Pouring Nonprobate Assets Into a Testamentary Trust: A Half-Protected Activity in Alaska

This Note examines the use of a testamentary trust as the receptacle for transfers of nonprobate assets. First, this Note describes the two principal objections that courts have raised with respect to the designation of a testamentary trustee as the beneficiary of nonprobate assets. Then, this Note evaluates statutory attempts to address these two objections. Finally, this Note concludes that recently proposed House Bill 308 could easily be revised to provide Alaskans with comprehensive protection from the dangers posed by both objections.

I. INTRODUCTION

During the last half century, an enormous change has occurred in both the nature of wealth and the way in which it is held.[1] So-called "will substitutes" such as life insurance, pension and retirement accounts, joint accounts and even revocable trusts have become commonplace and increasingly significant in the asset portfolios of middle and upper-income Americans. Will substitutes permit the transfer of property at death through the use of beneficiary designations. More importantly, however, will substitutes transfer title in a way that completely avoids the probate system. Thus, as the use of will substitutes has proliferated, the traditional system of title-clearing through a probate court has suffered a corresponding marginalization.

Part of the marginalization of the probate system can be traced to popular resentment of it. Norman Dacey's bestseller *How to Avoid Probate*,[2] now in its fifth edition,[3] reflects the widespread public scorn that crystallized around the middle of this century. The probate process has earned a reputation as an expensive,

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1. *See generally* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

2. NORMAN F. DACEY, HOW TO AVOID PROBATE (1965).

3. NORMAN F. DACEY, HOW TO AVOID PROBATE (5th ed. 1993).

awkward, delay-ridden system that many regard as little more than "a tax imposed for the benefit of court functionaries and lawyers."[4]

Reacting to increasingly negative public sentiment against the system, legislatures across the nation have adopted probate reform measures aimed at simplifying procedures.[5] The source of many of these reforms has been the Uniform Probate Code of 1969 ("UPC") and its revised versions.[6] Alaska is no exception to this trend. In recent decades, the Alaska legislature has enacted several statutes either wholesale or in a substantially similar form to UPC models.[7] House Bill 308,[8] moving through the current legislative session, is the latest in this series of probate reforms. The Bill contains language from articles II and VI of the 1990 UPC.[9] Although discussion among members of the probate bar and recent testimony before the Alaska House Judiciary Committee has focused largely on the elective share provisions of article II and counter-proposals by Alaska attorneys,[10] section 12 of the Bill contains an important new chapter on nonprobate transfers taken straight out of article VI of the UPC.[11] This new chapter, deeming a variety of contractual arrangements nontestamentary and thus not subject to the probate system, will update an earlier UPC section on nonprobate transfers adopted as Alaska Statutes section 13.31.070.[12]

By focusing on the use of a testamentary trust as the receptacle for the nonprobate transfers referred to in the new chapter of House Bill 308, this Note will highlight both the significance of the new chapter and the ways in which it could be improved to give testators in Alaska even more flexibility in planning their estates. First, this Note will sketch the body of law that developed through

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4. Langbein, *supra* note 1, at 1116.

5. *See infra* Part IV.

6. UNIF. PROB. CODE (1990). The Uniform Probate Code is a set of model probate laws approved by both the National Conference of Commissioners on Uniform State Laws and the American Bar Association.

7. *See, e.g., infra* text accompanying note 81.

8. H.R. 308, 19th Leg., 2d Sess. (Alaska 1995).

9. Letter from Arthur H. Peterson, Uniform Law Commissioner for Alaska, to Terry Bannister, Legislative Counsel, Alaska Legislative Affairs Agency (Mar. 7, 1995) (on file with the *Alaska Law Review*).

10. Telephone Interview with Deborah H. Randall, Associate, Davis & Goerig, Anchorage, Alaska (Oct. 24, 1995).

11. H.R. 308, 19th Leg., 2d Sess. (Alaska 1995).

12. ALASKA STAT. § 13.31.070 (1972).

judicial decisions dealing with the designation of a testamentary trustee as beneficiary of one of these nonprobate assets, namely life insurance. In particular, this Note will describe two principal objections courts have raised and review the statutory reactions to them. As Alaska has already dealt squarely with one of these principal objections by statute, this Note will propose that the second be addressed in the same way. Indeed, section 12 of House Bill 308 could easily be revised to meet the second objection. If this second objection is not addressed, a potential trap exists for testators who choose to designate a testamentary trustee as beneficiary of a nonprobate asset.

II. USE OF A TESTAMENTARY TRUST AS RECEPTACLE FOR NONPROBATE TRANSFERS

Many individuals prefer the trust vehicle to outright transfers of property because it commonly offers professional management of assets and protection of principal for future generations. Given the drawbacks associated with probate, many also prefer the use of nonprobate instruments to pass property outside of the probate system. Combining the advantages of the trust vehicle with those of nonprobate instruments can significantly enhance the flexibility and reduce the expense of post-mortem wealth transfers.

In a majority of states, testators desiring such a combination have a choice between two functional equivalents. They can either establish a trust during their lifetime, into which they may pour both probate and nonprobate assets,[13] or they may opt to create a trust in a will, into which they may pour the same types of assets. Yet when a trust created in a will is designated as the receptacle for nonprobate assets, concepts of trust, probate and nonprobate law often become muddled.

