Title

Incorporating into a trust instrument a nonjudicial mechanism for effectuating on an ongoing basis the wishes of the deceased settlor: The doctrinal and practical challenges

Text

There is much to commend in O'Brien, *Proposing a Model Antilapse Clause*, 48 ACTEC L. J. 257 (2023), particularly its flagging of the doctrinal and practical flaws in Uniform Probate Code §2-707, which would apply the concept of antilapse to equitable future interests under irrevocable trusts. An elaboration on these flaws may be found in §8.15.55 of *Loring and Rounds: A Trustee's Handbook* (2024), which section in its entirety has been uploaded for this posting. See below. I have long advocated that scriveners have a term in their trust instruments negating any application of the likes of UPC §2-707. The ACTEC article offers some suggestions as to how this might be accomplished. A minor quibble with the framing of the third suggestion is the subject of this posting. Here is the sample clause:

> *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.*

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. 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 *non-fiduciary* power of appointment. 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 the 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. 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 co-trusteeship. Would it not be preferable doctrinally and practically if the trust were simply to morph into a discretionary trust 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. 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.

Appendix

§8.15.55 *Lapse; Antilapse [The Trust Application]* (from *Loring and Rounds: A Trustee's Handbook* (2024)).

> *Antilapse statutes typically provide, as a rebuttable rule of construction, that devises to certain relatives who predecease the testator pass to specified substitute takers, usually the descendants of the predeceased legatee who survive the testator*— Restatement (Third) of Property (Wills & Don. Trans.)[967]

> *If the inter vivos donative document of transfer is a substitute for a will, by analogy to the case of a will, the result that would obtain if a will is involved may justifiably be adopted because of the similarity of the two situations*—Restatement (Third) of Property (Wills & Don. Trans.)[968]

Lapse defined. Lapse is the failure of any testamentary gift for want of a taker; ademption is the failure of a specific testamentary gift for want of the property designated. "[T]he common-law rule of lapse is predicated on the principle that a will transfers property at the testator's death, not when the will was executed, and on the principle that property cannot be transferred to a deceased individual. Under the rule of lapse, all devises are automatically and by law conditioned on survivorship of the testator. A devise to a devisee who predeceases the testator fails (lapses); the devised property does *not* pass to the devisee's estate, to be distributed according to the devisee's will or pass by intestate succession from the devisee."[969]

Antilapse in the wills context. In the event that a named legatee *under a will* predeceases the testator, there may well be an antilapse statute that applies which redirects the bequest directly to the legatee's issue, provided the legatee was related to the testator and provided the will contains no alternate dispoition.[970] (The statute would most likely apply to devises of real property as well[971]). Were there no such statute, the bequest or devise would fail, *i.e.*, it would "lapse."[972] The property then would pass to the residuary takers under the will, or to the testator's heirs at law if the residuary bequest itself had lapsed. In 1783, Massachusetts enacted the first antilapse statute.[973] Maryland enacted one in 1810.[974] England's antilapse statute was enacted in 1837.[975] Today, every U.S. state has some form of antilapse statute, except Louisiana.[976]

As noted, whether property bequeathed under a will lapses or is redirected pursuant to the terms of an antilapse statute, the property which is the subject of the lapsed bequest generally does *not* pass from the probate estate of the testator to the probate estate of the deceased legatee, regardless of what the will may

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

[968]Rest. (Third) of Property (Wills and Other Donative Transfers) §5.5, Reporter's Notes on cmt. p.

[969]UPC §2-603 cmt.

[970]Rest. (Third) of Property (Wills and Other Donative Transfers) §5.5. *See, e.g.*, UPC §2-603 (antilapse; deceased devisee; class gifts).

[971]Rest. (Third) of Property (Wills and Other Donative Transfers) §3.1 cmt. d.

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

[973]Ruotolo v. Tietjen, 93 Conn. App. 432, 437, 890 A.2d 166, 170 (2006).

[974]Ruotolo v. Tietjen, 93 Conn. App. 432, 437, 890 A.2d 166, 170 (2006).

[975]Ruotolo v. Tietjen, 93 Conn. App. 432, 437, 890 A.2d 166, 170 (2006).

