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INTERNATIONAL LAW

Irrevocable Trusts Can (Sometimes) Be Revoked

Location is everything. Beware

By Ian Marsh and Michael Ben-Jacob

If you want to create a trust that is truly irrevocable and unamendable, be careful which jurisdiction you select. In most, if the terms of an irrevocable and unamendable trust forbid a distribution to the settlor or beneficiaries, there is little either the settlor or beneficiaries can do to get at those funds. But in a few states such as New York, Oklahoma and Wisconsin, as well as under English law and the law of many Commonwealth jurisdictions, there are circumstances when a seemingly irrevocable and unamendable trust can be revoked or amended.¹

Section 7-1.9 of New York's Estates, Powers and Trusts Law provides that if a trust settlor obtains the acknowledged, written consent of all those beneficially interested in an unamendable, irrevocable trust, he may amend or revoke it.² With these consents,

Three U.S. states permit irrevocable, unamendable trusts to be revoked in certain instances.

a settlor can exercise this authority to vest title to the trust in himself, accelerate the interest of the trust remainder beneficiaries, and otherwise alter the dispositive provisions of the trust instrument as originally contemplated.³

Of course, it's illogical to grant control to a settlor who parted with all interest in the trust property. Does the law

view the trust beneficiaries, through their granting consent, as amending or revoking the trust? If this were so, shouldn't the law simply permit the trust beneficiaries themselves to amend the trust or direct a distribution? No need to involve the settlor. This is the rule in New York governing trusts created wholly for the benefit of charities when it is no

longer economical to administer a trust. Only the state attorney general, trustee or beneficiaries may petition the court to terminate the trust, and distribute the trust assets to achieve the trust's charitable purposes.⁴

Jurisdictions outside the United States avoid the incongruity of permitting trust settlors to exercise authority over trusts in which they do not hold an interest. Under English law, for example, trusts are largely viewed as the equitable equivalent of gifts at common law. As such, settlors cannot enforce them. Even an action against the trustees claiming they administered the trust in a manner inconsistent with the reasonable expectations of the settlor must be brought, not by the settlor, but by one or more beneficiaries—as they are the donees (albeit only in equity) of the settlor's gift.

Indeed, *Saunders v. Vautier*⁵ long ago established one of the most cherished rules of English law, one no law student forgets: If all the beneficiaries of a trust are in existence and all are of full age and capacity, they can together direct the trustees to transfer the whole of the trust property to them or as they otherwise direct.

Of course, it is easy to avoid "the *Saunders* rule." After all, the entire beneficial class of a trust is rarely in existence until quite close to the end of the trust period. The rule is also readily defeated by adding a provision to the trust that requires some third party involvement to determine ultimate vesting.

The *Saunders* rule does not empower beneficiaries to dictate trustees' behavior. They cannot, for example, require trustees to retire in favor of others,⁶ or demand an investment policy contrary to the trust instrument.⁷

And, although they may direct the trustees to deliver trust property to trustees of a new trust that includes whatever provisions they want,⁸ the trust assets will necessarily pass through the beneficiaries' ownership with all that implies in terms of taxation, exposure to creditors and so on.

In practice, therefore, the *Saunders* rule will generally be circumvented. Nevertheless, it underpins much of English trust thinking, whose fundamental premise is that, from the point of settlement onwards, the trust property is the beneficiary's, and the settlor retains an interest only to the extent that he specifically reserves that interest in the trust instrument.

The *Saunders* rule also applies in most countries that derive their jurisprudence from English law. However, there are exceptions. The Bahamas have legislated to overrule it, and maintain the trust for so long as there is apparent reason to do so.⁹ Both Guernsey and Anguilla give settlors standing to apply to the court with respect to the execution, administration or enforcement of their trusts or in relation to the trusteeship.¹⁰

Still, the rule in *Saunders v. Vautier*—and all the intellectual baggage it carries—is alive and well throughout England and the rest of the Commonwealth. And that includes barring settlors from initiating a process through which the trust can be amended or revoked. ■

Endnotes

1. New York's Estates, Powers and Trusts Law, Section 7-1.9; 60 Oklahoma Statutes, Section 175-41; Wisconsin Statutes, Section 701.12.
2. The Oklahoma and Wisconsin statutes are similar. Under New York law, the consent of living contingent remaindermen is necessary, but not the consent of unborns. See, for example, *Matter of Roth*, 423 N.Y.S.2d 25 (1st Dept. 1979). The consent of a beneficiary who is a minor or otherwise under a disability is, however, necessary. *Rosner v. Caplow*, 456 N.Y.S.2d 50 (1st Dept. 1982). Some cases have held that the consent of a beneficiary who is a minor is unnecessary to amend a trust where the trust amendment is clearly for the benefit of the beneficiary. *Matter of Cord*, 58 N.Y.2d 539 (1983); *Haber v. Wachtel*, N.Y.L.J., Jan. 18, 2001, p. 28, col. 6 (Supreme Court, New York County).
3. Under Section 11-1.11 of New York's Estates, Powers and Trusts Law a fiduciary also has limited authority to amend a trust instrument, but only to accomplish certain tax benefits and only if the amendment has "no significant dispositive effect."
4. New York's Estates, Powers and Trusts Law, Section 8-1.1(c).
5. [1841] Cr. & Ph. 240 (1841).
6. *Re Brockbank* [1948] Ch. 206.
7. *Stephenson v Barclays Bank Trust Co Ltd.* [1975] 1 WLR 882.
8. *Ibid.*
9. Sections 86 and 87 of the Bahamian Trustee Act 1998.
10. Article 63 Trusts (Guernsey) Law 1989 and Section 58 of the Anguillan Trusts Ordinance 1994.

Under English law, settlors can't revoke or amend an irrevocable trust. But beneficiaries can.

Collectors' Spotlight



Max Ernst's "La conversion de feu" went for slightly more than \$1 million—more than triple its estimated value of about \$320,000.