Title

When the guardian ad litem "representing" the yet-to-come-into-existence beneficiaries of a trust is nonfeasant or malfeasant

Text

Does a court-appointed GAL in a trust matter owe fiduciary duties to the parties to the trust relationship who have yet to come into existence, e.g., the settlor's future great grandchildren (hereinafter the "non-existent beneficiaries")? A *sine qua non* of a fiduciary relationship is accountability. Can there ever be accountability on the part of a GAL when it comes to defending via advocacy the current contingent equitable property rights of non-existent beneficiaries when the court ignores or abets the GAL's nonfeasance or malfeasance? There is no principal-agency relationship if either the purported principal or the purported agent is non-existent. It follows that a GAL owes no agency-based fiduciary duties to non-existent beneficiaries. In this case, the GAL is agent of the court, and the court alone. As a consequence the GAL enjoys quasi-judicial immunity. In trust litigation courts should see to it that they receive the benefit of robust advocacy, particularly in defense of the current economic interests of otherwise unrepresented future persons. Though GAL fees are a trust expense, if the court is disinclined to hold the nonfeasant or malfeasant GAL accountable, there is little the trustee and/or the beneficiaries can do about it. The GAL is not their agent. Consider the following hypothetical.

> Settlor establishes irrevocable discretionary inter vivos trust for named individuals. Some are his children; some his collateral relatives; and some are non-relatives. Neither power nor beneficial interest is reserved. Trust's provisions are unambiguous: As soon as there is no longer a named individual alive, any remainder in corpus passes outright and free of trust to the issue of all the named individuals, *per stirpes*. Thirty years pass. Settlor finally gets around to giving governing instrument a serious read. Laches anyone? He persuades trustee to bring a UTC §415 trust-reformation action to void the contingent equitable property rights of the issue of all generations of those named individuals who were not the settlor's children. In other words, to have the nonlineal issue judicially written out of the ostensibly irrevocable trust. A GAL is appointed to defend via advocacy the contingent equitable property rights of the nonlineals. The GAL's advocacy is less than robust.

This is the gist of the fact pattern in *Matter of Beebe*, 2024 WL 857220 (Miss. Supreme. Ct.). The unambiguous terms of the trust were reformed by the trial court pursuant to Mississippi' version of UTC § 415, the court finding that the extrinsic evidence of a mistake in expressing the settlor's true intent at the time the trust was created to be clear and convincing. "…[T]he guardian ad litem appointed to represent minor nonlineal descendants testified that all of the parents of the children that he represented had joined in the relief requested …[by the settlor…]…" He "had written the parents of the minor children twice, and he largely received no response." He stated that "no parent had voiced objection to the petition." By his own admission the GAL thus took a "neutral position" in the matter. The reformation was affirmed on appeal.

The GAL should not have deferred to the parents of the nonlineals, the parents' equitable interests being in conflict with those of their children. Recall that the parents were entitled to discretionary principal distributions from trust. And what about the more remote nonlineals, e.g., any future grandchildren of the named individuals who were not the settlor's children? They apparently were on the radar screens of neither the Court nor the GAL. Virtual representation by the parents had been foreclosed, they having voiced no objection to the equitable property rights of their issue being judicially looted. The appellate court based its decision in part on the fact that the GAL himself had "voiced no objection to the

reformation." Whatever relevant factual evidence or legal reasoning, if any, that might have been supplied in support of GAL's acquiescence did not make it into the appellate court's opinion, such as why the laches defense had not been asserted on behalf of the nonlineals. Or had it been? Laches is taken up in §8.15.70 of *Loring and Rounds: A Trustee's Handbook* (2024), which section may be downloaded without charge below.

And as for the actions of the trustee who was the plaintiff in the reformation action. An incident of the trustee's fiduciary duty of undivided loyalty to *all the trust beneficiaries* is the duty to defend the trust, particularly, it would seem, a fully-funded irrevocable trust already in operation for 30+ years whose terms are facially reasonable and patently unambiguous. See generally §6.2.6 of *Handbook* (trustee's duty to defend). One of the settlor's sons testified that the trustee had a "responsibility" to petition the court to cut out the nonlineals. Longstanding fiduciary doctrine would suggest otherwise.

Appendix

§8.15.70 *Laches, Doctrine of* [from *Loring and Rounds: A Trustee's Handbook* (2024)]

> *Delay defeats equities, or, equity aids the vigilant and not the indolent:* vigilantibus, non dormientibus, jura subveniunt.[1245]

Laches is a delay that is sufficient to prevent a party from obtaining an equitable remedy, a remedy to which the party but for the delay would otherwise be entitled.[1246] In order to be fair to both sides, a court of equity is loath to entertain stale demands brought forth by those who have slept on their rights.[1247] "Delay will accordingly be fatal to a claim for equitable relief if there is evidence of an agreement by the claimant to abandon or release his right, or if it has resulted in the destruction or loss of evidence by which the claim might have been rebutted, or if the claim is to a business (for the claimant should not be allowed to wait and see if it prospers), or if the claimant has so acted as to induce the defendant to alter his position on the reasonable faith that the claim has been released or abandoned."[1248] In order to abandon an equitable claim, such as a claim by a trust beneficiary against the trustee for breach of trust, one or one's authorized surrogate must be of full age and legal capacity and have "full knowledge" of the claim.[1249] In equity's eyes, lack of notice, legal disability, or undue influence can be a "satisfactory explanation" for why a party has delayed in seeking enforcement of the claim.[1250] In equity, even ignorance of the law, *i.e.*, of one's legal or equitable rights, can be a "satisfactory explanation."[1251]