At the heart of this confusion are the differing natures of inter vivos and testamentary trusts. All trusts involve a transfer of distinct property interests from an owner to a trustee and a beneficiary. The trustee receives the legal interest, while the beneficiary receives the equitable interest in the same property. If such a transfer occurs during the lifetime of the transferror, or settlor, an inter vivos trust is created. By contrast, if the settlor provides for such a transfer in a validly executed will, a testamenta-

13. *See* Uniform Testamentary Additions to Trust Act. This Act is found in UNIF. PROB. CODE § 2-511 (1990).

ry trust is created. It is precisely this interconnection between the testamentary trust and the will that has spawned two concerns as to the validity of using the testamentary trust as the receptacle for will substitutes. More specifically, as one commentator noted,

> [t]he dependence of the testamentary trust upon the will raises the problem of whether the disposition violates the Statute of Wills since the statutory formalities are not followed. Further, when the policies are assigned to trustees *to be named in the last will*, [some argue that] no trustees exist until the insured's last will is legally established[,] raising the question whether a valid trust has been created. Consequently, validity of such a trust is uncertain.[14]

These two principal issues—whether the disposition violates the Statute of Wills and whether it constitutes a valid trust—are the ones with which both courts and legislatures have grappled.

III. JUDICIAL DECISIONS

No court in either Alaska or the Ninth Circuit has addressed these issues in a reported decision. Other courts that have dealt with these issues have done so only in the context of life insurance proceeds payable to a trustee-beneficiary, and the results are conflicting.

Life insurance beneficiary designations were the first of the nonprobate contractual arrangements to be examined by the courts. Courts in several jurisdictions considered the arguments that life insurance by its very nature was a testamentary disposition and that beneficiary designations were no more than testamentary dispositions in violation of the Statute of Wills.[15] Some courts distinguished life insurance from property transmittable by will, observing that life insurance proceeds were owned by the beneficiary, not the insured decedent at the time of his death.[16] Other courts focused on life insurance as a contract between the insured and insurer to make payment to a third-party beneficiary. Premiums were said to be paid as consideration for the insurer's promise to

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14. Note, *The Testamentary Life Insurance Trust*, 51 MINN. L. REV. 1118, 1118 & n. 1 (1967) (emphasis added). This note specifically refers to life insurance, but the concerns it cites are equally applicable to beneficiary designations of other nonprobate instruments.

15. AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 57.3, at 150 (4th ed. 1987).

16. *See, e.g.*, Sigal v. Hartford National Bank & Trust Co., 177 A. 742, 744 (Conn. 1935); Bullen v. Safe Deposit & Trust Co. 9 A.2d 581, 584 (Md. 1939).

pay an agreed amount upon the death of the insured.[17] Regardless of the rationale employed, the results were the same: courts held life insurance beneficiary designations to be nontestamentary dispositions, even though they direct a transfer of property upon the death of the insured. Thus, such designations are not subject to the statutory formalities, such as attestation, required for the valid execution of a will.

Having determined that life insurance was not to be regarded as a testamentary disposition, courts next considered whether designating a trustee of an inter vivos trust as beneficiary somehow qualified as a testamentary disposition. Professor Austin Scott summarizes the outcome of this examination, noting that "[t]he fact that the policy is payable to a beneficiary as trustee for others makes it no more testamentary than if it were payable to the beneficiary absolutely."[18]

The first court to consider the validity of an assignment of life insurance policies to a trustee named or to be named in a will was the Supreme Judicial Court of Massachusetts.[19] In *Frost v. Frost*, the court interpreted the phrase "my will" to refer to the document finally admitted to probate. It then observed that until the will was probated, the trustees to whom the beneficiary designation referred could not finally be ascertained. The fact that the assignments could therefore never take effect during the lifetime of the testator led the court to conclude that they were testamentary in nature. As such, they were required to comply with the formalities prescribed by the Statute of Wills. According to the court, "[t]he question is not simply whether, assuming the validity of the assignments, the trust was good, but is much deeper, and is whether the assignments upon which alone the trust depends ever became operative in law."[20] The court concluded that "these assignments never took effect within the lifetime of the assignor, for want of assignees, and never took effect after his death for want of proper attestation."[21] Here, the court's holding emphasized the testamentary problem, as well as referring to a possible trust creation problem.

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17. *See, e.g.*, Gurnett v. Mutual Life Ins. Co., 191 N.E. 250, 253 (Ill. 1934).
18. SCOTT & FRATCHER, *supra* note 15, § 57.3, at 150.
19. Frost v. Frost, 88 N.E. 446 (Mass. 1909).
20. *Id.* at 448.
21. *Id.*

A. The Testamentary Objection

This same pair of objections was addressed by a California court in *In re Estate of Anderson v. Anderson.*[22] There, the court considered the effect of life insurance policies made payable to "Bank of America Trust Department, as stipulated in my Will, dated 1961."[23] In considering two cases cited by the appellant,[24] the court observed that a beneficiary designation naming a trust to be created in an after-executed will was purely testamentary. It further noted that "the same result follows where the policy merely refers ... to 'my will,' since the obvious reference is to whatever will may ultimately be admitted to probate."[25] However, the court went on to state that "a different result follows where—as in the case at bench—the reference is to a will already executed and specifically referred to."[26] In that context, the will serves as a document or memorandum incorporated by reference into the insurance policies, thus effecting the creation of a valid inter vivos insurance trust whose terms are identical to those of the testamentary trust. Addressing the argument that the whole arrangement was testamentary since the trustee did not receive the subject matter of the trust—the life insurance proceeds—until after the settlor's death, the court pointed out that "[t]he accepted doctrine is to the contrary, the general rule being that the designation of the trustee as immediate beneficiary of the policy is all that is required."[27]

In a more recent case, *Equitable Life Assurance Society of the United States v. Porter-Engelhart*, the U.S. Court of Appeals for the First Circuit examined a beneficiary designation directing the payment of insurance proceeds to "the Trustee named in my Last Will and Testament."[28] In contrast to the *Anderson* court, the *Porter-Engelhart* court applied the incorporation by reference

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22. 236 Cal. App. 2d 214 (Cal. Ct. App. 1965).

