

Title

When it is too late to commence a proceeding to contest the validity of a trust that was revocable at the settlor's death: End-running the Uniform Trust Code's short statute of limitations

Text

Introduction. The UTC, specifically §604(a), provides that “a person may commence a judicial proceeding to contest the *validity* of a trust that was revocable at the settlor's death within the earlier of: (1) [three] years after the settlor's death; or (2) [120] days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.” Copy of the trust instrument encompasses not only the inception instrument but all amendments thereto.

Hypothetical. An heir-at-law of a deceased settlor of a revocable inter vivos trust is duly served a few weeks after the settlor's death with a copy of the trust instrument and a notice informing the heir-at-law of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding to contest the trust. The time allowed is 120 days. If the trust is declared void, a resulting trust is triggered, and the subject property becomes an asset of the settlor's probate estate, to which the settlor's heir-at-law is entitled. The settlor had died not ever having executed a will. On the 125th day the heir-at-law sends his lawyer a copy of the UTC §604(a)(2) notification along with a message that he wishes to contest the trust's validity. The heir-at-law now has reason to believe that the trust is the product of fraud, duress, or undue influence. Though the heir-at-law may be time-barred from initiating a validity contest, all is not necessarily lost.

The due-process card. There may be a due-process card that can be played, provided someone else had brought suit to contest the trust's validity within the period of the UTC's short statute of limitations. Our heir-at-law should not be time barred, at least under UTC §604(a)(2), from *participating* in the litigation as the litigation will sort out whether his equitable reversionary property rights are now possessory or have extinguished. That makes him a necessary party. *See, e.g., In re Hickey Trust*, 979 N.W.2d 558 (S.D. 2022). Procedural economic due process in the trust context is taken up generally in §5.3.1A.2 of *Loring and Rounds: A Trustee's Handbook* (2023). The relevant portion of the section is reproduced in the appendix below. The Handbook itself is available for purchase at [Loring and Rounds: A Trustee's Handbook, 2023 Edition | Wolters Kluwer Legal & Regulatory](#).

The unjust-enrichment card. It turns out that our heir-at-law is on his own. No one else is contesting the trust's validity. That does not necessarily mean, however, that he also is time barred from bringing an equitable *in personam* restitution action against the parties who were unjustifiably enriched by the fraud, duress, or undue influence. As the validity of the trust itself is not being contested, just the unjustifiable enrichment, at least that would be the argument, the equitable doctrine of laches, not UTC §604(a)(2), would determine whether it is too late to bring the restitution action. “In proceedings in equity, a person otherwise entitled to restitution is barred from recovery if he has failed to bring, or having brought has filed to prosecute, a suit for so long a time and under such circumstances that it would be inequitable to permit him now to prosecute the suit.” Restatement of Restitution §148 (1936).

Appendix

§5.3.1A.2 The Due Process Clause [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](#)]

Procedural economic due process in the trust context. *The Constitution's irreducible core of due process rights.* For a general articulation of procedural due process one need look no farther than *Mullane v. Central Hanover Bank & Trust Co.*: “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require the deprivation of life, liberty or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case.”⁵³

Disputes between and among the parties to a trust relationship. There are three ways the United States, or a state, can endeavor to re-order, or extinguish altogether, legal and equitable property rights incident to a trust relationship: via legislation, judicial action, and executive action. No matter the vehicle of state interference employed, those in possession of such property rights are entitled under the U.S. Constitution to notice and an opportunity for hearing in defense of those rights. State-interference with future as well as current equitable interests, with contingent as well as vested equitable interests, are subject to procedural economic due-process constraints, their judicial enforceability rendering them property, not mere expectancies. Possible limited exceptions to this general rule are any contingent equitable property interests that are incident to a revocable inter vivos trust and the law-client's vested equitable property interest that is incident to an IOLTA scheme.

Bottom line: A trust beneficiary *per se* possesses a constitutionally protected property interest incident to the trust relationship itself. In §§5.1, 5.3, and 5.3.1 of this handbook, we consider the myriad forms such equitable property interests can and may take. In §8.14 of this handbook we examine the office of the guardian ad litem, the concept of virtual representation, and other such instruments of surrogacy that have evolved or are evolving to protect the procedural economic due process rights of contingent trust beneficiaries who are yet to be conceived, yet to be determined, or otherwise incapable of receiving service of process.

⁵³339 U.S. 306, 313 (1950).