It is classic laches doctrine that a competent trust beneficiary would have a reasonable time after receiving actual notice of the trustee's breach of fiduciary duty to bring an equitable action against the trustee to remedy the breach.[1252] By actual notice we mean that the trustee must openly "repudiate" the trust, a concept that is discussed in §7.1.3 of this handbook.

An unreasonable delay is a delay that would make the granting of equitable relief unjust, that would

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[1245]Snell's Equity ¶5-16.

[1246]Snell's Equity ¶5-19.

[1247]Snell's Equity ¶5-16 (England); Rest. (Third) of Trusts §98 cmt. b (U.S.).

[1248]Snell's Equity ¶5-19.

[1249]Snell's Equity ¶5-19. *See also* §7.1.2 of this handbook (discussing what constitutes informed consent to a breach of trust).

[1250]Snell's Equity ¶5-19 (England); Rest. (Third) of Trusts §98 cmt. b(1) (excuses for delay) (U.S.).

[1251]Snell's Equity ¶5-19. *See also* §7.2.7 of this handbook (beneficiary consent, release, or ratification).

[1252]Rest. (Third) of Trusts §98 cmt. b.

unfairly prejudice the trustee.[1253] Classic laches doctrine has no fixed time periods.[1254] In many jurisdictions, however, there are now statutes of limitation in effect that do fix a time in which a competent beneficiary with actual notice of a breach of trust may bring an action against the trustee to compel the trustee to remedy the breach.[1255] These statutes tweak traditional laches doctrine; they do not do away with the applicability of its general principles, such as the actual-knowledge-of-legal-rights requirement.[1256] Again, the laches doctrine itself is not a creature of statute.[1257] "The defense of laches sounds in equity and, therefore, the applicability of the defense 'in a given case generally rests within the sound discretion of the trial justice.'"[1258] An ancient invention of the English court of chancery,[1259] laches doctrine is still honed and applied today in common law jurisdictions, both here and abroad.[1260] The doctrine's modern-day practical applications are considered in §§3.6, 7.1.3, and 7.2.10 of this handbook.

It should be noted that the state attorney general is not bound by the doctrine of laches when it comes to the enforcement of charitable trusts.[1261] Neither is the court. "The mere fact that the trustees of a charitable trust have long applied the trust property to purposes other than those designated by the settlor does not preclude the court from directing that the trust be administered according to its terms."[1262]

[1253]*See, e.g.*, Lindsay Petroleum Co. v. Hurd [1874] L.R. 5 P.C. 221 at 239, 240 (Eng.), *per* Lord Selborne L.C. *See generally* Rest. (Third) of Trusts §98 cmt. b(2) (delay prejudicial to trustee); §7.2.10 of this handbook (limitation of action by beneficiary against trustee (laches and statutes of limitation)); §7.1.3 of this handbook (defense of failure of beneficiary to take timely action against trustee).

[1254]*See* Rest. (Third) of Trusts §98 cmt. b.

[1255]*See generally* §7.2.10 of this handbook (limitation of action by beneficiary against trustee (laches and statutes of limitation) and §7.1.3 of this handbook (defense of failure of beneficiary to take timely action against trustee).

[1256]*See generally* Rest. (Third) of Restitution and Unjust Enrichment §70 cmt. f (discovery rule).

[1257]Rest. (Third) of Trusts §98 cmt. a.

[1258]Branson v. Louttit, 213 A.3d 417 (R.I. 2019) (quoting Hazard v. E. Hills, Inc., 45 A.3d 1262, 1270 (R.I. 2012)).

[1259]*See generally* Chapter 1 of this handbook (containing a list of all those who have occupied the office of Lord Chancellor from 1068 to the present).

[1260]*See generally* Rest. (Third) of Trusts §98 cmt. a ("The doctrine of laches evolved in English and American jurisdictions during times in which statutes of limitations did not apply to equitable causes of action. The doctrine ordinarily remains applicable today along with modern statutes of limitations …."); §8.12 of this handbook (listing some of the more common equity maxims, including in the footnoting examples of their present-day applications). In litigation in a New York court over the ownership of a medieval prayer book containing within its pages the partially obliterated but recoverable text of the long-lost Codex C of Archimedes (287 B.C.–212 B.C.), the "greatest mathematician of antiquity," the trial judge in her August 18, 1999 dismissal noted that had New York law rather than the French law of adverse possession applied, the case would still have been dismissed as the claimant would have been found guilty of laches. Reviel Netz & William Noel, The Archimedes Codex 135–136 (2007).

[1261]*See* Rest. (Third) of Trusts §98 cmt. a(2) (immunity of attorneys general).

[1262]5 Scott & Ascher §37.3.10.