23. *Id.* at 216.

24. *Id.* at 218 (considering *In re* Estate of Rothenbuecher, 64 N.E.2d 680 (Ohio Ct. App. 1945); *In re* Myers' Estate, 164 A. 611 (Pa. 1933)).

25. *Id.*

26. *Id.* (quoting *In re* Hemingway's Estate, 151 A.2d 472, 472-73 (Pa. 1959)).

27. *Id.* at 218-19 (citing AUSTIN W. SCOTT, THE LAW OF TRUSTS § 84.1, at 646-48 (2d ed. 1956); RESTATEMENT (SECOND) OF TRUSTS § 57 cmt. f & § 84 cmt. b (1959)).

28. Equitable Life Assurance Soc'y of the United States v. Porter-Engelhart, 867 F.2d 79, 82 (1st Cir. 1989).

doctrine more broadly, allowing "my Last Will" to refer to a will *in existence* at the time of the assignment.[29] The result, again, was the creation of a separate and distinct inter vivos trust whose terms mirrored those of the testamentary trust. Despite the fact that the assignor did not refer to a will by a specific date or offer any other further description beyond "my Last Will," the court held that the testator "explicitly referred to, and described, a preexisting, unique and easily identifiable paper."[30]

In distinguishing the case at bar from *Frost*—which ruled a transfer testamentary in nature and therefore in violation of the Statute of Wills[31]—the court observed that in *Frost* no will existed at the time the beneficiary designation was made. In *Porter-Englehart*, the court relied heavily on evidence that the testator intended to distribute the insurance proceeds to his children through a trust. The court observed that "[u]nlike in *Frost*, the trust instructions were undeniably in the front of the insured's mind when he designated the trustee as beneficiary."[32]

While the incorporation by reference doctrine has allowed some courts to bypass the testamentary objection in cases where a preexisting will containing a testamentary trust is at hand, such a result is not entirely satisfying. First, it results in the creation of two trusts: the intended testamentary trust and a separate inter vivos trust with identical terms. Aside from the loss of administrative economy that one trust would have provided, the existence of two separate trusts may not be what the testator in fact intended. Second, it makes a questionable distinction between those testators who make beneficiary designations *after* executing a will containing a testamentary trust, and those who make such designations *before* executing such a will. Unless clear policy reasons exist for treating one situation differently than the other, both should be treated alike. The testator's intent, which prompted the use of the incorporation by reference doctrine in the former scenario, seems no less clear in the latter scenario.

B. The Valid Trust Objection

While some courts have focused on the testamentary objection, others have chosen to focus exclusively on whether a valid trust is

29. *Id.* at 87.
30. *Id.*
31. *See supra* text accompanying notes 19-21.
32. *Id.*

created when a testamentary trustee is designated as a beneficiary. Some courts conduct a narrow examination to determine whether all essential trust elements are present,[33] while others follow the *Porter-Englehart* court's broader approach of construing the language of beneficiary designations and wills together with facts and circumstances to determine whether all required elements of a valid inter vivos trust are present.[34] Professor George Bogert classifies the latter approach as one where "there was a valid inter vivos trust which merely lacked trustees and that they were provided by the will."[35]

In general, a valid trust is created when the presence of a trustee, a beneficiary and a sufficient trust res can be established. In order to qualify as a valid inter vivos trust, some property interest must pass during the lifetime of the settlor to the trustee and to the beneficiary, which may be one and the same person. Where the property interest passing is the right to receive the proceeds of an insurance contract, and such rights can be extinguished at any time by the insured through a change in the beneficiary designation, there is concern as to whether such extinguishable rights properly may constitute a trust res. In analyzing this interest, some courts have concluded that an interest indeed passes that is a sufficient trust res, but they do not name the interest.[36] Professor Scott clarifies the nature of this interest, observing that the beneficiary,

> immediately acquires a chose in action, a claim against the insurance company, although it is not enforceable by him until the death of the insured, and even though the insured by changing the beneficiary can divest his interest under the policy. He has, however, until his interest is divested, an interest he can hold in trust.[37]

Thus, a sufficient res may be deemed to exist and the validity of an inter vivos insurance trust upheld.

In addition to the challenge to the sufficiency of the res, the testamentary trust also faces a challenge to its validity based on the existence of the trustee, who is only finally ascertained by the probated will. On this point, it may again be helpful to refer to the

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33. *See, e.g.*, Prudential Ins. Co. of America v. Bloomfield Trust Co. 145 A. 735 (N.J. Ch. 1929).

34. *See supra* text accompanying note 32.

35. GEORGE T. BOGERT, TRUSTS § 22, at 57 (6th ed. 1987).

36. *See, e.g.*, Farkas v. Williams, 125 N.E.2d 600, 603 (Ill. 1955).

37. SCOTT & FRATCHER, *supra* note 15, § 84.1, at 474.

discussion of insurance above. In the insurance context, the effect of death is not a condition precedent to the vesting of the beneficiary's rights; it is the inevitable contingency that determines the time for payment of the proceeds. Similarly, in the testamentary trust context, the effect of the testator's death is to complete the assignment made in the beneficiary designation; it is not a condition precedent to the existence of the trustee. The *Frost* court takes note of this argument but discounts it by saying that "[w]hile it is true . . . that the trustees when finally ascertained would derive their appointment under the assignment and not under the will, still it remains equally true that they could not be appointed nor even ascertained, until after the death of the assignor."[38]

However, it must be kept in mind that the *Frost* court issued its opinion at a time when the judiciary's concept of insurance was unsettled, and, in retrospect, not fully developed. Concepts of trust law, now well-articulated by Professors Scott and Bogert, were also less developed. The 1909 *Frost* court was not operating under the same sets of assumptions that guide modern courts. Thus, a stark difference in opinion is reflected in more recent decisions.

