the case of such a breach of trust, the person entitled to the appointive assets may seek recovery from the trustee personally, as well as from the

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[691]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.15 cmt. f.

[692]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.16 cmt. a.

[693]Ascertaining the motive of the donee involves a subjective test. *See* Restatement (Third) of Property (Wills and Other Donative Transfers) §19.16 cmt. g. "Hence, only factors known to the donee can be considered in determining whether the donee was motivated in making the appointment to a permissible appointee to confer a benefit on an impermissible appointee." *Id*.

[694]The Restatement (Third) of Property (Wills and Other Donative Transfers) §19.16 cmt. g would seem to be in accord with this assertion:

Fulfillment of the intent of the donor that the property be devoted exclusively to the benefit of permissible appointees requires that an appointment be ineffective so far as it is motivated by the purpose of benefiting an impermissible appointee. That policy does not require the entire appointment to be invalidated in all cases. Circumstances may indicate that the desire to benefit impermissible appointees was the predominant motive for the appointment, that such desire affected only the amount of the appointment, or that such desire had no substantial effect. Ineffectiveness ensues only so far as necessary to overcome the impropriety of motive.

[695]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.16 cmt. g.

[696]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.16 cmt. g.

[697]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.16 cmt. g.

[698]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.17(b).

[699]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.17 cmt. b. *Cf.* Fournier v. Sec'y of Exec. Office of Health & Hum. Servs., 170 N.E.3d 1159, 1173 (Mass. 2021).

impermissible appointee who has been unjustly enriched.[700] Otherwise, the trustee would still have an obligation upon learning of the fraud "to notify the persons entitled to the appointive assets of their rights and to initiate action against the mistaken payee to recover the wrongfully dispensed assets."[701] When there is reasonable doubt as to whether there actually has been a fraud perpetrated on the special power, the trustee should petition the court for instructions and/or a declaratory judgment.[702]

Whether an impermissible appointee of a special power of appointment may transfer good title to a BFP. The rights of the good faith purchaser for value (BFP) of entrusted property is taken up generally in §8.15.63 of this handbook. As a general rule, an impermissible appointee of a special power of appointment may transfer to a BFP good title to the appointed property. The Restatement (Third) of Property's explanation of how the rule actually works in practice is inaccurate. Here is the description: "If an appointee of an ineffective appointment transfers the appointive assets to a purchaser for value, the purchaser is protected from liability, unless the purchaser knows or has reason to know that the appointment was a violation of the donee's scope of authority."[703] Absent special facts, the issue is not whether the purchaser incurs liability by taking the legal title from an impermissible appointee but whether equity will compel the purchaser to disgorge the property by means of a conveyance of title back to the trustee. This is particularly so in the case of a good faith transferee who furnishes no value in return. All he or she would need do is relinquish the title. The Restatement (Second) of Property had it right: The transfer to a BFP of title to impermissibly appointed property is generally *effective*.[704] "The equitable right to upset the transfer, like other equitable interests, cannot be asserted against a bona fide purchaser."[705]

Now, it is possible that the phrase "protected from liability" is an oblique and fragmentary reference to the unfortunate concept of "liability in restitution," which underpins the newly minted Restatement (Third) of Restitution and Unjust Enrichment: "A person who is unjustly enriched at the expense of another is subject to liability in restitution."[706] But where is the commentary linking the two Restatement (Third)s? The Restatement (First) of Restitution quite sensibly refrained from characterizing the generic obligation to make restitution as a liability.[707]

If the purchaser of the impermissibly appointed property may keep it, what then? The answer is that the person otherwise entitled to the appointive assets may recover from the impermissible appointee the greater of the following two amounts: (1) the consideration received for the property; (2) the value of such property.[708] Otherwise the impermissible appointee would be unjustly enriched.[709]

A general power to appoint only to the donee's creditors. "A general power under which the donee is free to appoint to himself or herself or to his or her estate has no impermissible appointee."[710] The Restatement (Third) of Property (Wills and Other Donative Transfers), however, proposes that a power to

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[700]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.17 cmt. b; §8.15.78 of this handbook (unjust enrichment).

[701]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.17 cmt. b.

[702]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.17 cmt. b; §8.42 of this handbook (actions for instructions and/or declaratory judgment).

[703]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.18.

[704]Restatement (Second) of Property (Wills and Other Donative Transfers) §20.4.

[705]Restatement (Second) of Property (Wills and Other Donative Transfers) §20.4 cmt. a.

[706]Restatement (Third) of Restitution and Unjust Enrichment §1.

[707]Restatement (First) of Restitution §1 ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

[708]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.18 cmt. b.

[709]*See generally* §8.15.78 of this handbook (unjust enrichment).

[710]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.15 cmt. b.

appoint only to the donee's creditors permits only such an appointment, *even though the power is general*.[711] Powers of appointment are covered generally in §8.1.1 of this handbook. The Restatement (Second) of Property adopted a similar posture.[712] In neither Restatement, however, is, or was, any light shed on the policy behind the proposition, in the Reporter's Notes, or anywhere else for that matter. The proposition just hangs there.

As the *primary* subjective motive behind most such creditor-focused general grants has to be to benefit the donee by indirection, not to bestow some gratuitous benefit on the donee's creditors, it is hard to see how a deviation from the express terms of the typical grant could somehow implicate the fraud on a power doctrine, particularly in light of the maxim: Equity looks to the intent rather than to the form.[713] On the other hand, in a given situation, an appointment other than to the creditors of the donee might well have been duly considered by the donor *not* to be in the best interests of the donee. The donee straitjacketed by education loans comes to mind. In that case, equity ought to honor the narrow focus and intent of the power grant. To do otherwise would be to abet a fraud on a *general* power.

[711]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.13(b) and §19.15 cmt. b.

[712]Restatement (Second) of Property (Wills and Other Donative Transfers) §19.1 cmt. b.

[713]*See generally* §8.12 of this handbook (equity's maxims).