

Memorandum

To: [lawyer]

From: Russell A. Willis III, rawilllis3@juno.com

Date: [redacted]

Re: [redacted] revocable trust

1. Whether the anti-lapse statute, ORS 112.400(2) applies to residuary dispositions under a revocable trust.

ORS 112.400(2) was enacted in 1973 specifically to supersede the common law rule that the failure of a residuary bequest resulted in a partial intestacy. See, *Nichols v. First National Bank of Baker*, 199 Or. 659, 264 P.2d 451 (1953), and *In re Estate of McCoy*, 193 Or. 1, 236 P.2d 311 (1951), in which the Oregon Supreme Court pointedly refused to adopt what was then the minority position. No analogous provision has been enacted in chapter 130.

When the Oregon legislature enacted portions of the most recent revision of the Uniform Trust Code in 2005, it did not include section 112 of the uniform act, which would expressly apply the existing statutory rules of will construction to revocable trusts. To the contrary, ORS 130.025 references the common law of trusts, "except as expressly modified."

The commentary to section 112 of the uniform code specifically mentions "the failure to anticipate the predecease of a beneficiary" and suggests a state might instead enact "detailed rules on the construction of trusts." The Oregon legislature took this path, in ORS 130.520 through .575. None of these sections deals with the failure of a residuary distribution. ORS 130.565 deals only with the failure of a specific, nonresiduary distribution. Thus the common law rule, whatever it is, remains in place.

Scott on Trusts, 4th edition, at paragraph 112.3, cites *First National Bank of Cincinnati v Tenney*, 165 Ohio St. 513, 60 Ohio Op. 481, 138 N.E.2d 15, 61 A.L.R.3d 470 (1956) and *Detroit Bank & Trust*

*Co. v. Grout*, 95 Mich.App. 253, 289 N.W.2d 898, 47 A.L.R.3d 358 (1980), as exemplifying the common law rule that a transfer to a revocable trust immediately creates a vested remainder in fee, subject to defeasance by the act of revocation. This is consistent with the rationale of *Allen v. Hendrick*, 104 Or. 202, 206 P. 733 (1922), and it is actually necessary, absent a statute, to validating the revocable trust as something other than a failed testamentary disposition.

The consequence is that a residuary disposition in a revocable trust to someone who had predeceased the settlor would not be a lapse, but would pass to the estate of the predeceased beneficiary, unless the disposition were conditioned on the beneficiary surviving the settlor. And actually this might explain why the drafters of the 2003 revisions to chapter 128 did not find it necessary to provide for the lapse of a residuary disposition in a revocable trust.

2. Distinguishing two decisions apparently contrary.

In *Estate of Button*, 79 Wash.2d 849, 490 P.2d 731 (banc 1971), the Washington supreme court applied that state's anti-lapse statute by analogy to a remainder disposition under a revocable trust for the benefit of the settlor's mother, who had predeceased. In arriving at this result, the court started from the premise "[i]t was the rule at common law that a gift in trust lapsed upon the death of the beneficiary prior to the death of the trustor." The citation is to Scott, 3rd edition, paragraph 112.3 [see above], but the discussion there has to do with testamentary trusts. So the decision proceeds from a mistaken premise. Had the court instead treated the remainder to the settlor's mother as vested subject to defeasance, it could have reached the same result without having to resort to the statute. See, annotation, 47 A.L.R.3d 358.

In *Marriage of Githens*, 227 Or.App. 73, 204 P.3d 835 (2009), a panel of the Oregon appeals court ruled a husband's remainder interest in his mother's revocable trust was not "property" within the meaning of ORS 107.105(1)(f), subject to division in a divorce. Judge Schuman dissented, citing *Allen v. Hendrick* in support of his argument the

remainder was no more "speculative" than a contingent interest in an irrevocable trust, which the court had ruled in at least two earlier decisions was "property" for purposes of the statute.

The majority relied on *Johnson v. Commercial Bank*, 284 Or. 675, 588 P.2d 1096 (1978), in which the court ruled a creditor of a decedent's insolvent probate estate could reach the assets of his revocable trust, despite the fact the remainders had vested at his death. The *Johnson* court distinguished a 1924 Connecticut decision involving claims against an irrevocable trust in which the settlor had retained a discretionary interest. The Connecticut court had ruled a creditor could reach only the settlor's retained interest, and not the contingent remainders. In contrast, the *Johnson* court said, the remainder interests in a revocable trust "were subject to complete defeasance at any time during [the settlor's] life if he chose to exercise his right to revoke."

The majority in *Githens* did not suggest a remainder interest in a revocable trust was not in fact vested subject to defeasance, it simply concluded the interest was "too speculative" to be treated as property subject to division in a divorce.

2. Assuming the anti-lapse statute did apply, whether the revocation by operation of ORS 130.535 of the former spouse's interest in the trust residue would be a "failure" of her interest for purposes of that statute.

So the question becomes whether the residuary disposition for the decedent's former spouse should be treated as having been revoked or whether she should be treated as having predeceased.

One cannot read paragraph (2) of ORS 130.535, which treats the former spouse as having predeceased, as creating a "failure" of her residuary interest, because this would render paragraph (1) largely redundant, violating fundamental precepts of statutory construction. See, e.g., *Union Pacific Railroad Co. v. Bean*, 167 Or. 535, 119 P.2d 575 (1941). Instead, paragraph (2) must be read as covering situations not already identified in paragraph (1), the typical

example being a remainder to some third party contingent on surviving the former spouse.

Even if ORS 112.400(2) did apply here, the revocation of provisions for the decedent's former spouse by operation of ORS 130.535(1) is not a "failure" of her residuary interest. The provisions for her benefit are simply stricken from the document, with the result that we have provision for [x] pct. of the residue to be distributed among the decedent's children, [y] pct. to be distributed among the named charities, and [z] pct. simply not disposed of.

If we were to treat this as a partial "failure" of the trust, decisions cited at 76 Am.Jur.2d Trusts, sec. 144, suggest there is a reversion to the settlor, and the property is to be distributed to the settlor's residuary legatees. But because we have a pourover will, the residuary legatee here is the trust itself, which again does not, by its express terms, dispose of the entire residue.

The situation is similar to that in *White v. Fleet Bank of Maine*, 739 A.2d 373 (Me. 1999), in which the court concluded:

As [the testator] made no provisions for the residue of his estate, other than the creation of the trust itself, the will is incapable of disposing of this property when the trust fails, and the principal will pass according to the rules of intestacy.

In other words, we have a partial intestacy under ORS 112.015, with the decedent's heirs taking under ORS 112.045.