In *Tootle-Lacy National Bank v. Rollier*[39] the Supreme Court of Missouri was confronted with a situation in which the insured designated a bank as trustee of one set of insurance policies, and "the Trustees under the last will and testament of the Insured" as the beneficiaries of a second set of policies.[40] Without even addressing the two possible *Frost* objections to the latter set, the court considered both sets together, holding that the beneficiary designations created a separate and distinct inter vivos trust of the insurance proceeds. Guided by what it called a "reasonable construction and interpretation of the language used, considered in light of the surrounding facts and circumstances," the court concluded that the testator "intended that a trust of the same kind and character and on the same conditions as that declared in the will should apply to the proceeds."[41] Clearly, the intent of the settlor-testator, and not some technical flaw in trust creation, was the controlling factor in this decision.

While some commentators have emphasized that the *Tootle-Lacy* decision was related to the fact that the wife of the insured

38. Frost v. Frost, 88 N.E. 446, 447 (Mass. 1909).
39. 111 S.W.2d 12 (Mo. 1937).
40. *Id.* at 17.
41. *Id.*

was committed to a hospital for the insane—implying that not only her deceased husband, but the court itself felt a need to protect her[42]—other courts have accorded similar weight to the intention of the insured. In *Prudential Insurance Company of America v. Gatewood*,[43] the same court focused on the intent of the settlor-insured to the exclusion of all other factors. The court outlined the boundaries of its inquiry by stipulating that

> [t]he essential question is, therefore, shall the intention of the insured be thwarted upon the ground that the trust must fail because the purpose cannot be ascertained, or are there other facts and circumstances in the case whereby its purpose can be ascertained and it may be made operative in the manner intended by the insured?[44]

Drawing an analogy between the desire of the insured in *Gatewood* to provide for his children and the desire of the insured in *Tootle-Lacy* to provide for his wife, the court concluded that the designation of a bank as trustee for the insurance proceeds, without any further mention of the terms of the trust, was designed to "incorporate by reference the terms and provisions of the trust created by the will as the terms and provisions by which the trust created in the proceeds of the policies was to be administered for the exclusive benefit of the children."[45] Again, the intent of the decedent and the incorporation by reference doctrine were used to overcome any technical flaws in trust creation.

In *United States v. First National Bank & Trust Co. of Minneapolis*,[46] the U.S. Court of Appeals for the Eighth Circuit confronted a situation in which the insured named a bank, "under the last Will and Testament of the insured," as beneficiary of two life insurance policies, while naming the same bank, "under Trust Agreement," as beneficiary of an additional two policies.[47] The will, which included a testamentary trust, made no reference to the insurance policies. Weighing the alternative option that the proceeds be turned over to the estate of the insured, the court

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42. *See* Paul G. Haskell, *Testamentary Trustee As Insurance Beneficiary: An Estate Planning Gimmick*, 41 N.Y.U. L. REV. 566, 578 (1966); Carl F. Schipper, Jr., *Designating Trustee Under Will As Beneficiary of Insurance—Legal Problems*, 94 TR. & EST. 819, 821 (1955).

43. 317 S.W.2d 382 (Mo. 1958).

44. *Id.* at 388.

45. *Id.* at 390.

46. 133 F.2d 886 (8th Cir. 1943).

47. *Id.* at 887.

noted that the fact that the insured made the policies payable to a specific beneficiary, here the bank as trustee, evidenced his intention that they be included in a testamentary trust, which existed for the benefit of his wife and daughter. The court observed that such was "the intent and design of the insured in this case is as manifest as it would be had he named his wife and daughter beneficiaries in the policies."[48] Here, in contrast to other decisions focusing on the decedent's intent, insurance proceeds actually flowed into a testamentary trust, rather than into a judicially discovered inter vivos trust.

In *Boston Safe Deposit & Trust Co. v. Commissioner of Internal Revenue*,[49] the U.S. Court of Appeals for the First Circuit also looked to the intention of the decedent in curing a possible flaw in the testamentary trust. In this case, the insured did not designate a trustee named or to be named in his will, but rather named "Boston Safe Deposit & Trust Company, trustee" as the beneficiary of insurance policies.[50] Boston Safe Deposit and Trust was also named in the insured's will as trustee of a testamentary trust. Observing that the decedent had made no inter vivos trust of which Boston Safe Deposit & Trust was the trustee, the court found that the documents and circumstances appearing in the case,

> disclose a clear intention on the part of the decedent to make the wife and children the beneficiaries of the trust created by the will, and to include in the corpus of that trust, for their benefit, the proceeds of the policies . . . as though the policies had stated that they were payable to the Boston Safe Deposit & Trust Company, trustee, under the trust set up in the will.[51]

In directing that the proceeds pass to the testamentary trustee, as though such designation had been made, the court not only gave effect to what it discerned as the intent of the decedent, but also acknowledged the validity of using the testamentary trust as a single receptacle for probate and nonprobate assets.

