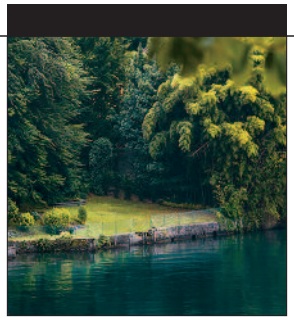

Section 112: The Problem Child of the Uniform Trust Code

A provision in the Uniform Trust Code extends to trusts the rules of construction for wills, potentially replacing long-standing common law principles.

RUSSELL A. WILLIS

In February 1999, almost five years into the drafting project for what would become the Uniform Trust Code, the committee circulated a text—at least the seventh or eighth draft[1]—that for the first time included language that would apply the "rules of construction" for a decedent's will, across the board, to the interpretation of a revocable trust functioning as what the reporter for the Restatement (Third) of Trusts, then also in draft, was calling a "will substitute."

Earlier drafts had expressly eschewed this approach, instead suggesting in commentary that states might enact the rules of construction set out in the Uniform Probate Code, which at section 2-701 of that code are made applicable to a variety of nonprobate transfers, including revocable trusts.

Still, commentary to the last previous draft had already acknowledged that the project was working in "close consultation" with the reporter for the Restatement (Third), and that "efforts are being made as well to coordinate the drafting of this Act with the current best guess on the probable substance of the uncompleted portions of the Restatement." And commentary to the draft section, then numbered 605, expressly acknowledged that it was "patterned after" the most recent draft of section 25(2) of the Restatement (Third), and specifically comment *e* to that section, about which more in a moment.

But by November 1999, a few months before they were to submit a final draft to the full conference of commissioners, the committee was struggling with a more sweeping proposal, put forward by an ABA task force, that would extend the coverage of draft section 605 to testamentary and inter vivos irrevocable trusts.

According to a memo from the project reporter circulated in advance of the November meeting,[2] this proposal had met with some resistance from at least some members of the ACTEC committee on state laws, who argued that it would "increase pressure on what we mean by a rule of construction." Examples cited in the memo included anti-lapse, pretermitted heirs, and revocation on divorce. "Are these even rules of construction at all," the memo asked, given that "they deal with events occurring after" the document is signed.

"Whichever view is adopted," the memo said, the two camps had agreed that "qualifying language, such as 'to extent pertinent' or 'to extent appropriate' should be added to signal to court[s] that applying rules of will construction to trusts is not always automatic," not even in the case of a revocable trust.

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"As appropriate"

That was the course the committee ultimately adopted. The final text, approved by the conference in August 2000, included what is now section 112, which does apply the rules of construction applicable to a decedent's will, "as appropriate," to the interpretation of any trust, revocable or not.

The section is bracketed as "optional," with the suggestion that a state might instead enact "detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute," again citing the example of the Uniform Probate Code.

To date, 33 states have enacted some version of the trust code, and at this writing there is legislation pending in two others.[3] Not all of these have adopted section 112, but in several that have, the courts are beginning to encounter "difficult questions" in construing the statute, even—or rather, especially—in the context of a revocable trust functioning as a "will substitute."

Which of the existing statutes establishing default rules for the distribution of a decedent's probate estate should be treated as a "rule of construction" for purposes of section 112? Does it matter that a statutory presumption is or is not rebuttable by extrinsic evidence? With reference to what principles should a court determine that is it or is not "appropriate" to apply the rule to the interpretation of a decedent's revocable trust?

And relatedly, what if anything is the effect of section 112 on section 106, which says "the common law of trusts and principles of equity" continue to apply, except where supplanted by the code or other legislation?

Restate or reshape

As the official commentary to the final draft confirms, section 112 is modeled on comment *e* to section 25(2) of the Restatement (Third). But that comment openly departs from what had been the common law in many states, articulating instead a normative view of what the law "should be."

Paragraph (1) of section 25 states the now widely accepted view that a revocable trust is not an invalid testamentary transfer, despite the settlor's reserved powers, because it is treated as a present transfer. The remainders are not "contingent," much less "illusory," but vested, subject to defeasance by the settlor's act of revocation, or by his or her having exhausted the trust during his or her lifetime.[4] This paragraph is essentially identical with what had been section 57 in the Restatement (Second).

However, paragraph (2) of section 25 is entirely new text, and it represents a substantial departure from the Restatement (Second). Both the drafters' comments and the reporter's notes explicitly and repeatedly acknowledge this.

