Title

Why trustees need to know something about will residue clauses

Summary

The Anglo-American trust is an invention of the judiciary, specifically the English Court of Chancery. The will, a testamentary instrument, on the other hand, is a creature of statute. The testamentary trust is a product of the direct intersection of will doctrine and trust doctrine. The inter vivos trust is not. That having been said, when it comes to the administration of an inter vivos trust, the two doctrines will occasionally indirectly intersect. Charles E. Rounds, Jr. explains in §8.26 of *Loring and Rounds: A Trustee's Handbook* [pages 1326-1328 of the 2015 edition], which is reproduced in its entirety below.

The Text

[From *Loring and Rounds: A Trustee's Handbook* (pages 1326-1328 of the 2015 Edition)]

§8.26 Why Trustees Need to Know About Will Residue Clauses

> *Now, Ahab and his three mates formed what may be called the first table in the Pequod's cabin. After their departure, taking place in inverted order to their arrival, the canvas cloth was cleared, or rather was restored to some hurried order by the pallid steward. And then the three harpooners were bidden to the feast, they being its residuary legatees. They made a sort of temporary servants' hall of the high and mighty cabin*.—Ishmael[1]

"A residuary devise is a testamentary disposition of property of the testator's net probate estate not disposed of by a specific, general, or demonstrative devise."[2] In other words, it is a provision, usually of the *all the rest, residue and remainder of my estate* variety, that picks up probate property not otherwise dealt with in the will, including failed (lapsed) specific bequests and devises. Were it not for a residue clause, at least some portion of the testator's probate estate most likely would pass by intestacy. Why then is it necessary for the trustee to know about residue clauses?

The first reason is that a revocable inter vivos trust, together with an associated pour-over will, forms the core of most modern estate plans. The subject of pour-overs is covered elsewhere in this handbook.[3]

The second reason is that when a trust fails, the property to which the trustee has title could pass to the executor or administrator of the settlor's estate upon a resulting trust. Assuming the settlor's will provides that the residue of his or her probate estate shall be distributed to an individual or corporation other than the trustee of the failed trust, then most likely the property of the failed trust will follow the fortunes of the estate residue that went out at the time the will was probated. If the will provides that the residue shall pass to the trustee of the failed trust, then the property coming from the failed trust into the probate estate could pass by intestacy in the absence of an express alternate disposition. The subject of

[1]Herman Melville, Moby-Dick, Ch. 34.

[2]Restatement (Third) of Property (Wills and Other Donative Transfers) §5.1 cmt. e.

[3]*See* §2.1.1 of this handbook (the inter vivos trust); §2.2.1 of this handbook (the pour-over statute); §8.15.9 of this handbook (doctrine of [facts or acts of] independent legal significance); and §8.15.17 of this handbook (the doctrine of incorporation by reference).

resulting trusts is covered elsewhere in this handbook.[4]

The third reason is that in a few jurisdictions, a general residue clause in the will of the holder of a general testamentary power of appointment can serve to exercise the power in favor of the residuary takers, even when there is no express reference in the will to the power or how it is to be exercised, a topic we take up in Section 8.1.1 of this handbook.[5] Of course, the terms of the power itself can negate this result. They can provide that an exercise may only be effected by a provision in the will that makes specific reference to the power. At one time, Section 2-608 of the Uniform Probate Code provided that a general residuary clause in a will or a will making a general disposition of all of the testator's property did *not* exercise a power of appointment held by the testator, unless specific reference was made to the power or there was some other indication of intention to include the property subject to the power.[6] In 1990 the negative rule was made subject to several exceptions. One is that if a power is a general one and there is no gift over in default of its exercise, a general residuary clause or general disposition in the will of the donee (holder) of the power will serve to exercise it.[7]

The fourth reason is that in cases where the residue of the probate estate is made the subject of a trust, either by its transfer to the trustee of a testamentary trust or by a pour-over (*i.e.*, a transfer to the trustee of an inter vivos trust), the trustee must deal with the question of who is entitled to the income generated by the residue from the date of death to the date of funding. Should it be distributed to the trust's income beneficiaries or should it be credited to the trust's principal account? The matter of what to do with the income thrown off by the residue during the period of estate administration is covered elsewhere in this handbook.[8]

[4]*See* §4.1.1 of this handbook (the equitable reversionary interest).

[5]Of course, the testamentary power of appointment must have come into existence by the time the testator dies, which is the time when the will speaks. "An attempted exercise of a nonexistent power or a nonexercisable power cannot produce an appointment." Restatement (Second) of Property (Wills and Other Donative Transfers) §18.4 cmt. a.

[6]Uniform Probate Code §2-608 cmt.

[7]Uniform Probate Code §2-608 cmt.

[8]*See* §6.2.4.5 of this handbook (when does income begin and what happens to accrued but undistributed income when the trust's term expires or the beneficiary dies?).