Title

Parsing the Uniform Trust Code in isolation without regard to the Uniform Probate Code and the Uniform Powers of Appointment Act is not advised

Text

Intro. The Uniform Trust Code (UTC) is a mere aggregation of tweaks to the corner of equity jurisprudence that long ago gave birth to and currently stewards the trust relationship, hereinafter "the background trust law." That being the case, I have cautioned in prior posts against parsing the UTC in isolation without regard to the background trust law. Here is one such past post: https://www.jdsupra.com/legalnews/equity-s-maxims-have-many-2669774/.

Today's posting cautions against parsing the UTC in isolation without regard to the myriad other aggregations of statutory tweaks to the background trust law, such as the Uniform Probate Code (UPC) and the Uniform Powers of Appointment Act (UPAA). Below are two examples of how parsing the UTC in isolation without regard to the UPC and UPAA could lead to a misdiagnosis of the rights, duties and obligations of the parties to a particular trust relationship, and/or of the rights of third parties to the entrusted property.

Extending antilapse to trust dispositive provisions. A controversial innovation is the expansion of antilapse to distributions of entrusted property. Before, antilapse applied only to distributions via will. The rules governing antilapse in the context of trusts are impossibly arcane. That they lurk not in the UTC but in the UPC, specifically §2-707, is a trap for the unwary trust practitioner whose search for the law governing the rights, duties, and obligations of the parties to a particular trust relationship misguidedly is limited to the UTC. See generally §8.15.5 of *Loring and Rounds: A Trustee's Handbook* (2025), the relevant portions of which section are reproduced in the appendix below.

Creditors of non-settlor holders of presently exercisable general inter vivos powers of appointment. Is property subject to a presently exercisable general inter vivos power of appointment, such as a power of revocation, accessible to the non-settlor power-holder's creditors? Yes, as per the model UTC, although textual authority is misleadingly oblique. UTC §505(a) (1) provides that while its settlor is alive, the property of a revocable trust is subject to the claims of

the settlor's creditors. Section 505(b)(1) provides that a non-settlor holder of a power of revocation is deemed the trust's settlor for creditor-accessibility purposes. The model UPAA is generally in accord. See UPAA §502(a)(1).

But wait. Four enacting jurisdictions have an upside-down version of model UPAA's §502, namely that property subject to a general inter vivos power in someone other than the settlor is reachable by the powerholder's creditors *only to the extent the power is actually exercised.* Four other enacting jurisdictions have a version of §502 that perversely goes so far as to exempt property subject to such a power from the claims of the non-settlor powerholder's creditors *even when the power is actually exercised*, provided the exercise is in favor of someone other than the powerholder. "This latter result would have been hard to imagine as a matter of decisional law." See Thomas P. Gallanis, *The Dark Side of Codifying U.S. Trust Law*, 49 ACTEC L.J. 283, 296 (2024).

Conclusion. Parsing the UTC in isolation without regard to the myriad other partial trust-law codifications is asking for misdiagnosis. So is parsing the *model* codifications rather than the versions actually in force and effect in the jurisdiction that has legal authority over the matter.

Appendix

§8.15.55 *Lapse; Antilapse [The Trust Application]* [from *Loring and Rounds: A Trustee's Handbook* (2025)]

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Antilapse in the trust context. Some courts by analogy are applying antilapse principles to will substitutes such as the revocable inter vivos trust.[983] The Restatement (Third) of Property (Wills and Other Donative Transfers) is fully in accord with these decisions.[984] As is the UPC. See §2-706. The UPC, see §2-707, actually goes farther, applying the antilapse concept to future interests in irrevocable trusts. In the case of a revocable trust, the predeceased beneficiary must be related to the settlor; in the case of the irrevocable trust, he or she need not be.

UPC §2-707 "provides that the share of a deceased class member passes to his or her surviving descendants (if any), unless the settlor has provided *unmistakably* to the contrary *and* provided for an effective alternate disposition of the share in

[983] *See, e.g., In re* Est. of Button, 490 P.2d 731 (Wash. 1971).
[984] Rest. (Third) of Property (Wills and Other Donative Transfers) §§5.5 cmt. p., 7.2 cmt. f.

question."[985] Mere words of survivorship would not be enough to defeat the antilapse statute.[986] Thus, if the terms of an irrevocable trust were *A to B, for C for life, and upon the death of C, the trust property shall pass outright and free of trust to the then living children of A*, the death with issue of a child of *A* after the trust was established but before the death of *C* might well trigger application of the UPC antilapse provisions upon the death of *C*.