[976]Ruotolo v. Tietjen, 93 Conn. App. 432, 437, 890 A.2d 166, 170 (2006).

say.[977] This is because a will speaks only at the death of the testator.[978] In other words, a legatee designation under a living person's will gives rise to, with a few contract-related exceptions, no property rights, only an expectancy. Accordingly, as a will cannot effect the passage of a property interest during the lifetime of the testator to a named legatee, all the more it cannot effect the passage of a property interest to a predeceased named legatee's executor, administrator, or personal representative, the one who merely stands in the shoes of the predeceased legatee.

Antilapse in the trust context. Some courts by analogy are applying antilapse principles to will substitutes such as the revocable inter vivos trust.[979] The Restatement (Third) of Property (Wills and Other Donative Transfers) is fully in accord with these decisions.[980] 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 question."[982] Mere words of survivorship would not be enough to defeat the antilapse statute.[983] 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*.[984] 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."[985] 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.[986]

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

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[977]Rest. (Third) of Property (Wills and Other Donative Transfers) §5.5 cmts. a, b.

[978]UPC §2-603 cmt.

[979]*See, e.g.*, *In re* Est. of Button, 490 P.2d 731 (Wash. 1971).

[980]Rest. (Third) of Property (Wills and Other Donative Transfers) §§5.5 cmt. p., 7.2 cmt. f.

[982]2 Scott & Ascher §12.14.4.

[983]*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).

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

[985]UPC §2-707(b).

[986]UPC §2-707(b)(1).

likely preference of the transferor, and is supported by the constructional preference for the construction that does not disinherit a line of descent."[987] 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 predeceases the distribution date, as did Mrs. Jones.[988]

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."[989] In other words, the drafters appear to have been "proceeding purely on their own speculation."[990] 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.[991] 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,"[992] 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 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.[993] 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."[994]

Under the model UPC antilapse default provisions applicable to trusts certain equitable future interests

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

[988]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.").

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

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

[991]UPC §2-707(d).

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

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

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

that had traditionally been construed as vested would become subject to the condition precedent of survivorship.[995] 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.[996] What had once been safely vested would no longer be.[997] "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."[998] 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.[999] 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.[1000] 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 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.[1001] 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.[1002] "The revocable trust, which is actually a fairly recent phenomenon, is not a 'will substitute' in any but the most nominal sense."[1003]

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

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

[996]*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).

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

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

[999]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).

[1000]481 U.S. 704, 104 S. Ct. 2076 (1987).

[1001]*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).

[1002]*See generally* §8.30 of this handbook (the difference between a vested equitable remainder subject to divestment and a vested (transmissible) contingent equitable remainder).

[1003]Russell A. Willis, *Section 112: The Problem Child of the Uniform Trust Code*, 46 Est. Plan. 32, 39 (July 2019).

subject to divestment[1004] or a vested (transmissible) contingent remainder.[1005] These are transmissible property interests.[1006] 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.[1007]

To be sure, all of this is default law that can be drafted around by knowledgeable counsel.[1008] 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 freely alienable as possible.[1009]

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"[1010] has yet to be made. In 1285, the English Parliament, via the Statute De Donis Conditionalibus, 13 Edw. I, c.1,[1011] 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.[1012] "It is not too far off the mark to say that section 2-707 of the UPC is a piece of feudalism redivivus."[1013] For more on the case against extending the "antilapse idea" to irrevocable trusts, the reader is referred to Jesse Dukeminier.[1014]

Applying antilapse to the exercise and nonexercise of powers of appointment. *The common law*. It has been traditional black-letter law that the exercise of an equitable testamentary power of appointment in

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[1004]*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.

[1005]*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).

[1006]*See generally* Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148 (1995).

[1007]Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148 (1995).

[1008]Rest. (Third) of Property (Wills and Other Donative Transfers) §5.5 cmt. g.

[1009]*See generally* §8.15.40 of this handbook (the rule against direct restraints on alienation; the trust exception).

[1010]UPC §2-707 cmt.

[1011]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 …."

[1012]*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.").

[1013]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.