Other courts have been less willing to cure perceived defects in the testamentary trust to facilitate such transfers. In *Prudential Insurance Company of America v. Bloomfield Trust Co.*,[52] a New Jersey court refused to correlate a life insurance policy made payable to a trust company as trustee with a will providing for a

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48. *Id.* at 888.
49. 100 F.2d 266 (1st Cir. 1938).
50. *Id.* at 266.
51. *Id.* at 267.
52. 145 A. 735 (N.J. Ch. 1929).

testamentary trust with the same trust company as trustee. Noting that the purported trust of the policy was silent as to its beneficiaries, and that the will made no mention of the insurance policy, the court refused to allow reference to the will to complete the insurance trust.[53]

In *Pavy v. Peoples Bank and Trust Company*,[54] an Indiana court also adhered to a strict analysis of whether a beneficiary designation of a trustee-beneficiary, without further mention of the beneficiary or terms of trust, was effective to create a valid trust. After setting out the essential legal requirements of valid formation, the court determined that the attempt to create an express trust had failed. It noted that the will made no mention of the life insurance and that the beneficiary designation did not refer to a trustee under a will. The court then referred to *Bloomfield Trust Co.* to conclude "that the insurance trust and the testamentary trust cannot be correlated."[55] Despite its unwillingness to supply missing elements of the insurance trust from the testamentary trust, the court did imply that such a correlation is possible when the beneficiary designation refers to a trustee under a will. Thus, while not giving effect to what may indeed have been the intent of the insured in this case, the court acknowledged that a properly worded beneficiary designation might allow for correlation between the policy and the testamentary trust.[56] Such a designation would permit the incorporation of the missing elements of the testamentary trust.

Similarly, a New York court has observed that, "assuming arguendo that an insurance contract can be so framed as to provide that the proceeds thereof shall be disposed of in such manner as the insured shall direct in his last will, clear language would be required to produce that result . . . ."[57] The court found "no language indicative of such intent,"[58] but nonetheless left the possibility open. This dictum leaves the strong impression that the use of the words "last will" would be sufficient to supply the necessary elements to create a valid trust.

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53. *Id.* at 736.
54. 195 N.E.2d 862 (Ind. App. 1964).
55. *Id.* at 867.
56. *Id.*
57. Bellinger v. Bellinger, 46 N.Y.S.2d 263, 266 (N.Y. Sup. Ct. 1943).
58. *Id.*

As the above decisions indicate, there is hardly unanimity in the approach courts have taken to resolving the questions raised by the designation of a testamentary trustee as beneficiary of a life insurance policy. Some courts have analyzed the problem using the law of wills, while other courts have applied principles of trust law. In sorting through the varied decisions, it is interesting to note that no court has squarely addressed both of the objections articulated in *Frost*.[59] The *Porter-Engelhart* court, in interpreting Massachusetts law, had the ideal forum in which to counter or clarify the arguments made in *Frost*. Instead, it chose to distinguish *Frost* and employ the incorporation by reference doctrine to save the beneficiary designations. The court's emphatic declaration that the testator "explicitly referred to, and described, a preexisting, unique and easily identifiable paper"[60] when, in reality, he made reference only to his last will in the beneficiary designation, seems to reflect a deliberate attempt by the court to save the testator from his own vagueness where his intent is otherwise clear. This strong emphasis on the intent of the decedent—seen clearly in the *Tootle-Lacy*, *Gatewood*, *First National Bank* and *Boston Safe Deposit* cases—and the attendant use of the doctrine of incorporation by reference, indicates that the courts are unable to offer more than slender rationalizations in response to the objections raised nearly a century ago by *Frost*. Although such rationalizations have been accepted by courts in the context of insurance and inter vivos insurance trusts, and are arguably similarly applicable where testamentary trusts are concerned, such an application would require yet another expansion of an already complicated web of legal doctrines.

The desired result in making these beneficiary designations is rather simple: it is simply to pour assets that are not subject to the probate system into a trust created by a will. The tendency of some courts to recharacterize such transfers as testamentary dispositions or attack the validity of the intended trust has led to a continuing skirmish over where and how to draw the line distinguishing wealth transfers subject to probate from those that are not. Drawing this line through the middle of the trust realm, thereby distinguishing the use of an inter vivos trust from that of

59. Note, *supra* note 14, at 1131.

60. Equitable Life Assurance Soc'y of the United States v. Porter-Engelhart, 867 F.2d 79, 87 (1st Cir. 1989).

a testamentary trust, has led to needless frustration of testators' intentions. Such a system creates a safe harbor for those who are informed and willing to use an inter vivos trust, while leaving those who elect the testamentary trust to take their chances, often without any warning of the risk they face.

IV. STATUTORY REACTIONS

Legislatures in many states have recognized this dilemma. Unable to discern any policy reasons for distinguishing between those who pour nonprobate assets into inter vivos trusts and those who pour the same kinds of assets into testamentary trusts, a majority of states have enacted statutes that facilitate, in varying degrees, the designation of a testamentary trustee as a beneficiary of nonprobate assets.[61] These statutes can be separated into roughly three categories in accordance with how they deal with the *Frost* objections: (1) some confront the testamentary objection while remaining silent as to the possible valid trust objections; (2) others address only the trust validity issues, while remaining silent on the testamentary objection; and (3) still others deal with both the testamentary and valid trust objections, providing testators with maximum flexibility and protection.

