

# The Settlor's Intent and Trust Modification

Hitoshi Kimura  
(Kwansei Gakuin University)

The repeal or modification of the Rule Against Perpetuities in a growing number of states is one of the most conspicuous trends in trust law in the United States. It is important to note that although the movement to abolish the Rule Against Perpetuities and the corresponding rise of the perpetual trust reflect tax minimization strategies, the rationale of the Rule itself has been under serious attack.

Traditional rules concerning trust modification and termination have been relaxed under the Uniform Trust Code and the Restatement (Third) of Trusts. This was done in order to cope with the problems resulting from changed circumstances and the risks of inadequacies in trust design which are exacerbated by the trend to use trusts of long or indefinite duration. However, it should be noted that the reasons underlying the liberalization of the rules of trust modification and termination are more fundamental: there is growing recognition that a trust must serve the interests of its beneficiaries. Moreover, there is also growing recognition that greater flexibility in the trust is more likely to aid than to undermine the settlor's intent.

Both the UTC and the Third Restatement have taken a number of steps toward accommodating the interests of beneficiaries when those interests will not be served by strict adherence to the settlor's intent as set forth in the terms of the trust. Although the UTC seems to adhere to the *Clafin* doctrine, the Third Restatement relaxes the material purpose limitation on the ability of beneficiaries to modify a trust. Both dispositive and administrative terms of a trust may be modified by court

approval in cases of unanticipated circumstances. The administrative terms of a noncharitable trust may be modified under the *cy pres* doctrine or under the requirement that a trust must be for the benefit of its beneficiaries.

Given the increasingly common use of perpetual trusts, trustee removal involves a similar tension between the intent of the settlor and the interests of the beneficiary to that of trust termination and modification. The grounds for changing the trustee have expanded under the UTC and there is an argument that removal or replacement of a corporate trustee should be allowed when it does not interfere with the material purpose of a trust.

Although Japanese trust law does not allow perpetual trusts, this Article argues that the rules of trust modification and trustee removal in Japan need greater flexibility to allow courts to adapt long-term trusts to reflect changed circumstances and better serve beneficiaries' interests.

In particular, it should be made clear that courts may modify the distributive as well as administrative terms of a trust. It should be recognized that administrative terms may be modified so that the trust and its terms serve the interests of its beneficiaries even if the settlor anticipated changed circumstances. In trustee removal cases, courts should take the purpose of the trust, the character of the trustee as well as the best interest of the beneficiaries into consideration in deciding whether the trustee should be removed or replaced. I also contend that if a trustee knows or should know of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to take appropriate steps to modify the terms of the trust.

Given the prospect of more frequent use of long-term trusts and the growing complexity of modern society, liberalization of the rules of trust modification and trustee removal is imperative to accommodate the interests of beneficiaries without frustrating the settlor's intent.