[1014]*The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148 (1995).

favor of a permissible appointee who has predeceased the donee of the power is ineffective.[1015] As the appointee's interest in the property subject to the unexercised power was a mere expectancy *at the time of the appointee's death*, no property interest in the subject property, whether vested or contingent, passed at that time to the appointee's executor or administrator. It is only later when the donee of the power of appointment dies that the donee's will, the instrument of power exercise, speaks. When that time comes, it is too late for the predeceasing designated appointee to benefit economically from the power exercise, and thus too late as well for those who stand in his shoes. To recapitulate: One may not effectively exercise a testamentary power of appointment in favor of someone who is dead at the time of exercise. This has been the rule at least since 1748 when it was enunciated by Lord Hardwicke in the English case of *Oke v. Heath*.[1016]

Antilapse statutes that are applicable to exercises of powers of appointment. The model UPC's antilapse section, §2-603, cheered on by the Restatement (Third) of Property (Wills and Other Donative Transfers), "rescues" not only devises to predeceasing devisees but also exercises of testamentary powers of appointment in favor of certain predeceasing appointees.[1017] If the predeceasing appointee is a grandparent, a descendant of a grandparent, or a stepchild *of the donor of the power of appointment*, there is a substitute appointment in favor of that person's descendants. "Unless the language creating … [the]… power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, *whether or not the descendant is an object of the power*."[1018] Apparently, a provision in default of exercise alone would not suffice as an expression of intent to negate the default substitution. The section's Comment asserts without explanation that this radical departure from settled law is "a step long overdue."[1019]

The Restatement (Third) of Property is in full accord, and then some. It provides, for example, that even when a particular antilapse statute fails to expressly address appointments to deceased appointees, its "purpose and policy" should apply to such an appointment "as if the appointed property were owned by *either the donor or the donee*."[1020] But what if a deemed ownership by the donor of the power would bring about a result that is different from a deemed ownership by a donee of the power? Which assumption is applied? The Restatement fails to address such a conflict.

The Restatement would have the substituted takers "treated" as permissible appointees of the power.[1021] Such "treatment" could render the fraud on a special power doctrine inapplicable to an antilapse substitution who happened not to be a permissible appointee under the express terms of the power grant.[1022] The fraud on a special power doctrine is taken up generally in §8.15.26 of this handbook. For the public policy case against applying antilapse principles in the context of power of appointment exercises, the reader is referred to Charles E. Rounds, Jr., *Old Doctrine Misunderstood, New Doctrine Misconceived: Deconstructing the*

[1015]*See, e.g.*, MacBryde v. Burnett, 45 F. Supp. 451, 453–454 (D. Md. 1942) ("But it seems reasonable to suppose that the donor who did not permit the donee to make an effective appointment until the donee's death intended the donee to make an appointment only to persons who survived him.").

[1016]Oke v. Heath (1748) 1 Ves. Sen. 136 (Ch.), 27 Eng. Rep. 940.

[1017]*See generally* Rest. (Third) of Property (Wills and Other Donative Transfers) §19.12 (appointment to deceased appointee or permissible appointee's descendants; application of antilapse statute).

[1018]UPC §2-603(b)(5).

[1019]Massachusetts quite sensibly declined to enact this later version of UPC §2-603 with all its pretentious complexities and convolutions. Instead it dropped into the slot a pre-1990 version of the section that made no mention of exercises of powers of appointment.

[1020]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.12(b).

[1021]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.12(b).

[1022]*See* Rest. (Third) of Property (Wills and Other Donative Transfers) §19.12(c).

Newly-Minted Restatement (Third) of Property's Power of Appointment Sections.[1023]

The expired general power of appointment: The Restatement (Third) of Property muddles the interplay of lapse, resulting trust, and capture doctrine. If the holder of a general inter vivos power of appointment dies without having effectively exercised the power, the power expires.[1024] Likewise, if the holder of a general testamentary power of appointment fails to effectively exercise the power by will, the power expires at the holder's death. In either case, the gift-in-default clause in the granting instrument, if there is such a clause, controls the disposition of the unappointed property.[1025] (So also if a power expires by inter vivos disclaimer or release.[1026]) The time when a power expires "is almost invariably the death of the donee,"[1027] although one could certainly fashion a grant of a general power that would be capable of expiring before its donee had, such as upon the exhaustion of an intervening equitable estate *pur autre vie*. The concept of the estate *pur autre vie* is discussed generally in §8.15.64 of this handbook.

The Restatement (Third) of Property speaks in terms of a general power "lapsing," an unfortunate innovation.[1028] Its predecessors spoke in terms of a power "expiring,"[1029] which is less ambiguous in that the term lapse can mean "to pass to another through neglect or omission." As we note in §8.1.1 of this handbook, a power of appointment itself is never directly transmissible.