A. Statutes Addressing the Testamentary Objection

The first statutory approach has its roots in the original UPC's section 6-201, which deemed the designation of a beneficiary for

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61. ALASKA STAT. § 13.31.070 (1972); ARIZ. REV. STAT. ANN. § 14-6101 (1995); CAL. PROB. CODE § 6321 (West Supp. 1995); COLO. REV. STAT. § 15-15-101 (Supp. 1994); CONN. GEN. STAT. ANN. § 38a-451 (West 1992); FLA. STAT. ANN. § 733.808 (West 1995); ILL. ANN. STAT. ch. 755, para. 5/4-5 (Smith-Hurd 1992); IND. CODE ANN. § 27-1-12-16 (Burns 1994); KAN. STAT. ANN. § 40-441 (1993); LA. REV. STAT. ANN. § 9:1881 (West 1991); ME. REV. STAT. ANN. tit. 18-A, § 6-201 (West 1964); MD. CODE ANN., EST. & TRUSTS § 11-105 (1991); MICH. COMP. LAWS § 700.256 (1995); MISS. CODE ANN. § 83-7-7 (1972); MO. ANN. STAT. § 456.030 (Vernon 1992); MONT. CODE ANN. § 72-33-207 (1993); NEB. REV. STAT. § 44-503.01 (1993); N.Y. EST. POWERS & TRUSTS LAW § 13-3.3 (McKinney Supp. 1995); N.C. GEN. STAT. § 36A-100 (1977); OHIO REV. CODE ANN. § 2107.64 (Baldwin 1994); OKLA. STAT. ANN. tit. 84, § 305 (West 1990); OR. REV. STAT. § 128.480 (1990); PURDON'S PA. CONS. STAT. ANN. § 6108 (1975); S.C. CODE ANN. § 62-2-510 (Law. Co-op. 1987); TENN. CODE ANN. § 35-50-103 (1991); TEX. INS. CODE ANN. art. 3.49-3 (West 1981); VA. CODE ANN. § 38.2-3112 (Michie 1994); WASH. REV. CODE ANN. § 11.98.170 (West 1987); W. VA. CODE § 44-5-11 (1982); WIS. STAT. ANN. § 701.09 (West 1981).

certain assets, such as insurance policies and pension plans, to be nontestamentary.[62] Alaska has adopted this same language in Alaska Statutes section 13.31.070.[63] According to the UPC Comment, "[t]he sole purpose of this section is to eliminate the testamentary characterization from the arrangements."[64] A variety of contractual modes of transfer were deemed nontestamentary because, in the words of the Comment, "there appear to be no policy reasons for continuing to treat these varied arrangements as testamentary . . . [when] the same courts have for years upheld the beneficiary designations in life insurance contracts."[65] In 1989, a new section 6-101 replaced and revised the former section 6-201 by expanding the list of beneficiary designations deemed nontestamentary to include such assets as individual retirement plans, employee benefit plans and "other written instrument[s] of a similar nature."[66] Section 12 of House Bill 308 would make the same changes by replacing Alaska Statutes section 13.31.070 with language virtually identical to UPC section 6-101.[67]

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62. UNIF. PROB. CODE § 6-201 (1969) (amended 1989). Subsections 6-201(a) and 6-201(b) contain the following text:

> (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance or trust is deemed to be nontestamentary, and this Code does not invalidate the instrument or any provision:
>
> (1) That money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated in either the instrument or in a separate writing including a will, executed at the same time as the instrument or subsequently;
>
> (2) That any money due or to become due under the instrument shall cease to be payable in the event of the death of the promisee or the promisor before payment or demand; or
>
> (3) That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.
>
> (b) Nothing in this section limits the rights of creditors under the laws of this State.

63. ALASKA STAT. § 13.31.070 (1972). Maine has also adopted the language of Subsection 6-201 in ME. REV. STAT. ANN. tit. 18-A, § 6-201 (West 1964).

64. UNIF. PROB. CODE § 6-201 cmt. (1969) (amended 1989).

65. *Id.*

66. *Id.* § 6-101 (1990).

67. Section 6-101 contains the following text:

> (a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note,

Both the wholesale adoption of UPC sections and the enactment of statutes declaring certain asset transfers to be nontestamentary[68] are reactions by legislators to judicial decisions that seemed to draw artificial distinctions among nonprobate assets. Both embody modern assumptions about nonprobate transfers on death, as well as the attitude that legislation should facilitate such transfers, not subject them to formalities and legal doctrines that are inconsistent with their nature. Nevertheless, these statutes fail to deflect possible trust law objections.

B. Statutes Addressing Valid Trust Objections

A number of states have recognized the potential of trust law objections to foil intended transfers of nonprobate assets into inter vivos and testamentary trusts. Some of these states have responded with legislation that simply declares, without further explanation, that a settlor may create either type of trust upon the proceeds of one or more nonprobate assets.[69] Other states have addressed possible trust law objections to a testamentary trust by enacting statutes specifying that a trustee *named by will* may be designated

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certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection includes a written provision that:

(1) money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;
(2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or
(3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(b) This section does not limit rights of creditors under other laws of this State.

The proposed replacement section, which would be named Alaska Statutes § 13.33.101, is identical, except for the deletion of the word "any" before "property" in subsection (a)(3). Arizona recently adopted the same language in ARIZ. REV. STAT. ANN. § 14-6101 (1994).

68. *See, e.g.*, PURDON'S PA. CONS. ANN. § 6108 (1975).

69. *See* LA. REV. STAT. ANN. § 9:1881 (West 1991).

as a beneficiary.[70] Under those statutes, however, it remains unclear if such statements cover both wills in existence when the designation is made and wills executed after the designation. Michigan legislation validates the transfer of nonprobate assets only in the former instance.[71] Statutes in several other states declare the trust valid in both cases, allowing the designation of a trustee *named or to be named by will.*[72] Another approach, taken by North Carolina, is to combine the *named or to be named by will* language with an explicit statement that the interest of a trustee as beneficiary is sufficient to support the creation of an inter vivos or testamentary trust.[73] This type of statute thus addresses both the trustee and res objections discussed above.[74]

Despite their elimination of possible trust law objections to the designation of a testamentary trustee as beneficiary of a nonprobate asset, all of these statutes fail to counter the possible testamentary objection. For example, the case notes following the North Carolina statute refer to case law affirming the nontestamentary nature of life insurance proceeds but fail to refer to other nonprobate assets.[75] This reliance on the courts to safeguard nonprobate assets from the testamentary objection does not offer the same measure of certainty as provided by legislation like UPC section 6-101 and its progeny. Such judicial decisions are unlikely to cover the broad range of nonprobate assets deemed nontestamentary under the uniform statutes. Additionally, it is simply more efficient and straightforward to address both sets of objections at the same time in the same statute. The use of a statute to answer one set of objections, while remaining silent as to the other exposes the testator to needless risk and uncertainty.

