

BASELINES IN TRUST TERM EXTENSION

Alexander A. Boni-Saenz^{*}

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INTRODUCTION

Professor Reid Kress Weisbord’s article insightfully identifies what may be the next battleground in the rancorous war over the Rule Against Perpetuities: trust term extension.¹ Seeking to take advantage of the abolition of the Rule in many states, trustees of irrevocable trusts settled before such a change in law might petition the court to extend the term of the trusts they administer, perhaps indefinitely.² Professor Weisbord is rightly skeptical of this move, and he recommends a simple but elegant solution: prohibiting the use of modification doctrines to add beneficiaries not identified in the original trust document.³

This essay makes two related points and suggests an alternative solution for trust term extension. First, the legal analysis of trust term extension is highly sensitive to the baseline one selects, which, in turn, incorporates many policy preferences about dead hand control. Thus, the debate about trust term extension risks devolving into a debate about whether or not to abolish the Rule Against Perpetuities. Second, one’s view of trust term extension need not flow directly from one’s view of dead hand control, as the practical problems in divining settlor intent with regard to perpetual trusts will be shared by disputants on both sides of that debate. A reform addressed to these concerns would permit trust term extension, but require proponents of modification to provide clear and convincing evidence of settlor intent to create a perpetual trust.

I. BASELINES

The Article presents trust term extension as another incarnation of the classic tension between the rights of beneficiaries and the settlor’s wishes.⁴ It adds an interesting twist by pointing out another classic tension between

^{*} Assistant Professor of Law, Chicago-Kent College of Law.

¹ *Trust Term Extension*, 67 FLA. L. REV. 73 (2015). I will henceforth refer to this as “the Article.”

² *Id.* at 75–76.

³ *Id.* at 123.

⁴ *Id.* at 78.

beneficiaries and trustees, who have much to gain in trustee fees from trusts that will exist in perpetuity.⁵ Setting itself up as pro-beneficiary, the Article's first and primary argument against trust term extension highlights the harm to existing beneficiaries from the practice: it "would force residuary beneficiaries who would have received an outright distribution under the original instrument to accept a less valuable lifetime interest under the modified trust."⁶

Trust term extension certainly impairs existing beneficiaries' interests, but it would also provide concrete benefits to future potential beneficiaries who would be added to the trust. The loss experienced by existing beneficiaries' through the conversion of their interests into a different and less valuable form is their successor beneficiaries' gain. Thus, these groups have interests that are in direct conflict with each other. What makes this situation different from other successive beneficiary conflicts, however, is that these future beneficiaries do not exist (yet), and trustees thus owe them no duties.⁷ But this theoretical tension still reveals that "beneficiaries" are not necessarily a singular class, existing in opposition to either the settlor or the trustee. Some subset of potential beneficiaries might find common cause with settlors who want perpetual trusts or trustees who want to convert the trusts they administer into them.

Recognizing this theoretical conflict between classes of beneficiaries is significant because it exposes the implicit choice of baseline in the Article's legal analysis.⁸ The baseline used is the current state of affairs, or the trust instrument as written. The Article's second argument against trust term extension makes this explicit, in reasoning that the equitable deviation doctrine typically only considers what is contained in the finally executed trust instrument, rather than "entertain[ing] a reconsideration of the settlor's original intent."⁹ In this context, the trust instrument incorporates a definite end point as the trust must comply with the Rule Against Perpetuities. Thus, it also incorporates a policy preference in favor of restrictions on dead hand control embodied in some form by the Rule. A particular type of legal analysis follows. The beneficiaries identified in the trust document are presented as possessing the entitlement to trust assets in a certain form, and change in that status quo brings them harm.

5. *Id.* at 87–88.

6. *Id.* at 95–96.

7. The most relevant duty may be the duty of impartiality, requiring the trustee give "due regard to the beneficiaries' respective interests." UNIF. TRUST CODE § 803 (2000).

8. See Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 914 (1989) ("The starting points—or baselines—for legal argument help explain outcomes."); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 902–03 (1987) (analyzing how using the common law as a baseline affects one's constitutional analysis).

9. Weisbord, *supra* note 1, at 97.

This baseline is a reasonable one, but it is not the only one. What if, instead, we use the settlor's intent as the baseline?¹⁰ Some nontrivial portion of settlors would likely have desired to create perpetual or near-perpetual trusts.¹¹ Thus, the preferred trust of many settlors is one in which many generations of beneficiaries would be represented, instead of the truncated trust that was required by the more restrictive law at the time of the trust's creation. Under a baseline of settlor intent, and assuming the settlor wanted a perpetual trust, the entitlement to trust assets belongs not only to the beneficiaries identified in the trust document, but also to future beneficiaries who were not permitted into that document because of the Rule Against Perpetuities. In this framing, trust term extension becomes an important corrective. The trust reverts back to its ideal form as imagined by the settlor, restoring to all those beneficiaries benefits to which they were denied by laws restricting dead hand control to an arbitrary number of years.