What paragraph (2) says is that a revocable trust is "*ordinarily* subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions." (Emphasis added.)

At least two, possibly three, concepts are lumped together here:

1. "Substantive restrictions on testation," e.g., as against the rights of a surviving spouse or a creditor.
2. "Rules of construction," which are the concern of the present article.
3. Unspecified "other" rules, possibly including, for example, whether a spouse's remainder interest in a revocable trust is to be taken into account in dividing property in a divorce.[5]

Comment *a* to section 25 notes, with respect to "substantive restrictions," that "increasingly, statutes and case law in the various states are coming to recognize, as this Restatement provides, that the rights of spouses and creditors of testators and of settlors of revocable trusts are fundamentally alike," although as to surviving spouses, at least, the path had been uneven.[6]

But comment *a* goes on to say, with respect to "rules of construction" and "other" rules, "whatever the technicalities of concept and terminology, the interests the revocable trust beneficiaries will receive on the death of the settlor *should, generally at least*, receive the same treatment and *should* be subject to the same rules of construction as the 'expectancies' of devisees." (Emphasis added.) These two expressions

1 Discussion draft dated 2/9/1999, posted to the committee archive at www.uniformlaws.org/viewdocument/committee-archive-76. The narrative with which the present paper opens is drawn entirely from these materials.

2 Meeting memo dated 10/29/1999, also posted to the committee archive, see note 1, *supra*.

3 HB 1471, pending in the Illinois legislature, includes a version of section 112, adding that "the rule that statutes in derogation of the common law shall be strictly construed does not apply." HB 7104, pending in the Connecticut legislature, does not include a version of section 112.

4 See, e.g., Allen v. Hendrick, 104 Or. 202, 206 P. 733 (1922), and the decisions cited therein, 104 Or. at 224-5, 206 P. at 740. This is the analysis given in *Scott on Trusts*, 4th edition, at paragraph 112.3. The treatise 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 this common law rule. See also, Randall v Bank of America National Trust & Savings Association, 48 Cal.App.2d 249, 119 P.2d 754 (1941).

5 See, for example, Marriage of Githens, 227 Or.App. 73, 204 P.3d 835 (2009), in which 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, *supra*, note 4, in support of his argument that 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.

6 See the discussion accompanying footnotes 56 and following, *infra*.

of what the law "should" be are detailed in comments *d* and *e*, as to which the reporter's notes openly acknowledge "there is no ... consensus of authorities," as these "differ fundamentally from the positions taken in prior Restatements."

Discerning a trend

Exactly two decisions are cited in the reporter's notes as representing a "trend" toward what the drafters say the law "should" be, and both of these were wrongly decided.

In *Estate of Button*,[7] 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 on Trusts*, 3rd edition, paragraph 112.3,[8] but the discussion there has to do with testamentary trusts, not revocable *inter vivos* trusts. Thus, the *Button* decision proceeds from a mistaken premise. Had the court instead treated the remainder to the settlor's mother as vested subject to defeasance—as the appeals court had done—it could have reached the same result without having to resort to the statute.[9]

In 1994, more than 20 years after the *Button* decision, the Washington state legislature amended its anti-lapse statute[10] to cover *inter vivos* trusts. HB 2270 also extended the class of predeceased beneficiaries whose interests were affected to include descendants of the settlor's grandparents, i.e., specifically addressing the factual situation in *Button*, and in effect formalizing the result.

Oddly, in 1988 the Ohio Supreme Court in *Dollar Savings & Trust Co. v. Turner*,[11] did follow *Button*, but without expressly overruling—or even citing—*Tenney* (see note 4), its own precedent to the contrary. Four years later, expressly announcing its intention to supersede "the effect of the holding in [*Turner*]," the Ohio legislature amended that state's probate code specifically to exclude *inter vivos* trusts from its scope.

Exactly two decisions are cited in the reporter's notes as representing a "trend" toward what the drafters say the law "should" be, and both of these were wrongly decided.

So the "trend" cited in the reporter' notes was weak at best.

Why a detailed code anyway

Shortly after the uniform law commissioners approved the final draft, the reporter for the project, Prof. David M. English,[12] wrote an article for the *Missouri Law Review* explaining "significant provisions and policy issues" addressed by the trust code, and making a pitch why states should enact it.[13]

The premise, articulated in the opening pages, was that "the trust law in most states is thin, with many gaps between the often few statutes and reported cases," so that state courts were left to rely on the Restatement (at that time, Second) and on the treatises authored by Scott and Bogert—sources that Prof. English said "fail to address numerous practical issues and that on others sometimes provide insufficient guidance." The purpose of the present project, he said, was to "update, fill out, and systematize" the law of trusts.