But what if the donor of an expired power had neglected in the granting instrument to provide for takers-in-default, or the instrument's gift-in-default clause was ineffective when the power expired? In that case, the unappointed property passes upon a resulting trust back to the donor if the donor is then living, or into the probate estate of the donor if the donor is not then living, but, again, not until all valid intervening equitable interests have themselves expired.[1030] Resulting trusts are covered generally in §4.1.1.1 of this handbook. *In a radical departure from settled doctrine, the Restatement (Third) of Property provides that if the donee "merely failed to exercise the power" the unappointed property is captured by the donee or the donee's estate*.[1031] There is no resulting trust. There is no antilapse.

A resulting trust, however, would still be imposed in the case of expiration by disclaimer or release,[1032] or upon the expiration by any means of a power of revocation, amendment, or withdrawal.[1033] Again, as we did in more detail in our discussion of ineffective exercises of general powers in §8.15.12 of this handbook, we question the logic of treating a power of "revocation, amendment, or withdrawal" differently from other "types" of general inter vivos power of appointment, whether for capture purposes generally or for any other purpose. A resulting trust also would be imposed if the donee "expressly refrained from exercising the power."[1034] Of course, this discussion is entirely academic if the donor is also the donee of the expired general power. The unappointed property would then end up in the probate estate of the donee in any case, whether by imposition of a resulting trust under traditional doctrine or by quasi-capture.[1035]

[1023]26 Quinnipiac Prob. L.J. 240, 275–279 (2013).

[1024]As we note in §8.1.1 of this handbook, a power of appointment is exercisable; it is never directly transferable.

[1025]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.22(a).

[1026]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.22(a).

[1027]Rest. (First) of Property §367 cmt. d.

[1028]*See* Rest. (Third) of Property (Wills and Other Donative Transfers) §19.22 (term lapse employed even in the section's title).

[1029]*See, e.g.*, Rest. (First) of Property §367 cmt. d.

[1030]*See, e.g.*, Restatement (First) of Property §367(1).

[1031]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.22(b).

[1032]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.22(b).

[1033]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.22 cmt. f.

[1034]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.22(b).

[1035]The traditional capture doctrine is discussed generally in §8.15.12 of this handbook.

The Restatement (Third) of Property exhibits a curious and tenacious aversion to invoking applicable resulting trust doctrine,[1036] particularly in the sections devoted to unexercised or ineffectively exercised general powers of appointment.[1037] The result is an unhelpful dearth of context, particularly when it comes to following chains of title, as well as a fair amount of general incoherence. Take, for example, §19.22(b), which in part reads: "… but if the donee released the power or expressly refrained from exercising the power, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest." The phrase "passes under a reversionary interest" is nonsensical in the trust context. What actually happens is that the legal title to the unappointed property passes from the trustee to the donor or his personal representative upon a resulting trust such that the equitable reversion, which had vested *ab initio*, becomes possessory. Nothing is passing from the trustee under, over, or in a reversionary interest.

We also quibble with the failure of all of the Restatements to expressly confirm that in the face of an expired power of appointment, title to property unappointed does not leave the hands of the trustee until such time as all valid intervening equitable estates have themselves expired, unless the terms of the trust so provide. An intervening equitable estate typically would be an equitable life estate.[1038]

The expired unexercised nongeneral power in the absence of a taker-in-default provision. We take up in §8.15.90 of this handbook the disposition of property subject to an expired unexercised nongeneral power of appointment when there is no taker-in-default provision in the instrument that granted the power. As we explain in the section, under the power-in-trust and the implied-gift-in-default doctrines, title to the appointive property passes outright and free of trust to the permissible appointees in lieu of the imposition of a resulting trust. In §8.1.1 of this handbook we discuss how the property Restatements have been pushing the implied-gift-in-default approach. Breaking with tradition, the Restatement (Third) of Property would apply antilapse principles to the situation where a permissible appointee has predeceased a power's expiration.[1039] Antilapse, of course, would still not be an option in the face of an operative taker-in-default provision in the granting instrument, or when the class of permissible appointees has not been sufficiently defined and limited.[1040]

[1036]*See, e.g.*, Rest. (Third) of Property (Wills and Other Donative Transfers) §25.2 (although the title to the sections is *Reversion or Remainder*, the resulting trust is mentioned once, and only in passing).

[1037]*See generally* §8.1.1 of this handbook (the power of appointment).

[1038]*See generally* §8.27 of this handbook (the equitable life estate).

[1039]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.23(b).

[1040]Rest. (Third) of Property (Wills and Other Donative Transfers) §19.23(b).