Study 2:

Validity of Testamentary Pourovers

Compiled by

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VALIDITY OF
TESTAMENTARY POUROVERS

I. GENERAL.
In every jurisdiction, a testamentary bequest or devise to a trustee of an amendable inter vivos trust (which must be funded at least with the right to receive life insurance proceeds and/or other assets of nominal value), in existence at or prior to the date of the will, is valid even if the trust was amended after the date of the decedent's last will but prior to his death, and property so bequeathed or devised shall be treated as an addition to the trust and governed by the terms of the trust as amended. A revocation of the trust before the death of the testator will cause the disposition to fail unless the testator has made an alternative disposition.

The statutes of some states may be broader and, among other things, permit pourovers (1) to trusts established or amended after the date of the will and, if so authorized by the will, after the death of the grantor; and (2) to trusts, regardless of the existence, size, or character of the corpus of the trust.

II. GRANTOR AS SOLE TRUSTEE AND SOLE INCOME BENEFICIARY.
Even where there is an absence of applicable statutory authority or case law, most reporters believe that the validity of the pourover would not be affected if the recipient trust were one in which, during the testator’s lifetime, he or she was the sole trustee and also the sole income beneficiary. This assumes that a new trustee is named or appointed and there are additional beneficiaries eligible for income and principal following the testator's death.

However, in two states (Connecticut and West Virginia) the reporters believe that testamentary pourovers under these circumstances may be invalid.

Reporters in four states (Alabama, Maryland, Mississippi and South Carolina) were unable to provide an opinion.

III. INELIGIBLE TRUSTEE.
The following table shows whether the validity of the pourover is affected if the pourover trustee is not eligible to act as a testamentary trustee under the laws of the decedent's domicile.

<table>
<thead>
<tr>
<th>State</th>
<th>Eligibility</th>
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</table>
KEY:
A – The pourover is valid regardless of whether the trustee is eligible to act as a testamentary trustee under the laws of the decedent's domicile.

B – If the trustee is ineligible to act under the law of decedent's domicile, the validity of the trust is unaffected, and the court will appoint an eligible substitute trustee.

C – If a trustee is ineligible, the validity of the trust is unaffected. If there are one or more eligible trustees, they may act alone, or the eligible trustee or trustees or the beneficiaries may petition the court to appoint a successor for any ineligible trustee. If there are no eligible trustees, the beneficiaries may petition the court to appoint a successor trustee or trustees.

D – A pourover involving a non-resident bank trustee appears permissible, but if the ineligibility is more fundamental (e.g., a felon) a court will likely appoint another trustee.

E – Provided that, at the time the devise or bequest is to be distributed to the trust, at least one trustee is an individual resident of Virginia or a corporation or association authorized to do a trust business in Virginia. A non-resident individual of Virginia may serve if related to the testator (parent, sibling, descendant, spouse, spouse of child, or child of sibling), but he or she must file with the court a consent to service of process in any action against the trustee, and bond with surety must be posted unless one trustee is a resident of Virginia. A corporation or association not authorized to do a trust business in Virginia at the time of funding the trust may not serve as trustee.

F – Regardless of whether the trustee is eligible to act as a testamentary trustee under the laws of Alabama, except that in the case of real property if a foreign corporate trustee is ineligible to act in Alabama, the validity of the trust is unaffected, and the court will appoint an eligible substitute trustee.

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Butte, Montana
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Morristown, New Jersey
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Robert E. Rosenvold
West Fargo, North Dakota
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Cincinnati, Ohio
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Portland, Oregon
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