Over the next couple or three years, Prof. English placed similar articles specific to the enactment or proposed enactment of versions of the code in Ohio,[14] Kansas,[15] and New Mexico[16] in law journals based in those states. These later articles incorporated large portions of the original article verbatim.

In each of these several articles, Prof. English mentioned the difficulties section 112 might present, noting the "very difficult questions" hidden in the phrase "as appropriate." "Not all will construction rules should necessarily be applied to trusts," he said, and "[e]ven those that should apply may require modification due to the legal distinctions between wills and trusts."

As a specific example, he cited anti-lapse statutes, observing in a footnote that:

> [d]evises under a will, because not effective until death, are classified as present interests. On the other hand, because a revocable trust is created at the moment it receives property, dispositions at the death of the settlor are classified as future interests. Most existing antilapse statutes apply only to present interests.

This of course was precisely the issue in *Button* and *Turner*, both of which had been wrongly decided even in the absence of an ambiguous statute adding to the difficulty.[17]

Elsewhere in these articles, Prof. English also mentioned section 106 of the new trust code, which provides that "[t]he common law of trusts and principles of equity supplement [the code], except to the extent modified" by the code itself or by another state statute. But he did not discuss the possible interplay between these two sections.

For example anti-lapse

At common law, in most states, the lapse of a residuary bequest would result in a partial intestacy.[18] Anti-lapse statutes were enacted specifically to supersede this common law rule. But by their express terms,

these statutes apply only to wills. In general, a statute abrogating the common law is to be construed narrowly. This is why the *Button* and *Turner* decisions, mentioned above, are anomalous.

In a state that has included some version of section 112 as part of its enactment of the uniform code, there is an inherent tension with section 106 on the question whether an anti-lapse statute should apply to a revocable trust functioning as a "will substitute." Is the anti-lapse statute a "rule of construction"? Would it be "appropriate" to apply the statute to a revocable trust? Is this an instance in which the code has "modified" the common law?

It appears there may be only one decision to date on point, and that decision does not discuss the interplay between sections 112 and 106, except by implication.

In 2012, in *Tait v. Community First Trust Co.*,[19] the Arkansas supreme court ruled that the state's anti-lapse statute did not apply to determine the succession of interests in a decedent's revocable trust where several remainder beneficiaries had predeceased the settlor.

Although the state had enacted a version of the Uniform Trust Code in 2005,[20] prior to the settlor's death, the court noted section 112 only in passing, and the decision appears to rest entirely on section 106—that is, applying the existing common law of trusts.

But Arkansas itself had no prior decisional law on the particular question. This was a case of first impression. The trial court, relying on the *Button* decision and its misreading of section 112.3 of *Scott on Trusts*,[21] had ruled that the interests of the remainder beneficiaries were contingent on their surviving the settlor.

The supreme court reversed, noting the criticisms that had been leveled against *Button* and citing several decisions to the contrary, including two that had expressly rejected *Button*.[22]

A transfer to a revocable trust immediately creates vested remainders, the court concluded, subject to defeasance by the act of revocation. Unless the disposition is expressly conditioned on the beneficiary surviving, it does not "lapse" when he or she predeceases the settlor, but instead passes to his or her estate.[23]

This of course is entirely contrary to the result that would obtain by treating the revocable trust as a "will substitute" and applying the anti-lapse statute for wills to a remainder interest for a beneficiary who has predeceased the settlor as though he or she were a legatee—as advocated by the Restatement (Third).

On the other hand

In December 2008, in *Estate of Zilles*,[24] a division of the Arizona Court of Appeals held that a "failed" or "lapsed" gift of a portion of the residue of a decedent's revocable trust was to be divided proportionally among the other residuary trust beneficiaries.

The timing of the decision is interesting. Earlier that year, the Arizona state legislature had enacted a somewhat modified version of the Uniform Trust Code, having delayed the effective date of an earlier enactment and then repealed it altogether. The revised statute had not yet taken effect when the *Zilles* decision was released.[25]

Although the Arizona version of the uniform code, as revised, did include section 112 verbatim, section

7 79 Wash.2d 849, 490 P.2d 731 (banc 1971).

