§6.2.6 Duty to Defend the Trust Against Attack; Duty Not to Attack the Trust; Indirect Attacks (Construction Proceedings)

[from pages 605-607 of Loring and Rounds: A Trustee's Handbook (2012)]

The trustee's duty to defend the trust. The trustee has a duty to defend the trust. The trust may be attacked by those who have an economic interest in bringing about its cancellation or termination. It may be attacked by those who oppose its purposes. To fail to mount a vigorous defense is to thwart the intentions of the settlor and may be grounds for the trustee's removal. Moreover, the trustee would be liable to the beneficiaries for any injury occasioned by an unwarranted capitulation. The trustee would be liable to the beneficiaries for any injury occasioned by an unwarranted capitulation.

However, if it is clear to a reasonable person who has sought and obtained independent, competent legal advice that an attack is warranted or that resistance would be futile, then a defense should not be mounted. This exception would not apply when there is reasonable uncertainty as to the facts or the law. How there is reasonable uncertainty as to the facts or the law.

The trustee must do what is necessary within the bounds of law and reason to defend the trust and thus may retain counsel for that purpose and is entitled to have the costs of such representation absorbed by the trust. All reasonable appeals should be taken. The trustee who is unprepared to go the distance should seek to have the trusteeship transferred to someone who is. He probably should not have accepted the trust in the first place.

In the case of an action for instructions or declaratory judgment to clarify the terms of a trust and/or sort out the rights of its beneficiaries, 697 it would seem that the trustee may assume a neutral posture, 698 once he has assured himself that all parties, including the unborn and

⁶⁸⁹See generally Bogert, Trusts and Trustees §581. See also 2A Scott on Trusts §178.

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⁶⁹¹See generally Bogert, Trusts and Trustees §581. See also 2A Scott on Trusts §178.

⁶⁹²See generally Bogert, Trusts and Trustees §581. See also 2A Scott on Trusts §178.

⁶⁹³See generally Bogert, Trusts and Trustees §581. See also 2A Scott on Trusts §178. ⁶⁹⁴See generally Bogert, Trusts and Trustees §581. See also 2A Scott on Trusts §178.

⁶⁹⁵See generally Bogert, Trusts and Trustees §581. See also 2A Scott on Trusts §178. See generally 3 Scott & Ascher §18.1.2.4 (noting also that the trustee can properly "pay out of the trust estate the expenses of resisting an attempt by the beneficiaries to terminate the trust prematurely").

⁶⁹⁶Bogert, Trusts and Trustees §581; 2A Scott on Trusts §178. See P.H. Vartanian, Annot., Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest, 6 A.L.R.2d 147 (1949).

⁶⁹⁷See generally§8.42 of this handbook (complaints for instructions versus complaints for declaratory judgment).

⁶⁹⁸See generally§6.2.5 of this handbook (trustee's duty of impartiality); 3 Scott & Ascher §17.10. *Cf.* 3 Scott & Ascher §18.1.2.4 (noting that "if the trustee is reasonably in doubt about the terms of the trust or the scope of the trustee's duties or powers, the trustee can properly incur the expense of a judicial proceeding to construe the terms of the trust or for instructions").

unascertained, are properly represented.⁶⁹⁹ On the other hand, if the action is actually a vehicle for attacking the trust itself, *e.g.*, if there are allegations that the trust was the product of fraud, duress, or undue influence, then the trustee is duty bound to advocate for the trust's validity, ⁷⁰⁰ unless to do so would be self-evidently futile and/or unreasonable. Likewise, if the judgments that are ultimately issued by the trial court amount to a "total or partial destruction of the trust," then the trustee may have a fiduciary duty to appeal to a higher court if to do so would be reasonable and in the interests of the beneficiaries.⁷⁰¹ Unless an appeal would be self-evidently unreasonable and/or futile, then its costs may be borne by the trust.⁷⁰²

The trustee's duty not to attack the trust. The trustee being a fiduciary, he may not mount an attack against his own trust. 703 It has been said that the trustee, having accepted the trust, is "estopped" from then setting up its invalidity. 704 At minimum, such acts of betrayal are grounds for removal. This would include attacks on only some of the equitable interests. Take the mistake-based reformation suit. 705 Legal title to the property of a trust being in the trustee, it is likely that the trustee would have standing to bring such an action. Whether under equitable principles the trustee should do so is another matter. If the trustee is seeking to bring about a reordering of the equitable property interests at the expense of one or more of the beneficiaries designated within the four corners of the governing instrument, then his initiating the reformation action, and certainly his appealing of any lower court decision not to reform, would be difficult to square with his fiduciary duties of loyalty and impartiality, not to mention his duty to defend the trust. The restort at a nominal defendant in a mistake-based reformation action brought by someone else, the trustee should be wary of taking a position that amounts to a constructive attack on the equitable interests of any designated beneficiary.

 $^{699} See\ generally \S 6.2.5$ of this handbook (trustee's duty of impartiality); 3 Scott & Ascher $\S 17.10.$

⁷⁰⁰See generally 3 Scott & Ascher §17.10.

⁷⁰¹3 Scott & Ascher §17.10.

⁷⁰²See generally 3 Scott & Ascher §17.10.

⁷⁰³Seegenerally Bogert, Trusts and Trustees §581; 2A Scott on Trusts §178 ("Clearly, the trustee owes a duty to the beneficiaries not to destroy the trust"); P.H. Vartanian, Annot., Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest, 6 A.L.R.2d 147 (1949).

⁷⁰⁴See generally Bogert, Trusts and Trustees §581; 2A Scott on Trusts §178 ("Clearly, the trustee owes a duty to the beneficiaries not to destroy the trust"); P.H. Vartanian, Annot., *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147 (1949).

⁷⁰⁵See generally §8.15.22 of this handbook (reformation actions).

⁷⁰⁶See, e.g., Reid v. Temple Judea & Hebrew Union Coll. Jewish Inst. of Religion, 994 So. 2d 1146 (Fla. Ct. App. 2008).

⁷⁰⁷See§§6.1.3.6 of this handbook (breaches of the trustee's duty of loyalty that do not involve self-dealing) and 6.2.5 of this handbook (the trustee's duty of impartiality).