

Title

Synchronizing the will and will substitute via the Uniform Probate code and the Uniform Trust Code: Whatever for and how is it coming along?

Text

One common policy theme of the Uniform Probate Code and the Uniform Trust Code is that rules applicable to the will and will substitute should be the same. We law academics, particularly the non-practitioners among us, love conceptual symmetry. Symmetry for the sake of symmetry. Hence UTC's §112: "The rules of construction that apply in this State to the interpretation of [sic] and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." What about pretermission? The Supreme Court of New Hampshire has determined that N. H.'s pretermitted heir statute applicable to wills has not been abrogated by UTC §112's enactment. See *In re Teresa E. Craig Living Trust*, 194 A.3d 967 (N.H. 2018). As a practical matter, is partial symmetry when it comes to the disposition of property by will and will substitute preferable to a total absence of symmetry? Are the attendant complexities worth the candle? And what are the practical advantages of total symmetry, assuming such a state could ever be achieved in the U.S., which lacks a federal probate jurisprudence? Pretermission is covered generally in §8.15.89 of *Loring and Rounds: A Trustee's Handbook* (2019), which section is reproduced in its entirety in the appendix below.

Appendix

§8.15.89 Pretermission [from *Loring and Rounds: A Trustee's Handbook* (2019)]

Pretermission, n.1. The action of overlooking or disregarding something; the omission of something from a speech, narrative, etc.; omission of or neglect to do something ... 4. Roman Law. The omission by a testator to mention in his or her will one of his or her children or natural heirs.—Oxford English Dictionary

Descendants of descendants. Circa 170 A.D., under Roman civil law, as laid down in Gaius' *Institutes*, "if a testator 'passe[d] over in silence' any one of his sons, 'his testament [would] be of no effect.'"¹³⁴¹ On this side of the Atlantic we see the first pretermitted heir/child statute being enacted in 1700 in the Province of Massachusetts Bay.¹³⁴² A pretermission statute in a common law jurisdiction is designed to prevent *unintentional* disinheritance by will of the members of a designated class of individuals. The typical protected class is comprised of some cohort of the testator's descendants/issue. The UPC's omitted child or "pretermitted-heir" section, §2-302, protects the children of a testator who were born or adopted after the will's execution. Some statutes cover not only afterborn children, but also children alive when the will was executed. A minority of states have expansive pretermission statutes that operate in favor of a testator's other issue as well.

While the focus of a pretermission statute is unintentional disinheritance by will, pretermission via the trusteed will substitute, namely the revocable inter vivos trust, can come about in two ways. One could have

¹³⁴¹Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 Real Prop. Tr. & Est. L.J. 175, 178–179 (Fall 2015) (referring to J. Inst. 2.13 (Thomas Collett Sanders trans., 1922) (533 A.D.) (restating Gaius's *Institutes*, c. 170 A.D.)).

¹³⁴²Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 Real Prop. Tr. & Est. L.J. 175, 180 (Fall 2015) (referring to Act of June 28, 1700, 1 Acts and Resolves of the Province of the Massachusetts Bay 429 (Boston 1869) reprinting 1700-01 Mass. Acts ch. 4).

a technical pretermisison if a will which makes no reference to any of the testator's children pours a portion or all of the probate estate over into a preexisting inter vivos trust for the benefit of those very children. One could have a full-blown substantive pretermisison if the terms of the revocable trust make no provision whatsoever for those children and the trust was fully funded inter vivos such that there is no probate estate to pour over into the trust.

Technical pretermisison by pour-over. The pour-over to a trust for the benefit of persons covered by a pretermisison statute is omission in form only. Thus, the Restatement (Third) of Property (Wills and Other Donative Transfers) provides that: “[i]f the testator's will contains a pour-over devise ..., a child who is a beneficiary of the trust into which the devise pours over is not entitled to an omitted-child share.”¹³⁴³ Certainly such a principle comports with the spirit if not the letter of most pretermisison statutes. Pour-over devises are covered generally in §2.1.1 of this handbook and in §2.2.1 of this handbook.

Substantive pretermisison by funding the revocable inter vivos trust predeath . Those who advocate expanding either by legislation or judicial fiat the reach of the generic pretermisison statute to the will substitute, particularly to the revocable inter vivos trust, have little to show for their advocacy.¹³⁴⁴ “No cases have been found in which the protections by statute or case law afforded to a child omitted from a will have been extended to a child omitted from a will substitute used as a comprehensive dispositive plan. Courts that have addressed the issue have decided against expanding the policy.”¹³⁴⁵ The Restatement (Second) of Property (Donative Transfers) had proposed that the policy be so expanded.¹³⁴⁶ Its successor, the Restatement (Third) of Property (Wills and Other Donative Transfers), has declined to take up the torch.¹³⁴⁷ “As of now ... [,2017,]... pretermitted child statutes in only three states ... [,California, Iowa, and Missouri,]... account for will substitutes, but none do so in an ideal way.”¹³⁴⁸

Pretermitted spouses. Statutory pretermisison protections afforded spouses of decedents are taken up in §5.3.4.1 of this handbook.

¹³⁴³Restatement (Third) of Property (Wills and Other Donative Transfers) §9.6 cmt. h.

¹³⁴⁴See, e.g., *Kidwell v. Rhew*, 268 S.W.3d 309 (Ark. 2007).

¹³⁴⁵Restatement (Third) of Property (Wills and Other Donative Transfers) §9.6, Reporter's Note, No. 17.

¹³⁴⁶Restatement (Second) of Property (Donative Transfers) §34.2(2).

¹³⁴⁷Restatement (Third) of Property (Wills and Other Donative Transfers) §9.6.

¹³⁴⁸Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 Real Prop. Tr. & Est. L.J. 175, 240 (Fall 2015).