

MEMORANDUM

TO: John Jonathan II, Esquire

FROM: National Legal Research Group, Inc.
James P. Witt, Senior Attorney

RE: MA/Trusts/Resulting/Extrinsic Evidence—Continuation Of 52-27479-012

FILE: 52-27747-012 January 19, 1999

YOUR
FILE: Conrad H. Brown 1968 Trust Instrument

STATEMENT OF FACTS

The donor, Conrad H. Brown, had originally executed the revocable trust in question on April 6, 1968. The trust's final form is represented by the Sixth Amendment of the Conrad H. Brown 1968 Trust Instrument. Under Article II of the trust, the donor reserved the right to the trust's net income during his life and directed that the trustee pay such amounts of principal to himself or his nominee as he might direct.

Under Article III of the trust, upon the donor's death, his wife, Anne P. Brown, was to receive an amount equal to the maximum marital deduction, less the value of other property passing to her that has qualified for the marital deduction and less the amount allocated to a credit shelter trust. Mrs. Brown was to receive the net income of the continuing trust, with income also to be paid for the emergency needs of the donor's daughter, Susan H. Webley, or to assist in the education expenses of Susan's issue if such expenses cannot be funded from other sources.

Under Article IIIB, the trust is to continue after Mrs. Brown's death for the benefit of Susan H. Webley. The provision specified that Susan's benefits under Article IIIA were to continue (income for her emergency needs and for the education needs of her issue if not available from other sources). Article IIIB further provided that the trustees were to distribute for Susan's benefit

such amounts of principal as she may request in writing, to a maximum of three (3%) percent of the principal of the trust property in any calendar year as determined on the last business day of the previous calendar year in which such request is made; provided, however, the annual right to request principal hereunder shall not be cumulative and the total amounts subject to withdrawal hereunder shall not exceed fifteen (15%) percent of the value of the trust and as adjusted for the value of prior withdrawals and as it may exist on the last

business day of the prior calendar year, in which the power is last exercisable. During any year in which SUSAN H. WEBLEY requests principal pursuant to this Paragraph, the Trustees shall make no discretionary distributions of principal to her, except in the event of severe emergency need relating to her health.

Article IIIC of the Brown trust provides that Susan has a power of appointment (exercisable either by will or codicil executed after the donor's death or by a notarized writing during her life) to direct payment of the trust remainder to or for her issue. If Susan's husband, Charles A. Webley, is, at Susan's death, living with her as her husband, he is entitled to one-third of the net income yielded by the remainder. Mr. Webley's interest would be negated to the extent that Susan appoints part or all of the one-third income interest to or for her issue. Article IIID provides for a distribution of the trust in the event that Susan fails to exercise her power. The distributees are to be the donor's living grandsons and surviving issue of deceased grandsons.

The donor has died and is survived by Mrs. Brown and his daughter, Susan.

QUESTIONS PRESENTED

1. What will be the proper disposition of trust income upon Mrs. Brown's death, considering that Article IIIB fails to provide for income distribution (except to the extent that Article IIIB incorporates Susan's right to income under Article IIIA for emergency needs)?

Conclusion

The general rule is that where an express trust or an interest in an express trust fails the trust corpus or failed interest is to revert to the settlor by way of resulting trust and pass through the settlor's estate to his beneficiaries or heirs. The imposition of a resulting trust is based on the presumption that the settlor would have wished this result had he thought to provide for the failure that occurred. The presumption of resulting trust applies regardless of whether the failed interest is in income or corpus. In the present case, there is no basis for concluding that the presumption of a resulting trust is rebutted. There is no admissible evidence that the donor would have wished the Article IIIB income to be distributed on an accelerated basis to presumptive remaindermen or to be accumulated. Therefore, Article IIIB income should pass by resulting trust to the donor's estate and thus to his sole heir, Susan H. Webley.

2. Can extrinsic evidence be introduced to rebut the presumption of a resulting trust as to Article IIIB income?

Conclusion

No. Although extrinsic evidence is normally admissible in the case of a purchase-money resulting trust (one that arises in the situation where one party provides the funds for the purchase of property but title is placed in the name of another), that is not the case where a resulting trust arises out of the failure of an express trust or part thereof. The parol evidence rule governs this situation, and, under that rule, parol or extrinsic evidence cannot

be introduced to add to a trust provision so as to explain the trust settlor's intent in a situation not covered by the trust instrument itself.

DISCUSSION OF AUTHORITY

I. What Will Be The Proper Disposition Of Trust Income Upon Mrs. Brown's Death, Considering That Article IIIB Fails To Provide For Income Distribution (Except To The Extent That Article IIIB Incorporates Susan's Right To Income Under Article IIIA For Emergency Needs)?