8 See note 4, *supra*. Indeed, paragraph 112.3 includes the observation that "[i]n the case of an inter vivos trust, it has been held that the death of a beneficiary, before the death of the settlor, does not cause a lapse even though the trust is revocable. The beneficiary has a vested interest, though subject to defeasance by revocation of the trust."

9 See annotation of Button at 47 A.L.R.3d 358, criticizing the court's analysis. Courts in other states have declined to follow Button. See, e.g., Grout, *supra* note 4; First National Bank of Bar Harbor v. Anthony, 557 A.2d 957 (Me. 1989), and Tait v. Community First Trust Co., 2012 Ark. 455, 425 S.W.3d 684 (2012), discussed below at text accompanying notes 19 and following.

10 WA Rev. Code sec. 11.12.110.

11 39 Ohio St. 3d 182, 529 N.E.2d 1261 (1988).

12 Then, as now, a professor at the University of Missouri, Columbia, School of Law, holding a chair endowed in the name of the late William Franklin Fratcher, who had edited the fourth edition of *Scott on Trusts* (1987) after the death of Austin Wakeman Scott, and updated that treatise until his own death in 1992.

13 English, "The Uniform Trust Code (2000): Significant Provisions and Policy Issues," 67 Mo. L. Rev. 143 (2002).

14 English, "The Uniform Trust Code (2000) and Its Application to Ohio," 30 Cap. U. L. Rev. 1 (2002), expanding on an article first published at 12 Prob. L. J. of Ohio 1 (2001).

15 English, "The Kansas Uniform Trust Code," 51 U. Kan. L. Rev. 311 (2003).

16 English, "The New Mexico Uniform Trust Code," 34 New Mexico L. Rev. 1 (2004).

17 In some states, the courts construing an ambiguous statute will look to the drafters' comments as expressing legislative intent. The commentary to section 112 references comment *e* to paragraph (2) of section 25 of the Restatement (Third). It would appear Prof. English continued to have mixed feelings on this issue, even as he was promoting enactment of the code.

18 See for example 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 to the contrary.

19 2012 Ark. 455, 425 S.W.3d 684 (2012).

20 AR Code, title 28, chapter 73.

21 See text accompanying notes 7 and following, *supra*.

22 Including, among others, Baldwin v. Branch, 888 So.2d 482 (Ala. 2004), First Galesburg National Bank & Trust Co. v. Robinson, 500 N.E.2d 995 (Ill. App. Ct. 1986), First National Bank v. Anthony, *supra* note 9, and the three decisions cited in note 4, *supra*, Tenney, Grout, and Randall.

23 This result would hold even if the predeceased remainderman were not related to the settlor by blood or adoption, whereas the typical anti-lapse statute—for example, the Arkansas statute at issue here, AR code sec. 28-26-104—attempts to rescue only those lapsed bequests that would have passed to descendants of the testator who themselves are survived by children or more remote descendants.

24 219 Ariz. 527, 200 P.3d 1024 (2008).

25 The story behind the enactment, delay, repeal, and revision of the uniform trust code in Arizona would require a separate article. Among the matters in controversy was the retroactive application to existing trusts of provisions according "qualified beneficiaries" access to financial information. Also, the version of section 411, modification by consent, as initially enacted could arguably have caused inclusion in a settlor's estate under IRC Section 2038. In addition, that same section had initially included the optional paragraph (c), saying a spendthrift provision would not be presumed to express a "material purpose" for purposes of the Claflin doctrine.

106 was altered in ways that suggest the result might have been different if the decision had been issued a few days later.[26] Specifically, the legislature added language to section 106 limiting the courts to the common law as expressed in the Restatement (Second) of Trusts, "and not subsequent Restatements," in determining, among other things, "the settlor's intent." But the *Zilles* decision is replete with references to the Restatement (Third), including, crucially, comment *e* to section 25(2), on which the decision finally rests.

While it is unclear, in view of the legislature's rather pointed elaboration of section 106, whether this aspect of *Zilles* will be followed in any future decision on similar facts, that question is further complicated by the fact that the underlying antilapse statute[27] actually codifies rather than abrogates what had already been the common law in that state. In 1970, in *Estate of Jackson*,[28] the Arizona supreme court had embraced the minority view that the partial lapse of a residuary bequest under a will should enhance the remaining residuary shares rather than creating a partial intestacy. This is the (minority) common law rule the *Zilles* court applied by analogy to a decedent's revocable trust.

The New Hampshire state supreme court chose not to engage the question whether it would be "appropriate" under section 112 to apply a pretermitted heir statute to a revocable trust functioning as a "will substitute."

