Title

A trust's in terrorem clause is unenforceable as a matter of public policy to the extent that it would subvert fiduciary accountability

Text

In my April 20, 2022 JDSUPRA posting I wrote that when adjudicating trust disputes the equity courts are duty-bound to act, *sua sponte* if necessary, in vindication of the lawful intentions of settlors.
See https://www.jdsupra.com/legalnews/when-adjudicating-trust-disputes-the-eq-49523/. "There is… a tendency in the United States for a court that has supervision over the administration of a trust to enforce the trustee's duties even though the beneficiaries have not asked it to do so." Scott and Ascher on Trusts §24.4.4. "The notion, although rarely articulated, seems to be that it is the function of the court to see that the settlor's directions are carried out, even though no one complains to the court; that the court has administrative powers, not just judicial powers; and that once the court acquires jurisdiction over the administration of a trust, it is the court's function to see that the trust is administered in accordance with the settlor's directions." Id.

But what if the settlor's directions, as conveyed in the trust's terms, are that the court shall not exercise its "administrative" function in certain situations. Consider, for example, the situation of an expansive *in terrorem* clause in a trust that, if taken literally, would trigger a forfeiture of the interest of a beneficiary who sought to have the trustee correct errors that the trustee had made on a tax return. But for the beneficiary's assistance it is unlikely that the court would have discovered the error on its own. Nevertheless, a literal reading of the *in terrorem* clause would require that the beneficiary keep his concerns to himself if forfeiture is to be avoided. In *Salce v. Cardello*, 301 A.3d 1031 (Conn. 2023), https://scholar.google.com/scholar_case?case=15896612504321459477&hl=en&as_sdt=6&as_vis=1&oi=scholarr, the Connecticut court wrestled with such a situation. The subject trust's *in terrorem* clause provided that forfeiture would be triggered if a beneficiary "directly or indirectly" objected to "any action" taken or proposed to be taken in good faith by any trustee. It concluded that the particular facts were such that enforcement of the clause would violate Connecticut public policy: […[W]e nevertheless conclude that the testator's prerogative to dispose of his or her property as

he or she sees fit must yield to the Probate Court's exercise of its power to protect the assets of the estate, which would be impinged if a beneficiary risks disinheritance by bringing, in good faith, potential tax return errors to the attention of the Probate Court." Section 96(2) of the Restatement (Third) of Trusts is in accord. The beneficiary who renders such assistance to the court in good faith and with reasonable grounds ought not suffer forfeiture of his equitable interest, no matter what the *in terrorem* clause may say. As a practical matter, the court needs all the help that it can get in performing its fiduciary oversight function. As a doctrinal matter, fiduciary accountability is an essential element of the trust relationship. In *Salce* the validity of the trust itself was never an issue.