The basic idea that a failed interest under a trust should be disposed of by way of a resulting trust in favor of the settlor's estate is expressed as follows in 89 C.J.S. *Trusts* § 103 at 951 (1955):

A commonly recognized type of resulting trust is that which arises in favor of the donor where the trusts of a conveyance are not declared, or are only partially declared, or fail. So, where property is conveyed on an express trust which fails, in whole or in part, a resulting trust arises as against the trustee in favor of the grantor and those claiming under him in the property conveyed or in the residue of the property remaining at the time of the failure or extinguishment of the trust, if the property is not otherwise disposed of.

(Footnotes omitted.)

The general concept of resulting trusts in the context of a failed trust or trust provision was recognized under Massachusetts law in *Ventura v. Ventura*, 407 Mass. 724, 555 N.E.2d 872 (1990). The settlor had created a trust for a term of 20 years but had failed to provide for the disposition of remaining property at the expiration of the term. The court imposed a resulting trust in favor of the settlor's estate.

The applicability of the resulting trust concept in the situation where a trust or an element of a trust has failed was recognized under Massachusetts law in *Amory v. Trustees*

of Amherst College, 229 Mass. 374, 118 N.E. 933 (1918). David Sears made two conveyances of real property to the trustees of Amherst College. The terms of the deeds were such that a portion of the provisions of each deed qualified as a charitable trust, but other provisions of the deeds, which were for the benefit of the settlor and his representatives and descendants, failed as in violation of the Rule Against Perpetuities. The court stated:

The deeds properly construed created two distinct trusts; one for the benefit of the college, the other for the benefit of the grantor and his descendants named. The former was valid; the latter was invalid. *Dexter v. Harvard College*, 176 Mass. 192, 57 N.E. 371; *St. Paul's Church v. Atty. Genl.*, *supra*. That a charitable gift was intended appears from the deeds. Accordingly the trust in favor of the college will be supported although the trust for the grantor and his representatives fails. *Jackson v. Phillips*, 14 Allen, 539, 556; *Sorresby v. Hollins*, 9 Mod. 221; *Curtis v. Hutton*, 14 Ves. 537. As the trust for the benefit of Sears and his heirs was invalid, the beneficial interest therein resulted to him.

118 N.E. at 936.

Although not involving a failure of the settlor to provide for income distribution, the New Jersey court in *In re Voorhees' Trust*, 225 A.2d 710 (N.J. Super. Ct. App. Div. 1967), imposed a resulting trust on part of the corpus of a trust where the settlor had failed to provide for the contingency that occurred. The case thus furnishes support for the general proposition that the imposition of a resulting trust is the appropriate remedy in the situation where the settlor has failed to provide for a particular disposition or for particular circumstances. The settlor had reserved a life-income interest under the trust and, upon the settlor's death, the trust income was to be paid to the settlor's brother, Dr. Irving Wilson Voorhees, for his life. Upon Dr. Voorhees's death, one-half of the principal was to be paid in equal shares *per stirpes* to the children of the settlor's deceased brother, Stephen H.

Voorhees. The other one-half of the principal was to remain in trust, with the income therefrom to be paid quarterly to Dr. Voorhees's son, Irving Wilson Voorhees Jr., until he reached age 40; that portion of the principal was to be distributed to Irving Jr. upon his attainment of age 40. If Irving Jr. died prior to reaching age 40, then the portion of the trust corpus being held for his benefit was to be distributed to his issue *per stirpes*. Concurrent with the trust, the settlor executed a will leaving her residuary estate to Dr. Voorhees. The settlor died nine days after the execution of the trust and will; she was survived by Dr. Voorhees, his son Irving Jr., and the two daughters of her deceased brother, Stephen. The contingency that the settlor failed to foresee and which occurred was Irving Jr.'s death prior to his reaching age 40 but leaving no issue. Upon Dr. Voorhees's subsequent death, the trust terminated, and the question arose as to the proper distribution of the portion of the trust corpus that was to be given to Irving Jr. or his issue.

The trial court held that the share of corpus intended for Irving Jr. reverted to the settlor's estate by virtue of resulting trust due to the failure of the gift over. One of the daughters of the settlor's late brother Stephen appealed on the basis that a partial lapse should be avoided and that the settlor's probable intent should be carried out so that she and her sister, who were unquestionably entitled to one-half of the corpus, would receive the entire corpus. The appellate court rejected that argument and affirmed the lower court's finding of a resulting trust:

When property is transferred upon a trust which subsequently fails in part, a resulting trust arises as to the interest with respect to which the trust fails and the *corpus* reverts to the settlor. Restatement, Trusts 2d § 411, and comments (h) and (k) (1959); 4 Scott, Trusts (2d ed. 1956), § 411, p. 2935.

