UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT (1991)

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RICHARD V. WELLMAN, University of Georgia, School of Law, Athens GA 30602, *Chairman*
FLORENCE NELSON CRISP, P.O. Box 7146, Greenville, NC 27835
RICHARD E. FORD, 203 W. Randolph Street, Lewisburg, WV 24901
CLARKE A. GRAVEL, P.O. Box 1049, Burlington, VT 05402
JOHN H. LANGBEIN, Yale Law School, New Haven, CT 06520
ROBERT A. STEIN, University of Minnesota, School of Law, Minneapolis, MN 55455
OGLESBY H. YOUNG, 8th Floor, 520 S.W. Yamhill Street, Portland, OR 97204
LAWRENCE A. WAGGONER, University of Michigan Law School, Ann Arbor, MI 48109-1215, *Reporter*

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Advisor to Drafting Committee

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ROBERT A. STEIN, University of Minnesota, School of Law, Minneapolis, MN 55455

American Bar Association Representatives:

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RICHARD V. WELLMAN, University of Georgia School of Law, Athens, GA 30602

Director of Research and Chief Reporter:

LAWRENCE W. WAGGONER, University of Michigan Law School, Ann Arbor, MI 48109-1215

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UNIFORM LAW COMMISSION
111 North Wabash Ave., Suite 1010
Chicago, Illinois 60602
(312) 450-6600
www.uniformlaws.org

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UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT (1991)

Prefatory Note

The Uniform Testamentary Additions to Trusts Act (UTATA) was first promulgated in 1960 and was incorporated into the Uniform Probate Code of 1969 as Section 2-511. The UTATA or substantially similar legislation has been enacted in the District of Columbia and nearly all of the states.

The 1960 version of the UTATA clarified the law with respect to the validity of so-called pour-over devises or bequests to a receptacle trust. The validity of a pour-over devise or bequest was then in doubt because of the general requirement that the ultimate beneficiaries of a testator's estate can only be validly designated in a document executed in accordance with the special statutory formalities for a validly executed will. The ultimate beneficiaries of a pour-over devise or bequest are not designated in the testator's validly executed will, but in the receptacle trust document, which in most cases is a document that is not executed in accordance with those special formalities. To be sure, if the trust document was in existence when the will was executed, most courts utilized the common-law doctrine of incorporation by reference to validate the pour-over devise or bequest. But that doctrine was not wholly satisfactory. By incorporating the terms of the inter-vivos trust into the will, the doctrine theoretically led to two trusts -- one, the inter-vivos trust containing the property transferred to the trust during the testator's lifetime; and the other, a testamentary trust governed by the incorporated terms of the inter-vivos trust and containing the property covered by the "pour-over" devise or bequest. The doctrine was also incapable of curing cases in which the testator amended the receptacle trust after executing the will, because that doctrine does not allow incorporation of the terms of the post-execution amendment. Eventually, a few courts held that a pour-over devise or bequest to a subsequently amended receptacle trust was valid under a different common-law doctrine, the doctrine of independent significance. The courts held that the post-execution amendment had independent significance; the amendment not only purported to control the ultimate disposition of the poured-over assets, but also of the assets that had been transferred to the receptacle trust during the testator's lifetime. By this time, however, it had come to be generally thought that the cleanest and most reliable way of dealing with the pour-over problem was through enabling legislation -- hence the promulgation of UTATA in 1960 and its widespread enactment throughout the country.

In general, the 1960 version of the UTATA validated pour-over devises and bequests to receptacle trusts whether or not the receptacle trust was amended after the will was executed, as long as the terms of the receptacle trust were set forth in a written instrument executed before or concurrently with the execution of the testator's will. It also avoided the two-trust problem by providing that the poured-over assets become part of the inter-vivos receptacle trust.