The UPC's presumption against early vesting. Assume instead that upon the death of *C*, the property passes outright and free of trust not to the members of a class but to a named individual, say *X*. Assume, also, that *X* had been in existence at the time of entrustment but died before *C* (the equitable life beneficiary). Consistent with traditional early-vesting doctrine, title to the entrusted property passes at termination from *B* (the trustee) to the personal representative of the deceased *X*, *X* having taken a vested equitable remainder *ab initio*.[987] The subject of vested equitable interests incident to the trust relationship is discussed generally in §8.2.1 of this handbook.

UPC §2-707 replaces the classic early-vesting presumption with a late-vesting presumption, namely that "a future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date."[988] It then couples the late-vesting presumption with an ultra-complicated and hyper-technical antilapse regime. Under the regime, title to the entrusted property would pass at trust termination not to *X*'s personal representative but directly to *X*'s issue then alive.[989]

The Restatement (Third) of Property (Wills and Other Donative Transfers) shies away from endorsing some kind of equitable presumption comparable to the UPC's statutory one. The traditional "rule of construction is the rule best suited within the confines of the common-law tradition to approximate the likely preference of the transferor, and is supported by the constructional preference for the construction that does not disinherit a line of descent."[990] The Restatement (Third), however, does call upon the state legislatures to enact UPC §2-707, suggesting that it "provide[s] a more direct and efficient means of protecting equality among different lines of descent" than having the trust property augment the probate estate of a beneficiary who

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[985]2 Scott & Ascher §12.14.4.

[986]*See generally* Ruotolo v. Tietjen, 93 Conn. App. 432, 448, 890 A.2d 166, 176 (2006) (citing to holdings from various jurisdictions to the effect that words of survivorship alone are insufficient to defeat an antilapse statute). For an example of survivorship language that would effect a negation of antilapse in the trust context, *see* Tonn v. Est. of Sylvis, 412 P.3d 1055 (Mont. 2018).

[987]For another example of the application of traditional early-vesting doctrine, *see* Est. of Woodworth, 22 Cal. Rptr. 2d 676 (Ct. App. 1993).

[988]UPC §2-707(b).

[989]UPC §2-707(b)(1).

[990]Rest. (Third) of Property (Wills and Other Donative Transfers) §26.3 cmt. c.

predeceases the distribution date, as did Mrs. Jones.[991]

Likely preferences? Protecting equality among different lines of descent? One commentator was struck by the fact that §2-707 had made it to promulgation unsupported by any credible "empirical evidence indicating that most trust settlors want a remainderman to lose the remainder if he does not survive the life tenant, substituting his descendants for him if he leaves descendants."[992] In other words, the drafters appear to have been "proceeding purely on their own speculation."[993] The same might be said for the authors of the Restatement (Third) of Property.

The notional resulting trust. But what if there were no issue then living? Under the UPC antilapse regime, essentially those who *would have taken* the trust property had a resulting trust been imposed are deemed to be alternate remaindermen.[994] In other words, the resulting trust is only notional. There would be no actual imposition of a resulting trust, no actual passage of legal title to the trust property from *B* (the trustee) to *A*'s (the settlor's) personal representative. What traditionally would have been an equitable reversion has been constructively converted by statute into an equitable remainder. Time will tell whether the prevention of "cumbersome and costly distributions to and through the estate of deceased beneficiaries of future interests, who may have died long before the distribution date,"[995] is worth the inevitable unintended consequences of all this cumbersome, that is to say all this hyper-technical and convoluted, "law reform." That the evolution of the trust relationship over the centuries has been gradual rather than precipitous, and principles-based rather than code-based, in large part accounts for the relationship's protean genius.

The resulting trust is covered generally in §4.1.1.1 of this handbook. For an explanation of the vested equitable property interest, the reader is referred to §8.2.1.3 of this handbook.

The policy debate over applying antilapse principles to equitable interests under trusts. Professor Ascher has observed that these aspects of the UPC have proven more controversial than influential, although a Connecticut court has acknowledged

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[991]Rest. (Third) of Property (Wills and Other Donative Transfers) §26.3 cmt. h. *But see* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, Or More Like the Internal Revenue Code?*, 77 Minn. L. Rev. 639, 640 (1993) ("To be blunt, the 1990 version … [of the UPC]… is also quite pretentious.").

[992]Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148, 149–150 (1995).

[993]Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148, 149–150 (1995).

[994]UPC §2-707(d).