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70. *See, e.g.,* CONN. GEN. STAT. ANN. § 38a-451 (West 1992); MISS. CODE ANN. § 83-7-7 (1972); OHIO REV. CODE ANN. § 2107.64 (Baldwin 1994); OKLA. STAT. ANN. tit. 84, § 305 (1990); OR. REV. STAT. § 128.480 (1990); TEX. INS. CODE ANN. art. 3.49-3 (West 1981).

71. MICH. COMP. LAWS § 700.256 (1995).

72. *See, e.g.,* FLA. STAT. ANN. § 733.808 (West 1995); MO. ANN. STAT. § 456.030 (Vernon 1992); VA. CODE ANN. § 38.2-3112 (Michie 1994); WASH. REV. CODE ANN. § 11.98.170 (West 1987).

73. N.C. GEN. STAT. § 36A-100 (1977).

74. *See supra* Part III.B.

75. N.C. GEN. STAT. § 36A-100 (1977).

C. Statutes Addressing Both Testamentary and Valid Trust Objections

States recognizing the vulnerability of testators to both testamentary and trust validity objections have adopted statutes addressing both. In a brief subsection in its chapter on nonprobate transfers to trustees named in a decedent's will, California expressly allows for the designation of a trustee *named or to be named in the will* as beneficiary.[76] As in other states, such language is inserted in the statute to counter the allegation that the testamentary trust fails for lack of a trustee. In allowing for beneficiary designations of a testamentary trustee both before and after a will containing a testamentary trust has been executed, the California statute places paramount emphasis on giving effect to the intent of a testator. If the testator takes the pains to make such a designation as well as to provide for a testamentary trust in his will, the order in which these actions occurred will not matter for purposes of trust validity. This approach also obviates the need to rely on the incorporation by reference doctrine and other fictions used by courts to save intended trusts.

In addition to eliminating traditional trust law objections, the California statute also deals squarely with the possible testamentary objection by expressly stating that the beneficiary designation is not required to comply with the Statute of Wills. Thus, California testators are afforded far greater clarity and certainty in pouring nonprobate assets into testamentary trusts.

Colorado has taken a somewhat different path to the same end. It has combined the security and advantages of UPC section 6-101 with statutory language dismissing classic trust law objec-

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76. CAL. PROB. CODE § 6321 (West Supp. 1995). This section contains the following text:

> An instrument may designate as a primary or contingent beneficiary, payee, or owner a trustee named or to be named in the will of the person entitled to designate the beneficiary, payee, or owner. The designation shall be made in accordance with the provisions of the contract or plan or, in the absence of such provisions, in a manner approved by the insurer if an insurance, annuity, or endowment contract is involved, and by the trustee, custodian, or person or entity administering the contract or plan, if any. The designation may be made before or after the execution of the designator's will and is not required to comply with the formalities for execution of a will.

tions.[77] Although not quite as broad as the California statute in terms of the beneficiary designation flexibility it offers to testators, the Colorado statute does encompass the entire range of nontestamentary contractual arrangements enumerated in the uniform law. After addressing the possible testamentary objection to such designations in subsection (1), the statute shifts its focus to possible trust law objections in subsection (2). More specifically, the Colorado statute expressly permits the designation of a testamentary trustee, eliminating the question as to the trustee's existence when a testamentary trust is used. Perhaps unwisely, the statute stipulates that the will containing the testamentary trust must predate the beneficiary designation. The rationale for this requirement is not offered, but one might assume that some sort of strict logic or legal doctrine such as the incorporation by reference principle is in play here. In any regard, the existence of the will containing the testamentary trust will provide a clear set of trust elements guaranteeing the existence of a valid trust. Finally, the Colorado statute affirms that the right to receive benefits under the beneficiary designation will constitute a sufficient trust res, rounding out the arsenal in subsection (2) with which it could defend against a trust law attack. Much like the California statute, the Colorado statute deflects both testamentary and present trust attacks. Again, this hybrid allows Colorado to cover more scenarios than each of the statutes might reach individually.

V. CONCLUSION

As the above statutory survey reveals, Alaska is already halfway toward the goal of shielding testators by statute from the objections raised nearly a century ago by the *Frost* court.[78] Much has changed in the area of wills and trusts since that time, but each

77. COLO. REV. STAT. § 15-15-101 (Supp. 1990). Subsection (1) sets out the language of UPC section 6-101 verbatim. Subsection (2) includes the following text:

> Under the provisions of subsection (1) of this section, it is permissible to designate as a beneficiary, payee, or owner a trustee named in an inter vivos or testamentary trust in existence at the date of such designation. It is not necessary to the validity of any such trust that there be in existence a trust corpus other than the right to receive the benefits or to exercise the rights resulting from such a designation. It is also permissible to designate as a beneficiary, payee, or owner a trustee named in, or ascertainable under, the will of the designator.

78. *See supra* text accompanying notes 63-64.

objection still carries some currency in jurisdictions where courts and legislators have not yet addressed one or both.