As Vice-Chancellor Sooy observed in *Pedrick v. Guarantee Trust Co.*, 123 N.J.Eq. 395, 197 A. 909 (Ch.1938):

"* * * in case an express trust does fail, in whole or in part, for any reason, the equitable interest automatically returns to the settlor and his successors in interest and the beneficial interest is considered as never having left the settlor. Bogert on Trusts, vol. 2, § 468; Perry on Trusts, vol. 1, § 152." (at p. 400, 197 A. at 912)

See also the ordered disposition of *corpus* in *Fidelity Union Trust Co. v. Byrne*, 76 N.J.Super. 256, 184 A.2d 163 (Ch.Div.1962), and *Wright v. Renchan*, 10 N.J.Super. 363, 76 A.2d 705 (Ch.Div.1950).

When a lapse occurs the presumption is that a resulting trust should be imposed, "But where it is shown by evidence which is properly admissible that the settlor intended that a resulting trust should not arise, it does not arise. In such a case the ordinary inference which gives rise to a resulting trust is rebutted." 4 Scott, op. cit., § 412, p. 2947. Accord, Restatement, Trusts 2d, § 412.

Id. at 712-13 (emphasis added).

There is no apparent reason why the foregoing principles would not apply to a failed income interest under a trust; like a failed interest in trust corpus, a failed interest in trust income denotes an equitable interest that has not been effectively dealt with by the trust provisions. Therefore, the presumption of resulting trust applied in *Voorhees' Trust* to the one-half interest in corpus that was not effectively disposed of should be applicable in the present case to the failed income interest. As was true in *Voorhees' Trust*, there is no admissible evidence of the settlor's intent in the present case that would rebut the presumption that a resulting trust should be imposed. The lack of such evidence is especially apparent in the present case where the failure of the income interest under the trust during the life of Susan H. Webley following Anne P. Brown's death was not the result of the

inability of the person designated to receive the income to do so but, rather, from the settlor's failure to provide for the distribution of income during that period. The fact that under Article IIIB Susan H. Webley is the only beneficiary having a fixed beneficial interest under the trust during her life following Anne P. Brown's death supports the conclusion that the settlor, had he considered the distribution of income during this period, would have directed its distribution to Susan (presumably, Susan's right to 3% of trust principal during any calendar year, up to a maximum of 15% of trust principal, is a fixed right, and the prohibition in this section on "discretionary distributions of principal to [Susan] . . . except in the event of severe emergency need relating to her health" concerns distributions over and above distributions subject to the 3%/15% limitations; i.e., it appears that if Susan requests a distribution within the 3%/15% limitations, such distribution is mandatory). While this observation is speculative, it is, as will be confirmed by the discussion in the following section, the only evidence under the present facts that can be brought to bear on the settlor's supposed intent as to the distribution of trust income following Mrs. Brown's death. Regardless of the mandatory/discretionary nature of the distributions of principal to which Susan will become entitled following her mother's death, the point is that Susan is the only logical object of income distributions during that period and such finding would support, rather than rebut, the imposition of a resulting trust on trust income during that period in that Susan would be the sole ultimate beneficiary of such a resulting trust.

The point is that in applying the presumption of a resulting trust in the case of the failure of a trust or portion of a trust there is no distinction between the failure of an interest in trust corpus and the failure of an interest in trust income. This point is borne out by the

fact that there is no discussion of such a distinction in the following authorities. The following excerpt from 5 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 411.2 at 3 (4th ed.) demonstrates the interchangeability of income and principal interests in this context:

So also there may be a resulting trust as to the whole of the trust property during or after a specified period. Thus property may be given in trust for one beneficiary for life and another in remainder, and the trust may fail as to the latter beneficiary, in which case there is a resulting trust as to the remainder interest. Conversely, the trust may fail as to the prior interest and not fail as to the subsequent interest. In this case there may be a resulting trust during the period of the prior interest. Thus a testator may leave property in trust for one beneficiary for life with the remainder over to other beneficiaries. In such a case, if the life beneficiary disclaims, and if the interest of the remaindermen is not thereby accelerated, there is a resulting trust of the prior interest. The persons to whom the trust results are entitled to the income during the life of the life beneficiary.

(Footnotes omitted.)

The general rule as to the presumed imposition of a resulting trust where the express trust fails is stated as follows in Restatement (Second) of Trusts § 411 (1959):

Where the owner of property gratuitously transfers it and properly manifests an intention that the transferee should hold the property in trust but the trust fails, the transferee holds the trust estate upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust should arise or the intended trust fails for illegality.

Comment h to § 411 and illustration 11 thereunder show that a failed income interest under a trust is subject to the imposition of a resulting trust just as is a failed interest in corpus:

h. Where trust fails in part. If property is transferred upon a trust which fails in part, a resulting trust arises as to the interest with respect to which the trust fails, unless the transferor properly manifested an intention that no resulting trust should arise. This is true whether the trust fails as to a fractional share of the trust property, or as to the whole of the trust property during or following a specified period of time.