[995]UPC §2-707 cmt. (common-law background).

the influence of the UPC in deciding that mere words of survivorship *in a will* are insufficient to avoid application of Connecticut's antilapse statute, which has seen only minor substantive statutory changes since its enactment in 1821.[996] In 2008, Massachusetts enacted a substantially reworked version of UPC §2-707. It provides that "[i]f an instrument is silent on the requirement of survivorship, a future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date."[997]

Under the model UPC antilapse default provisions applicable to trusts certain equitable future interests that had traditionally been construed as vested would become subject to the condition precedent of survivorship.[998] This could, for example, cause the contingent equitable interests of some takers in default of survivorship to violate the Rule Against Perpetuities, at least in jurisdictions where the rule is still enforced.[999] What had once been safely vested would no longer be.[1000] "To prevent an injustice from resulting because of this, the Uniform Statutory Rule Against Perpetuities, which has a wait-and-see element, is incorporated into the Code as part 9."[1001] Still, the legislative conversion of one's vested equitable interest into an interest that is nontransmissible postmortem in the absence of an overt expression of intent on the part of the settlor that the interest be vested would seem to pose a problem under the U.S. Constitution.[1002] The U.S. Supreme Court in *Hodel v. Irving* has confirmed that the right to pass property postmortem is a property right that is covered by the Takings Clause.[1003] The topic of the retroactive application of new trust law to preexisting irrevocable trusts is covered generally in §8.15.71 of this handbook.

One must concede that it makes some sense to treat the will and the funded revocable trust similarly for antilapse purposes. Each, after all, is a device commonly employed to effect a gratuitous transfer of property. There is, however, a

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[996]Ruotolo v. Tietjen, 93 Conn. App. 432, 449–450, 890 A.2d 166, 177 (2006).

[997]Mass. Gen. Laws ch. 190B, §2-707(a).

[998]*See generally* §8.2.1.3 of this handbook (vested and contingent equitable interests).

[999]*See generally* §8.2.1 of this handbook (the Rule Against Perpetuities) and §8.2.1.9 of this handbook (abolishing the Rule Against Perpetuities).

[1000]*See generally* §8.2.1 of this handbook (the vesting concept).

[1001]UPC §2-707 cmt. *See generally* §8.2.1.7 of this handbook (perpetuities legislation).

[1002]The UPC's §2-707 antilapse regime is still merely a rule of construction. *See* UPC §2-701. In trusts like "income to … [*C*]… for life, remainder in corpuso … [*D*]… whether or not … [*D*]… survives … [*C*]…," or "income to … [*C*]… for life, remainder in corpus to … [*D*]… or [*D*'s]… estate," this section [§2-707] would not apply and, "should … [*D*]… predecease … [*C*]…, [*D*'s]… future interest would pass through … [*D*'s]… estate to … [*D*'s]… successors in interest, who would be entitled to possession or enjoyment at … [*C*'s]… death." UPC §2-707 cmt. In other words, D's future equitable interest would be validly vested *ab initio*. *See generally* §8.2.1 of this handbook (the concept of vesting).

[1003]481 U.S. 704, 104 S. Ct. 2076 (1987).

fundamental difference between the will and the funded revocable trust that suggests that one can go only so far in analogizing such trusts to wills.[1004] A will speaks at death. Its execution, *i.e.*, its signing, witnessing, etc., is a nonevent for property law purposes. No property interest passes to anyone at that time. In the case of a funded revocable inter vivos trusts, however, property rights do accrue at the point of execution to persons other than the settlor, assuming there is funding at that time and assuming the property is not to pass to the settlor's probate estate at his death.[1005] "The revocable trust, which is actually a fairly recent phenomenon, is not a 'will substitute' in any but the most nominal sense."[1006]

Consider a revocable inter vivos trust for the benefit of the settlor for his or her lifetime. The terms of the trust provide that upon the death of the settlor, the property passes outright and free of trust to John Jones. Under traditional default law, John Jones receives at the time of funding either a vested remainder subject to divestment[1007] or a vested (transmissible) contingent remainder.[1008] These are transmissible property interests.[1009] If John Jones dies before the settlor, these vested property rights would pass to John Jones's estate for disposition in accordance with the terms of his will. This has been the law for some time, the inheritability of vested remainders having been recognized in the time of Edward I, and their divisibility having been recognized with the Statute of Wills in 1540.[1010]

To be sure, all of this is default law that can be drafted around by knowledgeable counsel.[1011] Still, extending the concept of antilapse to revocable trusts such that property is automatically redirected to the issue of certain predeceased remaindermen runs somewhat counter to the principle that property should be as

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[1004]*See generally* §5.3.1 of this handbook (the nature of the property rights of the ultimate takers under a funded revocable inter vivos trust during the lifetime of the settlor).

[1005]*See generally* §8.30 of this handbook (the difference between a vested equitable remainder subject to divestment and a vested (transmissible) contingent equitable remainder).

[1006]Russell A. Willis, *Section 112: The Problem Child of the Uniform Trust Code*, 46 Est. Plan. 32, 39 (July 2019).

[1007]*See, e.g.*, Baldwin v. Branch, 888 So. 2d 482 (Ala. 2004) (categorizing the future interest as vested subject to divestment upon the settlor's exercising his right of revocation). *See* also Restatement (Second) of Property (Wills and Other Donative Transfers) §34.6, illus. 3.