Thus, the choice of baseline affects the legal analysis, and the choice of baseline likely reflects a set of normative priors about dead hand control.¹² This makes the discussion over trust term extension largely derivative of the debate over the Rule Against Perpetuities. This point occasionally bubbles to the surface, for instance in the Article's third argument against trust term extension: "modifying a trust to create new beneficial interests for future generations of the settlor's descendants undermines the trust law requirement of a definite, ascertainable beneficiary."¹³ The lack of an ascertainable beneficiary is a problem with legally permitting perpetual trusts at all rather than being a problem with allowing trust term extension *per se*.

10. This is also not an unreasonable starting point. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."). The Article does consider arguments that use a baseline of settlor intent. See Weisbord, *supra* note 1, at 94–95. However, after considering the arguments against trust term extension, it rather quickly concludes without further argument that "[o]n balance, the arguments against trust term extension would seem to greatly outweigh those in favor." *Id.* at 99.

11. See Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 362 (2005) (noting that settlors have taken their trust business to certain states that have abolished the Rule Against Perpetuities).

12. Part IV of the Article could be seen as an argument about which baseline to select, by seeing which trend, towards or away from dead hand control, is dominant. With significant movement in both directions, though—from the abolition of the Rule Against Perpetuities on the one hand to the evolution of various trust doctrines on the other—it is hard to establish a clear winner in this exercise.

13. Weisbord, *supra* note 1, at 97–98.

II. DIVINING SETTLOR INTENT

Must one's view of trust term extension flow directly from one's normative view of the Rule Against Perpetuities and dead hand control? Not necessarily. The Article's last argument against trust term extension presents a way out: "applying equitable deviation in this context would present a significant risk of misinterpreting the settlor's intent, particularly in cases where the settlor is deceased or incapacitated."¹⁴ In other words, it might be difficult to determine with certainty whether a settlor actually wanted a perpetual trust at all. The entity responsible for bringing the question before the court—the trustee—is seriously conflicted on that very issue. This argument emphasizes practical concerns about the implementation of trust term extensions.

The Article endorses a reform that would prohibit the addition of beneficiaries not identified in the original trust document through trust modification doctrines.¹⁵ This reform has much to recommend it, most notably its ease of implementation. It is also theoretically justified, if one has a normative preference for restrictions on dead hand control. It may not be appealing, however, to those who are either in favor of perpetuities reform or ambivalent about it. These groups may still not favor unrestricted trust term extension, given the practical difficulties of determining settlor intent, but they may be open to it.

A more modest reform might be attractive to all of these constituencies, creating a form of overlapping consensus. Instead of prohibiting trust term extension altogether, one could merely require clear and convincing evidence of settlor intent to create a perpetual trust before permitting trust term extension under modification doctrines. This heightened evidentiary standard would put the burden of proving settlor intent on the proponent of trust term extension. In addition, it is an approach that is consistent with how both the Uniform Probate Code and the Restatement deal with the analogous area of reformation of wills.¹⁶ The rationale that applies to reformation also applies here:

Tilting the risk of an erroneous factual determination in this fashion is appropriate because the party seeking reformation is seeking to establish that a donative document does not reflect the donor's intention. This tilt also deters a potential plaintiff from bringing a reformation suit on the basis of insubstantial evidence.¹⁷

14. *Id.* at 98–99.

15. *Id.* at 123.

16. *See* UNIF. PROB. CODE § 2-805 (2008, as amended 2010) (adopting a clear and convincing evidentiary standard for reformation of even unambiguous terms in wills); *see also* RESTATEMENT, *supra* note 10, at § 12.1 (2003).

17. *Id.* at § 12.1 cmt. e (2003).

The heightened evidentiary requirement in the case of trust term extension will prevent trust modifications that were not clearly desired by the settlor and also prevent trustees from depriving existing beneficiaries of rights without substantial evidence that the settlor would have wanted it that way. While this solution does not stop the expansion of perpetual trusts through trust modification doctrines completely, it likely does ensure that it will only occur when the settlor actually desired it.

CONCLUSION

If the question of trust term extension eventually does reach a court, as it may, the presiding judge's view of the case will likely be influenced by her underlying policy preferences about dead hand control. This, in turn, will likely determine which baselines she adopts for the legal analysis. However, Professor Weisbord's Article identifies a different set of practical concerns that may worry those of multiple ideological stripes. These concerns point to a particular reform: heightening evidentiary requirements for proponents of trust term extension to ensure that modification to make a trust perpetual in fact represents the settlor's intent.