And to be clear, the court in *Zilles* expressly rejected the invitation to extend the reach of the antilapse statute to apply to a revocable trust. Instead it extended the rationale of *Jackson*. Still, the result appears to be inconsistent with the legislature's expressed distaste for the Restatement (Third).[29]

The pretermitted heir

Similar considerations arise in connection with statutes protecting direct descendants of a testator from disinheritance through inadvertence.

The typical statute provides for a child who was born after the will was executed, and either allows him or her what would have been the child's intestate share had the decedent died intestate or a pro rata share of bequests that were made to other children, ratably abating their shares.[30] This is sometimes called an "omitted child" statute.

Some statutes go further and protect any child, or the descendant of a deceased child, who is not mentioned at all, even if she was already in existence at the time the will was executed. This is what is literally meant by the phrase "pretermitted child" or "pretermitted heir."[31]

In either case, the typical statute makes an exception where it appears from the text of the will itself that the omission was intentional. Absent an ambiguity, extrinsic evidence will not be admissible on this question.

In 2007, in *Kidwell v. Rhew*,[32] the Arkansas supreme court determined that the state's pretermitted heir statute[33] should not be extended by analogy to apply to a decedent's revocable trust. The court declined to adopt section 34.2 of the Restatement (Second) of Property, Donative Transfers (1992), which urged courts to extend what it called "omitted issue" statutes to revocable lifetime transfers, observing that the reporter's notes acknowledged there was no caselaw supporting this position.

What makes the decision particularly interesting is that the Arkansas legislature had enacted a version of the Uniform Trust Code, including section 112, in 2005—after the decedent's death but prior to the decision in the case. The Arkansas legislation also included section 1106 of the uniform code, the effective date provision, which on its face would apply the code to "existing relationships" and to pending court proceedings,[34] and which at paragraph (a)(4) applies "any rule of construction or presumption provided in [the code] to trust instruments executed before [the effective date], unless there is a clear indication of a contrary intent in the terms of the trust." But neither the parties nor the court mentioned the possible application of the statute to the situation at hand.[35]

Forcing the issue

Just last year, in a case styled *In re Craig Trust*,[36] the New Hampshire state supreme court chose not to engage the question whether it would be "appropriate" under section 112 to apply a pretermitted heir statute to a revocable trust functioning as a "will substitute." Instead, the court determined that the statute is simply not a "rule of construction" at all, but a "conclusive rule of law."[37]

There is a rather specific history here. In 2001, in *Robbins v. Johnson*,[38] the court had declined to extend the state's pretermitted heir statute[39] to a decedent's revocable trust "absent clear indication from the legislature that this is its intention." Three years later, the state legislature enacted the Uniform Trust Code essentially wholesale, including section 112, verbatim.[40]

A rather large drafting committee of bankers and lawyers, including the supervising judge of the state's probate courts, worked to shape the bill. One member of that committee testified at some length to the senate judiciary committee to the effect that

what they were trying to accomplish was to bring certainty to an area of law that until then had been developed haphazardly through litigation on unsettled questions.[41] That witness testified on the one hand that the committee "felt pretty comfortable that we really aren't working substantial changes in what we think New Hampshire law is," but on the other hand that the uniform code "does substantially conform to the restatement."

Nothing was said with specific reference to either section 112 or the *Robbins* decision. But it bears noting that comment *e(1)* to section 25(2) of the Restatement (Third) had specifically mentioned pretermitted heir statutes as an example of a will construction rule that "ought to" apply to revocable trusts, and that the "notes on decisions" following the commentary had characterized the decision in *Robbins* as "unfortunate."

As recently as December 2017, in *Hodges v. Johnson*,[42] the New Hampshire court had said it would rely on the official commentary to the Uniform Trust Code in ascertaining legislative intent, quoting an earlier decision in which it had said "the intention of the drafters of a uniform act becomes the legislative intent upon enactment."

The underlying facts

When Teresa Craig first created the trust in 1999, about a year after marrying her second husband, both her adult sons from her first marriage were still alive and each of them had children. Under the terms of the trust, if her husband did not survive her, the remainder after her death was to be divided into equal shares for the two sons. If either son predeceased her, his share was to pass to his descendants, per stirpes.

The spouse and one son did predecease, and if the settlor had done nothing further, that son's share would have descended to the two grandchildren.[43] But in 2012, the settlor amended the trust, leaving everything to the surviving son, and she executed another will, pouring the residue of her probate estate over to the trust as amended.