Aside from guarding against the uncertainties articulated by the courts, a far more compelling reason exists for eliminating remaining uncertainty by statute. Giving effect to the reasonable intentions of testators has become a universal principal guiding the action of courts and legislatures alike. As many of the judicial decisions in this area indicate, modern courts are often willing to employ whatever legal fiction might be appropriate to achieve a decedent's clearly manifested intention.[79] Legislatures have also taken an activist posture as far as sanctioning the intentions of decedents who elect to pass property through nonprobate channels.

A prime example of such activism is the adoption in almost all fifty states of the Uniform Testamentary Additions to Trusts Act[80] or something equivalent. Alaska is no exception to this rule, having codified the exact language of the uniform act in Alaska Statutes section 13.11.200.[81] This legislation was enacted to resolve the myriad of problems and the contradicting judicial

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79. *See supra* text accompanying notes 39-51.

80. The Uniform Testamentary Additions to Trust Act is found in UNIF. PROB. CODE § 2-511 (1969) (amended 1990). The Act contains the following text:

> A devise or bequest, the validity of which is determined by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

81. ALASKA STAT. § 13.11.200 (1972).

authority surrounding the validity of pour-over wills.[82] All these problems were addressed by legislation affirming that what the testator wants to do may be done, despite any common law doctrine to the contrary.[83] Such a statutory solution was critically needed in the pour-over will context and is equally important in the nonprobate asset beneficiary designation context.

Enacting a validating statute to resolve the remaining trust law objections surrounding nonprobate transfers into testamentary trusts is appropriate for two reasons. First, Alaska Statutes section 13.31.070 and its proposed replacement in section 12 of House Bill 308 already address the testamentary objections.[84] Second, the pour-overs sanctioned by Alaska Statutes section 13.11.200 are functionally equivalent to pour-overs of nonprobate assets into a testamentary trust. South Carolina has recognized the functional equivalency of these pour-overs and has thus included statutory language permitting pour-overs of nonprobate assets into testamentary trusts in the same section in which it adopts the Uniform Testamentary Additions to Trust Act.[85] Indiana, Maryland and Washington have similarly sanctioned all nonprobate transfers to

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82. *See* PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 95 (1987).

83. *Id.* at 96.

84. *See supra* text accompanying note 12.

85. S.C. CODE ANN. § 62-2-510 (Law. Co-op. 1987). Subsection (a) sets out the Uniform Testamentary Additions to Trust Act exactly as it appears in section 2-511 of the 1969 Uniform Probate Code. Subsection (b) validates the pour-over of death benefits of any kind into inter vivos trusts. Subsection (c) validates the pour-over of death benefits of any kind into testamentary trusts using the following language:

> *Death benefits of any kind,* including but not limited to proceeds of life insurance policies and payments under an employee's trust, or contract of insurance purchased by such a trust, forming part of a pension, stock-bonus, or profit-sharing plan, or under a retirement annuity contract, *may be paid to a trustee named, or to be named, in a will which is admitted to probate as the last will* of the insured or the owner of the policy, or the employee covered by such plan or contract, as the case may be, *whether or not such will is in existence at the time of such designation.* Upon the admission of such will to probate, and the payment thereof to the trustee, such death benefits shall be administered and disposed of in accordance with the provisions of the testamentary trust created by the will of the testator. Such payments shall be deemed to pass directly to the trustee of the testamentary trust and shall not be deemed to have passed to or be receivable by the executor of the estate of the insured, employee, or annuitant.

(emphasis added).

either inter vivos or testamentary trusts in one consolidated statute.[86]

Alaska can easily follow suit by adding a few statutory lines to eliminate the potential trust law objections that linger over nonprobate transfers into testamentary trusts. One need not search beyond the text of the California and Colorado enactments for the requisite language. As Alaska has already met the testamentary challenge through its enactment of UPC section 6-201, and appears poised to broaden this language through the adoption of revised section 6-101, the Colorado model of augmenting the UPC text would offer the most convenient route to comprehensive protection of testators.[87] However, some of the language chosen by Colorado legislators places unnecessary limitations on the testator by requiring the testamentary trust to be "in existence at the date [the beneficiary is designated]."[88] As noted above, this restriction allows for the employment of the incorporation by reference doctrine, but it fails to protect testators whose beneficiary designations predate the execution of a will containing a testamentary trust.

If the motivating factor is to give effect to testators' intentions as they attempt to use a testamentary trust as a receptacle for nonprobate assets, and, more generally, to avoid disparities in outcome where functional equivalents are involved, then California's broader language is preferable.[89] This language could even be shortened to the following:

> An instrument referred to in subsection (a) of this section [proposed Alaska Statutes section 13.33.101/UPC section 6-101] may designate as a beneficiary, payee or owner, a trustee named or to be named in the will of the person entitled to make such a designation. The designation may be made before or after the execution of the designator's will. It is not necessary to the validity of the underlying trust that there be in existence a trust corpus other than right to receive the benefits or to exercise the rights resulting from such a designation.

These three additional sentences, whether appended to proposed Alaska Statutes section 13.33.101 or added to Alaska Statutes section 13.11.200, would go a long way toward protecting

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86. IND. CODE ANN. § 27-1-12-16 (Burns 1994); MD. CODE ANN., EST. & TRUSTS § 11-105 (1991); WASH. REV. CODE § 11.98.170 (1984).

87. *See supra* note 77.

88. COLO. REV. STAT. § 15-15-101 (2) (Supp. 1990).

89. *See supra* note 76.

Alaskan testators from the pitfalls highlighted in the case law of jurisdictions in which no such statute exists. The addition could easily be added to section 12 of House Bill 308 as it moves through the Alaska House of Representatives in January and thereafter to the Senate. Failure to take further legislative action in an area already partially governed by statute leaves testators with one foot on solid ground and the other in a potential quagmire.

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