UNIFORM LAW CONFERENCE OF CANADA

UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT (2019)

As adopted December 1, 2019

Introduction

[1] The Act is divided into 5 sections

[2] Section 1 defines terms used in the Act.

[3] Section 2 allows a testator to make a testamentary disposition to a trust established or to be established. It may be established by the testator, by the testator and some other person or persons or by some other person or persons, if the trust is identified in the will. The terms of the trust must be identified in a written instrument executed before or currently with the execution of the will. A gift may also be made to a trust contained in the valid will of a person who has predeceased the testator.

[4] Subsections (2) and (3) of section 2 make it clear that additions to a trust may be made through designation of a trust as a beneficiary outside a will, including life insurance, RRSP's, RRIF's, TFSA's, pensions, and other instruments in which a person may designate a beneficiary. Subsection (2) was in the original Act; subsection (3) is new, as is the definition of "plan" in section 1.

[5] Subsection (4) of section 2 states that the disposition made under subsection (1) shall not be invalid because the trust is amendable or revocable or was amended after the execution of the will or after the death of the testator.

[6] Section 3 provides that property be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of that trust, and not held as a separate testamentary trust. Amendments to the trust before the death of the testator are valid, and any amendments to the trust after the death of the testator would also be valid unless the will of the testator shows a contrary intent.

[7] Section 4 provides that the revocation or termination of a trust to which a testator has disposed property before the death of the testator shall cause the disposition to lapse.

[8] Section 5 is different from the 1968 section. The 1968 Act provided that the Act was not retroactive. This is changed to allow a pour over disposition in a will made prior to the Act, but only if the testator died after the effective date of the Act.

Testamentary Additions to Trusts Act (2019)

1. In this Act:

"**disposition**" includes a bequest, a legacy, a devise and the exercise of a power of appointment;

"**plan**" means:

a. a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees, former employees, agents or former agents of an employer or their dependants or beneficiaries, whether created by or pursuant to a statute or otherwise,

b. a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term or under which money is paid for the purpose of providing, on the happening of a specified event, for the purchase of, or the payment of, an annuity for life or for a fixed or variable term, whether created before or after this section comes into force,

c. a registered retirement savings plan or registered retirement income fund as defined in the *Income Tax Act* (Canada),

d. a Tax Free Savings Account within the meaning of section 146.2 of the *Income Tax Act* (Canada), or

e. a fund, trust, scheme, contract or arrangement prescribed in the regulations.

Comment:

The definition of "disposition" is intended to update the use of the terms "devise" and "bequest" in the original Act, and to include the use of the exercise of a power of appointment. Each jurisdiction will need to determine whether they wish to retain the reference to devise and bequeath or use another term such as "gift".

The definition of "plan" is included for the purpose of subsection 2(3).

2. (1) A testator may by will make a disposition, the validity of which is determinable by the law of (name of province), to the trustee or trustees of a trust established or to be established

a. By the testator;
b. By the testator and some other person or persons; or
c. By some other person or persons,

if the trust, regardless of the existence, size or character of the corpus thereof, is

identified in the will of the testator and the terms of the trust are set forth;

d. In a written instrument, other than a will, executed before or currently with the will of the testator; or

e. In the valid last will of a person who has predeceased the testator.

Comment:

The wording removes any doubt that the receptacle trust can be one established not only by the testator or by the testator and another or others, but also by a person or persons other than the testator.

The Act requires that the trust instrument, in the case of a pour-over to an *inter vivos* trust, actually had been executed before or contemporaneously with the will. Parenthetically, it should be noted that where a trust and a pour-over will are executed at the same time as integral parts of an estate plan, testators and their counsel are relieved from the necessity of making certain that the trust has been executed before the pour-over will. The pour-over is valid under this provision as long as the signing of both instruments takes place as part of the same transaction.

The phrase 'or to be established' would seem to contemplate trusts created after the execution of the will, an apparent inconsistency with language which appears later in the Act. Actually, it has a different meaning and was deliberately included for a different reason. It recognizes any distinction which may exist between trusts established by a written instrument and trusts established when the corpus is added sometime after the trust instrument is written (such as an insurance trust) and is intended to cover both situations.

A potentially troublesome problem in the application of the doctrine of independent significance was just how large, relatively speaking, the corpus of a pour-over trust had to be before it was significant enough to support the pour-over. The Uniform Act removes any requirement of testing the independent significance of the corpus of the receptacle trust. In fact, it goes much further. It eliminates the necessity that there be a trust corpus. One might ask if the Uniform Act and any other statutes which contain similar language, 'create a new kind of institution, a trust without a corpus'. This is exactly what the Act does, but it is submitted to those who might be troubled by this result, that it is better to have resolved the problem in this way than to perpetuate the doubts and uncertainties about exactly what is required to support a pour-over.

Subsection (1)(e) validates pour-overs to the testamentary trusts of others, but limits them to trusts contained in the will of a second testator who has predeceased the testator whose will contains the pour-over, thereby eliminating the possibility of a pour-over to a trust contained in an ambulatory will. While it is not at all clear whether the second testator must have predeceased the testator whose will pours over at the time of the execution of the latter's will or at the time

of his death, the sense of the Act would seem to require the first result. First of all, even though a will has been properly executed by a competent testator, it could be argued that its validity does not become certain until it is admitted to probate without contest. Secondly, since it is the intent of the Act to eliminate the possibility of a pour-over to an ambulatory will, the only way this can be achieved is to validate pour-overs only to wills which can never be changed or revoked because the death of the second testator has intervened.