There was boilerplate in the pourover will saying the omission of "any" child or more remote descendant was intentional, and not the result of "accident, mistake[,] or inadvertence." The will did not mention the deceased son or either of the grandchildren by name.

The grandchildren petitioned the probate court to determine that this language was not sufficient to disinherit them, and also to require the trustee to produce a copy of the trust document so they could build a case that they were "pretermitted" remainder beneficiaries under the trust as well, and/or lay the groundwork for a possible claim of undue influence.

The trustee objected, but after the trial court ordered him to produce copies of both the 1999 trust and the 2012 amendment for *in camera* review, he simply delivered copies to the lawyer for the grandchildren.

The trial court then transferred the matter to the supreme court on the question whether section 112 incorporated the pretermitted heir statute as a "rule of construction" applicable to trusts. Although the transfer order did not mention this, apparently the trust document did not include even boilerplate language to overcome any presumption section 112 might import from the probate code that the exclusion of unnamed heirs was unintentional.

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26 The effective date provision, section 18 of HB 2806, would apply the statute to judicial proceedings pending on the effective date "unless the court finds that application of a particular provision of this act would … prejudice the rights of the parties," and would in particular apply "any rule of construction or presumption provided in this act" to an existing trust instrument "unless there is a clear indication of a contrary intent in the terms of the trust."

27 AZ Rev. Stat. sec. 14-2604.

28 106 Ariz. 82, 471 P.2d 278 (1970).

29 On the other hand, the purported restriction on the further development of the common law of trusts might implicate the separation of powers.

30 This is the approach adopted by the Uniform Probate Code, section 2-302. As is also typical, an exception is made here if the will was executed at a time when the testator had no children, and substantially all of the estate is instead left to a surviving spouse who is also the parent of the later born children.

31 When the reporter for the Uniform Trust Code project raised the question in his November 1999 memo whether anti-lapse, pretermitted heir, and revocation on divorce statutes "are even rules of construction at all," see text accompanying note 2, *supra*, he characterized these as "deal[ing] with events occurring after" the document is signed.
The second category of pretermitted heir statute, which in effect requires a testator to acknowledge that he or she is intentionally omitting an existing child or the descendants of an already deceased child, does not fall within that description.

32 371 Ark. 490, 268 S.W.3d 309 (2007).

33 AR Code sec. 28-39-407.

34 The proceedings in Kidwell were commenced more than a year after 9/1/2005, the effective date of the Arkansas statute.

35 Kidwell was cited with approval by the court in Tait on the question whether a statute made expressly applicable to wills might be extended by analogy to a revocable trust.

36 194 A.3d 967 (2018).

37 Citing several of its own prior decisions, including Robbins, the court attempted to distinguish what it called a "conclusive rule of law" from a "rule of construction," which in the present context would be a presumption that cannot be rebutted by extrinsic evidence. The drafters' comments to section 112 of the uniform code distinguish between "constructional preferences," for example the preference to avoid partial intestacy, and "rules of construction," which attribute intention to the trust settlor.

38 147 N.H. 44, 780 A.2d 1282 (2001).

39 NH Rev. Stat. section 551:10. This is what was characterized in the text accompanying note 31, *supra*, as a "pretermitted heir" statute, protecting any child of the testator, or the descendant of a deceased child, who is not mentioned at all, even if he or she was already in existence at the time the will was executed.

40 NH Rev. Stat. section 564-B:1-112 (2004).

41 Judiciary Committee hearing report dated 4/13/2004, posted at www.gencourt.state.nh.us/scaljourns/calendars/2004/SC%2014.pdf, last accessed by the author on 5/7/2019.

42 177 A.3d 86 (2017). At issue in *Hodges* was the breadth of a trustee's discretion in decanting to a trust for the benefit of fewer than all of the beneficiaries of an existing trust. Grist for an entirely separate article.

43 Either under the common law, as discussed in the text accompanying note 4, *supra*, or by application per section 112 of the state's anti-lapse statute, NH Rev. Stat. section 551:12, which substitutes heirs of a predeceased legatee "in the descending line," presumably excluding the deceased son's surviving spouse.

Further complications

Before the petitioners' opening brief was yet due to be filed, someone[44] caused a bill to be introduced in the state legislature, SB 311,[45] that would "clarify" section 112 by specifying that, "for purposes of this section," the pertermitted heir statute is "not a rule of construction," so that the question whether it would be "appropriate" to apply it to a particular trust would not arise.