[1008]*See, e.g.*, First Nat'l Bank of Bar Harbor v. Anthony, 557 A.2d 957 (Me. 1989) (categorizing the future interest as a vested contingent/transmissible equitable remainder, the condition precedent being the nonexercise of the settlor's right of revocation).

[1009]*See generally* Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148 (1995).

[1010]Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148 (1995).

[1011]Rest. (Third) of Property (Wills and Other Donative Transfers) §5.5 cmt. g.

freely alienable as possible.[1012]

While the benefits of synchronizing the will with the revocable trust, a type of will substitute, may well outweigh the attendant costs of eroding somewhat a predeceased remainderman's rights of alienation, that rationale cannot be applied to the *irrevocable* trust, the irrevocable trust not being a will substitute. It would seem then that a compelling case for the wholesale "projection of the antilapse idea into the area of … [equitable]… future interests"[1013] has yet to be made. In 1285, the English Parliament, via the Statute De Donis Conditionalibus, 13 Edw. I, c.1,[1014] authorized "a rather similar estate," either in possession or in remainder, namely the fee tail, an estate that had seen its last days on both sides of the Atlantic by the 1920s.[1015] "It is not too far off the mark to say that section 2-707 of the UPC is a piece of feudalism redivivus."[1016] For more on the case against extending the "antilapse idea" to irrevocable trusts, the reader is referred to Jesse Dukeminier.[1017]

Drafting around UPC §2-707. An article in an ACTEC publication proffers three model clauses that are intended, at least in part, to negate the applicability of UPC §2-707.[1018] Each clause takes a different approach to negation. The three approaches are labeled "no antilapse, "all-inclusive antilapse," and "directed antilapse." Here is the directed-antilapse model:

> *Upon my death I appoint [primary agent], and in the alternative [alternate agent], to serve as my agent in accommodating my intent in regards to any transfer made to any beneficiary predeceasing me or the occurrence of any designated event, without constraints imposed by any existing state statute, but strictly in accord with what my agent considers to be my intent in regards to distribution, but with the exception that my agent is not permitted to appoint to himself/herself, his/her estate, his/her creditors, or the creditors of his/her estate.*

[1012]*See generally* §8.15.40 of this handbook (the rule against direct restraints on alienation; the trust exception).

[1013]UPC §2-707 cmt.

[1014]The statute takes its name from its opening words, which were in Latin and which may be roughly translated as: "Concerning gifts of land made upon condition …."

[1015]*See* Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148, 166 (1995) ("After centuries of experience, the fee tail was found to deprive the head of family of power to make wise and flexible dispositions of family land, to interfere greatly with marketability of land, and to have numerous other disadvantages.").

[1016]Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148, 166 (1995). The estate in fee tail was an estate of inheritance the descent of which had been cut down (*talliatum* in Latin and *taille* in French) to the heirs of the body of the donee.

[1017]*The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148 (1995).

[1018]*See* Raymond C. O'Brien, *Proposing a Model Antilapse Clause*, 48 ACTEC L. J. 257 (2023).

It is self-evident that the term "agent" in the clause is employed metaphorically. Under classic principles of agency law an agency terminates upon the death of either the principal or the agent. See §9.9.2 of this handbook. What then are the pros and cons of the agency analogues that are obliquely, and a bit imperfectly, alluded to in the article that might be employed for effectuating on an ongoing basis the wishes of the deceased settlor?

There is the limited/special *nonfiduciary* power of appointment. See §8.1.1 of this handbook. The problem with this option is absence of meaningful accountability. As long as the powerholder refrains from committing a fraud on the special power, see §8.15.26 of this handbook, the holder owes no one, let alone the deceased settlor, any duties whatsoever. Likewise, with the appointment of a trust protector/director who, pursuant to some enforceable trust provision, owes no fiduciary duties to anyone. See §3.2.6 of this handbook. On the other hand, if, whether by default law or pursuant to the terms of the trust, the protector/director is saddled with fiduciary duties, to whom do those duties run? To the extent they run to the deceased settlor exclusively they are, as a practical matter, unenforceable. If the protector/director is saddled with a fiduciary duty to act solely in the interests of the beneficiaries as that duty is qualified by any lawful purpose limitations imposed by the trust's terms, then it is hard to see how a trust protectorship/directorship differs from a cotrusteeship. Would it not be preferable doctrinally and practically if the trust were simply to morph into a discretionary trust, see §3.5.3.2(a) of this handbook, in the event of a "lapse" that would otherwise be regulated by UPC §2-707? In other words, vest the trustee with a limited/special *fiduciary* power of appointment to select alternate takers from a pool specified in the trust's terms. See §8.15.26 of this handbook. It being a fiduciary power, eligible alternate takers perforce would have standing to bring an abuse-of-discretion action against the trustee should circumstances warrant. See §5.1 of this handbook.

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