(2) A trust mentioned in subsection (1) includes a funded or unfunded life insurance trust, notwithstanding that the settlor has reserved any or all rights of ownership of the insurance contract.

Comment:

At common law, under the doctrine of independent significance, the retention and control of some or all of the ownership rights in the insurance contracts, leaving the trustee with the mere expectancy of receiving the insurance proceeds on the death of the insured, may have been enough to deprive the insurance trust of the significance it needed to support a pour-over. This provision in the Act wisely removes any question of the validity of a pour-over to such a trust.

(3) A trust mentioned in subsection (1) includes a funded or unfunded trust for the proceeds of a plan, notwithstanding that the settlor has reserved any or all rights of ownership of the plan.

Comment:

There has been a substantial increase in estate planning tools that allow assets to pass outside of a will. When the ULCC published its report in 1968, one of the few assets that allowed the designation of a beneficiary in an instrument outside a will was life insurance. We now have the ability to designate a beneficiary of Registered Retirement Savings Plans, Registered Retirement Income Funds, Tax Free Savings Accounts, pensions, annuities, (which are defined above as a "plan") and insurance products such as segregated funds as well as RRSP's and RRIF's that meet the definition of insurance under each jurisdiction's insurance legislation. All of this can be accomplished by the signature of the owner, without the necessity of complying with the formalities of wills legislation.

Section 2(2) of the Act was included for the reason outlined in the comment above on that subsection. The same holds true for a "plan" as defined in section 1. This subsection makes it clear that an addition to a trust may be accomplished by a designation of a trustee of a trust which is intended to hold the proceeds of a plan. Provincial insurance statutes govern the designation of beneficiaries of insurance products. Other provincial statutes govern the designation of beneficiaries of non-life insurance products (for example pensions and bank RRSP's). Each jurisdiction will need to determine which statutes require

amendment to implement the recommendations.

(4) A disposition made under subsection (1) shall not be invalid because the trust

a. Is amendable or revocable or both; or

b. Was amended after the execution of the will or after the death of the testator.

Comment:

A pour-over to a revocable, amendable trust is not invalid because the testator amends it during his or her lifetime or another person does so either before or after the testator's death.

3. (1) Where, in accordance with the provisions of section 2, a testator makes a disposition of property to a trustee or trustees, unless the will of the testator otherwise provides, the property so disposed

a. Shall not be deemed to be held under a testamentary trust of the testator but shall become part of the trust to which it is given; and

b. Shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of that trust.

Comment:

In brief, there is an actual pour-over and a single, non-testamentary trust results.

The phrase “unless the will of the testator otherwise provides” is included to reserve to the testator the power to provide by his or her will for results other than those contemplated by the provisions which follow it. Without this language, there might have been some doubt as to whether or not the testator was precluded from making other provisions in his or her will.

(2) A trust to which property is disposed by a testator includes

a. Any amendments made thereto before the death of the testator, notwithstanding that the amendments were made before or after the execution of the will of the testator; and

b. Unless the Court, in interpreting the will of the testator, finds that the testator had a contrary intention, any amendments to the trust after the death of the testator.

Comment:

This language is consistent with the intent of the Act to codify an exception to Wills legislation by validating pour-overs to trusts amended after the execution of the pour-over will, including amendments after the death of the testator.

The testator is presumed to be content with the pour-over trust as it stood at the

time of his or her death. However, in also giving initial efficacy to amendments after the death of the testator, this is a change from the 1968 Act which required that the testator include a provision in the pour-over clause allowing for amendments after the death of the testator. A lay person or inexperienced draftsperson may have inadvertently omitted such words, which might well have created more confusion than now exists in the law. It would certainly have created administrative problems in cases where the will was silent, and the trust was amended after the death of the testator. Subsection 3(2)(b) now provides for initial efficacy of amendments after death, unless the will of the testator shows a contrary intent.

This provision adopts the minority view of the 1968 Commissioners that the burden should be on the testator to provide specifically for a limitation on the pour-over if that was his or her intention.

4. The revocation or termination of a trust to which a testator has devised or bequeathed property before the death of the testator shall cause the disposition to lapse.

Comment:

If nothing more, this provision should operate as a caveat to a testator and his or her legal counsel to make proper provisions in the will for alternative disposition of the pour-over property unless the testator is content to have the property pass either by intestacy if the residuary clause of the will contains the pour-over or by the residuary clause if it does not.

5. This Act has no effect upon any disposition made in a will of a person who died prior to the effective date of this Act.

Comment:

Section 5 of the 1968 Act stated that "This Act has no effect upon any devise or bequest made by a will executed prior to the effective date of this Act." The Act was drafted at the time that many of the states in the United States were adopting similar legislation to allow pour-over wills. Practitioners are now encountering US pour-over wills, or Canadian wills that include pour-over provisions for US citizens, or for the benefit of US beneficiaries (such as in the *Quinn* and *Kellogg* cases). Therefore section 5 was amended to recognize such pour-over provisions that were signed prior to the effective date of the Act, but only for the wills of persons who die after the effective date of the Act.