<u>Title</u>

Scriveners of trust instruments, and trustees as well, should take note: The settlor of an inter vivos trust has been held to have exercised via her will a reserved right to amend the trust during her lifetime

<u>Text</u>

Under the settlor's original estate plan (revocable trust and associated pour-over will), upon settlor's death, all settlor's children were to receive equal beneficial interests under the trust. Under a later pour-over will one of the children was to take nothing under the will. The trust instrument had never been formally amended. The court, however, deemed the child's testamentary exclusion from receiving any interest in the probate estate also to constitute a constructive amendment of the trust, such that the child took no beneficial interest under the trust as well. Though the later and final will had not expressly stated an intention to exercise a reserved right to amend the trust, it had, noted the court, expressly referred to the property that would pour over into the trust. That being the case, the disinheritance in the later will would be "meaningless" unless it had exercised the reserved power to amend the trust inter vivos. *See* IMO Amelia Noel Living Trust, 2022 WL 3681269 (Del. Ch. Aug. 16, 2022), *aff'd*, 293 A.3d 1000 (Del. 2023) (hereinafter "Noel").

When, then, had the trust been amended, at the time the later will had been executed, i.e., signed by testator and witnesses, or at the time of the settlor's death? In Noel no guidance is afforded. The lot of the trustee is not an easy one. (If the amendment had kicked in at the time of execution, what if the will had been executed after the testator had died, as per §2-502 of the Uniform Probate Code?!)

If the amendment had kicked in at the time of death, essentially what we would have is a testamentary exercise of a general inter vivos power of appointment, which is what the settlor had reserved to herself via a retained inter vivos right to amend. Since time immemorial a will has spoken only at death however.

The Uniform Trust Code, which Delaware has not enacted, has thrown a bone to the trustee community in the face of such doctrinal chaos. Section 602(g) provides that a trustee who does not know that a trust has been amended "is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust has not been amended." What if the trustee should have known? Also, no mention is made of the rights, duties, and obligations of those who had received and consumed distributions made pursuant to the incorrect "assumption." They are certainly not BFPs. Scriveners of revocable trusts might give some thought to including in their boilerplate an unambiguously exclusive amending protocol. Literal compliance only. No inter vivos amending via testamentary instrument. And as to postmortem amending, that is the job of the testamentary power of appointment, and has been since time immemorial. The inter vivos and the testamentary need to stay in their respective lines.

Cross reference. See my June 2, 2014 JDSUPRA posting *The Confusion being engendered by the Uniform Trust Code's default trust-revocation methodologies (§602 (c))*at https://www.jdsupra.com/legalnews/the-confusion-being-engendered-by-the-un-97229/. Or see the catalogue of all my JDSUPRA postings below.