This 1991 version of the UTATA originated in the revisions of Article II of the Uniform Probate Code that were approved in 1990. These revisions increase the intent-effectuating characteristics of the original Act. Section 2-511 of the revised Uniform Probate Code and the 1991 revision of the UTATA make the following intent-effectuating improvements: they make

it clear that the receptacle "trust" need not have been established (funded with a trust res) during the testator's lifetime, but can be established (funded with a res) by the devise itself; allow the trust terms to be set forth in a written instrument executed after as well as before or concurrently with the execution of the will; require the devised property to be administered in accordance with the terms of the trust as amended after as well as before the testator's death, unless the testator's will provides otherwise; and allow the testator's will to provide that the devise is not to lapse even if the trust is revoked or terminated before the testator's death.

This 1991 version of the UTATA is appropriate for enactment in states that have not enacted Section 2-511 of the Uniform Probate Code as revised in 1990.

UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT (1991)

SECTION 1. TESTAMENTARY ADDITIONS TO TRUSTS.

(a) A will may validly devise property to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator, by the testator and some other person, or by some other person, including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts, or (ii) at the testator's death by the testator's devise to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust. The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(b) Unless the testator's will provides otherwise, property devised to a trust described in subsection (a) is not held under a testamentary trust of the testator but it becomes a part of the trust to which it is devised, and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(c) Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise to lapse.

Comment

Purpose and Scope of 1991 Revisions. As revised, this section makes it clear that the "trust" need not have been established (funded with a trust res) during the decedent's lifetime, but

can be established (funded with a res) by the devise itself. The pre-1990 version probably contemplated this result and reasonably could be so interpreted (because of the phrase "regardless of the *existence* ... of the corpus of the trust"). Indeed, a few cases have expressly stated that statutory language like the pre-1990 version of this act authorizes pour-over devises to unfunded trusts. E.g., *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985); *Trosch v. Maryland Nat'l Bank*, 32 Md. App. 249, 359 A.2d 564 (1976). The authority of these pronouncements is problematic, however, because the trusts in these cases were so-called "unfunded" life-insurance trusts. An unfunded life-insurance trust is not a trust without a trust res; the trust res in an unfunded life-insurance trust is the contract right to the proceeds of the life-insurance policy conferred on the trustee by virtue of naming the trustee the beneficiary of the policy. See *Gordon v. Portland Trust Bank*, 201 Or. 648, 271 P.2d 653 (1954) ("[T]he [trustee as the] beneficiary [of the policy] is the owner of a promise to pay the proceeds at the death of the insured ...."); *Gurnett v. Mutual Life Ins. Co.*, 356 Ill. 612, 191 N.E. 250 (1934). Thus, the term "unfunded life-insurance trust" does not refer to an unfunded trust, but to a funded trust that has not received *additional* funding. For further indication of the problematic nature of the idea that the pre-1990 version of this act permits pour-over devises to unfunded trusts, see *Estate of Daniels*, 665 P.2d 594 (Colo. 1983) (pour-over devise failed; before signing the trust instrument, the decedent was advised by counsel that the "mere signing of the trust agreement would not activate it and that, before the trust could come into being, [the decedent] would have to fund it;" decedent then signed the trust agreement and returned it to counsel "to wait for further directions on it;" no further action was taken by the decedent prior to death; the decedent's will devised the residue of her estate to the trustee of the trust, but added that the residue should go elsewhere "if the trust created by said agreement is not in effect at my death.")

Additional revisions of this section are designed to remove obstacles to carrying out the decedent's intention that were contained in the pre-1990 version. These revisions allow the trust terms to be set forth in a written instrument executed after as well as before or concurrently with the execution of the will; require the devised property to be administered in accordance with the terms of the trust as amended after as well as before the decedent's death, even though the decedent's will does not so provide; and allow the decedent's will to provide that the devise is not to lapse even if the trust is revoked or terminated before the decedent's death.

SECTION 2. EFFECT ON EXISTING WILLS. This [act] applies to a will of a testator who dies after the effective date of this [act].

SECTION 3. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [act] among states enacting it.

SECTION 4. SHORT TITLE. This [act] may be cited as the Uniform Testamentary Additions to Trusts Act (1991).

SECTION 5. SEVERABILITY CLAUSE. If any provision of this [act] or its application is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end provisions of this [act] are severable.

SECTION 6. REPEAL. The following acts and parts of acts are repealed:

(a)

(b)

(c)

SECTION 7. EFFECTIVE DATE. This [act] takes effect _____.