Lawyers on both sides of the case testified at a hearing on the bill before the senate commerce committee, the proponents arguing that "everyone" had "always" understood that section 112 did not have the effect of extending the pretermitted heir statute to revocable trusts, that a great many trust instruments had been executed in the intervening 14 years on this understanding, and that an adverse outcome in the *Craig Trust* could open a can of worms. The senate sponsor openly acknowledged that the bill was intended to require a particular result in the pending litigation.

The lawyer whose testimony before the senate judiciary committee in 2004 is quoted above, text accompanying note 41, testified briefly against SB 311 on the ground it was "a fix we don't need," because in his view it was already "clear" that section 112 did not extend the pretermitted heir statute to trusts.[46]

He and other witnesses also argued that singling out the pretermitted heir statute for this "clarification" might be taken to imply that all other "rules of construction" for wills therefore do apply to trusts, regardless of any policy concerns to the contrary.

Having cleared the senate, the bill was still pending in the house as briefs came due in *Craig Trust*, and the cause came on for oral argument.

In his response brief, the lawyer for the trustee made the rather startling argument that the mere introduction of SB 311 in the current session somehow confirmed what the legislature had intended back in 2004. At oral argument, however, he hedged the question whether the statute, if enacted, should apply retroactively to the trust at issue.

The revocable trust, which is actually a fairly recent phenomenon, is not a "will substitute" in any but the most nominal sense.

In the end, as noted above, the court sidestepped these questions entirely, finding that the pretermitted heir statute is simply not a "rule of construction" at all. This is despite the fact that the statute does attribute meaning to the testatrix' silence on a matter on which she might have been expected to express herself.[47]

The pretermitted spouse

In her opening brief in *Craig Trust*, the lawyer for the grandchildren noted that an intermediate appeals court in Pennsylvania had ruled, in a case styled *In re Trust under deed of Kulig*,[48] that that state's enactment of section 112 of the uniform code[49] extended the state's pretermitted spouse statute,[50] to a revocable trust. The effect was to include the assets of the decedent's revocable trust in the pretermitted spouse's intestate share—one-half, as the decedent was survived by children from a prior marriage[51]—which was considerably more advantageous to her than electing against the will and claiming only one-third.[52]

At the time that brief was filed, the *Kulig* decision was still pending review by the state supreme court. Two weeks later, a majority of that court reversed,[53] finding it was not "appropriate," within the meaning of section 112, to extend the pretermitted spouse statute to a revocable trust, where the legislature had already provided an alternative remedy through the elective share statute.

In his response brief, the lawyer for the trustee in *Craig* mistakenly characterized the latter ruling as having determined that the pretermitted spouse statute was not a "rule of construction." To the contrary, the *Kulig* court said this point was "materially undisputed."

An amicus brief filed on behalf of a trust industry trade organization[54] spent nearly a page arguing that the court in *Kulig* had ruled that the pretermitted spouse statute "did not apply to trusts," without mentioning the court's rationale, i.e., the inconsistency with the existing remedial structure of the elective share statute.

But what about the elective share

The key takeaways from *Kulig* are (1) that a pretermitted heir statute may indeed be a "rule of construction," at least in some states, and (2) that the phrase "as appropriate" places the policy details in the hands of the courts.

In the particular case, the court determined that the legislature had not intended, in enacting section 112, to disturb the mechanisms it had already put in place years earlier to protect a surviving spouse—whether pretermitted or not—from disinheritance, by including *inter vivos* trans-

fers in an "augmented estate" against which the elective share would be calculated. Therefore it would not be "appropriate" to include assets of the decedent's revocable trust in the calculation of the pretermitted spouse's intestate share.[55]

But it bears noting—to bring the discussion full circle back to comment *e(1)* to section 25(2) of the Restatement (Third)—that until legislatures began enacting "augmented estate" provisions to expand the reach of their elective share statutes, a surviving spouse could easily be defeated by the simple expedient of the decedent having transferred assets to a revocable trust in which the survivor had limited or no benefit.

In 1984, in *Sullivan v. Burkin*,[56] for example, the Massachusetts supreme court said it unfortunately was bound by a 1945 precedent[57] to rule that a surviving spouse could not recover assets from the predeceased spouse's revocable trust to satisfy her statutory elective share against his "estate," even if the decedent had transferred assets to the trust for the purpose of defeating her elective share.

Going forward, however, "as to any *inter vivos* trust created or amended after the date of this opinion," the court said, it would construe the same statute[58] as including in the "estate" from which the elective share might be satisfied "an *inter vivos* trust created during the marriage by the deceased spouse over which he or she alone had a general power of appointment," regardless of the settlor's "motive or intention" in creating the trust.

In 2003, the same court ruled, in *Bongaards v. Millen*,[59] that the prospective rule in *Sullivan* would not be extended to a trust of which the decedent was not herself the settlor, although she had a general power, exerciseable *inter vivos*, to appoint the entire corpus to herself.

In the version of the Uniform Trust Code enacted in Massachusetts in 2012, the scope of section 112 is expressly limited to a revocable trust, created or amended after the effective date of the statute.[60] The courts in that state have not yet had occasion to rule on the scenario presented in *Kulig*.

Concluding remarks

Asking a state legislature to enact, at a single stroke, a complete overhaul of the state's trust law, 15,000 words codifying and/or supplanting hundreds of years of common law, much of which the lawyers serving on an ad hoc drafting committee do not themselves fully understand, is a rather heavy lift.

Those features of the uniform code that formalize the rights of beneficiaries to receive information from the trustee, detail the circumstances under which beneficiaries may modify the substantive terms of an irrevocable trust by consent, etc., are more or less amenable to codification, and any departures from the common law in these matters can be seen as matters of policy within the reach of a reasonably well-informed legislative committee.

But until the uniform code project came along, the law of trusts had been developed almost entirely by courts. The revocable trust, which is actually a fairly recent phenomenon, is not a "will substitute" in any but the most nominal sense. Quite the contrary: In order to validate the revocable trust as something other than an attempted testamentary disposition that would fail for want of compliance with the required formalities, courts had determined that the remainder interests were not contingent on surviving the settlor, they were vested subject to defeasance.

Comment *e(1)* to section 25(2) of the Restatement (Third), and section 112 of the uniform code to the extent it incorporates that comment, would erase these distinctions, and while that may or may not prove to be a "good thing" in the long run, it is unrealistic to suppose that any state legislature has clearly understood the more subtle implications of what they were doing in enacting this section. ■

44 Who exactly brought the bill to its cosponsors has never been made clear, but among the witnesses at the senate commerce committee hearing was the president of a trust industry trade organization which also filed an amicus brief in support of the trustee in Craig Trust, see text accompanying note 54, *infra*.

45 SB 311, introduced 1/3/2018, enrolled 5/3/2018, signed into law 5/30/2018, chapter 0120. The bill took effect immediately, on May 30. The decision in Craig Trust was issued September 7.

46 This is arguably at odds with his testimony in 2004 that the uniform code "does substantially conform to the restatement," but again, section 106 might be read to have implicitly adopted the rule in *Robbins*.The larger point is that the state legislature, confronted with draft legislation comprising 15,000 words, cannot reasonably have been expected to grapple with these complexities.

47 In addition to Robbins, the court cited two other prior decisions characterizing the statute as a "conclusive rule of law," as distinct from a "rule of construction." But both In re Estate of Treolar, 151 N.H. 460, 859 A.2d 1162 (2004), and In re Estate of MacKay, 121 N.H. 682, 433 A.2d 1289 (1981), could equally be read as holding that, in the particular case, other language elsewhere in the will did not "sufficiently" reference the omitted heirs to overcome a presumption that the testator's omitting to mention a descendant was inadvertent.

48 131 A.3d 494 (Pa. Super. 2015).

49 20 PA Cons. Stat. sec. 7710.2.

50 20 PA Cons. Stat. sec. 2507(3).

51 20 PA Cons. Stat. sec. 2102(4).

52 20 PA Cons. Stat. sec. 2203.

53 In re Trust under deed of Kulig, 175 A.3d 222 (2017).

54 Possibly itself the author of SB 311, see note 44, *supra*. The amicus brief opens with a disclaimer that although two lawyers in the firm that drafted the 2012 trust amendment are directors and equity owners of a member trust company, neither of them participated in the decision to file the brief, nor in preparing the brief itself.

55 The majority in Kulig also noted that the interpretation for which the spouse was arguing here would work against her if the nonprobate transfers in question were not in trust, e.g., beneficiary designations, etc.

56 390 Mass. 864, 460 N.E.2d 572 (1984).

57 Kerwin v. Donaghy, 317 Mass. 559 (1945).

58 G.L. c. 191, sec. 15.

59 440 Mass. 10, 793 N.E.2d 335 (2003).

60 G.L. c. 203E, sec.112.