Illustrations:

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11. A devises Blackacre to B in trust to pay the income to C for life and on C's death to convey Blackacre to a person who cannot be ascertained until C's death. C disclaims. B holds Blackacre upon a resulting trust for the estate of A for the duration of C's lifetime.

Under the illustration, the failed income interest is thus held in resulting trust until the time for distribution of corpus.

Under Restatement § 412, which deals with rebutting the presumption of a resulting trust in the case of a failed express trust, lack of any significant distinction between income and principal interests in this context is also made clear. Section 412 states the general rule that if the settlor manifests a contrary intention no resulting trust will be imposed in the case of a failed interest under an express trust. Illustration 2 under comment a to § 412 states:

A bequeaths property to B in trust to pay the income to C and D in equal shares and after their death to pay the principal to E. C predeceases A. Whether D is entitled to receive the whole of the income during his life, or E is immediately entitled to receive half of the principal, *or there is a resulting trust of half of the income for the life of B* depends upon the interpretation of the language of the will in the light of all the circumstances.

(Emphasis added.) The illustration thus shows that the imposition of a resulting trust must be considered in the event of a failed income interest under an express trust. As discussed in connection with the case *Voorhees' Trust*, however, there is no basis for rebutting the presumption of a resulting trust due to the failed income interest under Article IIIB of the Brown trust.

Resulting trusts have been declared as to income in situations where the trust has yielded more income than could be distributed under the terms of the trust for the particular

period. It is stated in George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 811 at 210-12 (West 1991):

Surplus Income

If a trust produces more income than is required by the express payment clauses, it becomes a question of fact whether the settlor intended to make an implied gift of the surplus income, or to have it accumulated, *or failed to make any disposition of it so that it will pass to the settlor or his successors by way of resulting trust* or intestacy, unless it is payable to the holder of the next estate.

(Emphasis added; footnotes omitted.) For present purposes, there would appear to be no difference between a settlor's total failure to provide for the distribution of income (the present case) and a settlor's failure to provide for the distribution of income in excess of the amount called for by the trust.

In *Canal National Bank v. Noyes*, 348 A.2d 232 (Me. 1975), the settlor, as part of the financial agreement in connection with his divorce from his first wife, established a trust that was to pay the first wife, Althea G. Noyes, \$2,500 quarterly until her death or remarriage. Following Althea's death or remarriage, the settlor was to receive the income from the trust for his lifetime and, at the settlor's death, the trust property was to be distributed among the three sons (or issue of deceased sons) of the settlor and Althea. The trust had been created in 1949, but starting in the 1950s and continuing into the 1960s the trust produced income in excess of the amounts needed to pay the first wife. The excess income was kept in a separate account and was reinvested.

The settlor had died, and Althea and the remaindermen, the three sons, argued that the excess income should be added to trust principal to safeguard the future payments due

Althea. The settlor's estate contended that the excess income should have reverted to the settlor's estate by way of resulting trust.

The case was certified by the lower court to the Supreme Judicial Court of Maine.

The court stated as follows at the outset of its discussion:

The general rule governing the disposition of trust income in excess of the amount necessary to fulfill the purpose of the trust is that such income reverts to the Settlor or his heirs under a resulting trust in the absence of manifestation of an intent that it be disposed of otherwise. *New Haven Bank v. Hubinger*, 117 Conn. 417, 167 A. 914 (1933); I G. Bogert, *Trusts and Trustees*, § 469 (2d ed. 1962); II A. Scott, *Trusts* § 430.2 (3d ed.). The rationale of this rule has been explained as follows:

"The reasoning behind this is that the Settlor did not part with his money absolutely out and out but only *sub modo* to the extent that his wishes, as declared by the trust, shall be carried into effect. When, therefore, this has been done, any surplus still belongs to him. This doctrine does not rest, . . . on any evidence of the state of mind of the Settlor, for in the vast majority of cases no doubt he does not expect to see his money back; he has created a trust which, so far as he can see, will absorb the whole of it. The resulting trust arises where the expectation is, for some unforeseen reason, cheated of fruition and is an inference of law based on afterknowledge of the court." *Re Gillington Bus Disaster Fund*, 1 All E.R. 37, 41 (1958).

Id. at 234. The court then noted that the manifestation of any intention on the settlor's part that is the outcome that would come about under a resulting trust would have to be honored. The court found itself unable to detect such an intention from either the trust or surrounding circumstances and concluded that it was evident that the settlor had not considered the possibility that there would be excess income. Therefore, the court announced that it was resolving the issue as a question of law. The court applied "the general rule, which directs

that the income in excess of the amount necessary for the annuity to Althea G. Noyes return to the estate of the Settlor . . . by way of resulting trust." *Id.* at 236.

The same reasoning applied in *Canal National Bank* should apply in the present case. There is no evidence in the trust that Conrad H. Brown had an intent that the trust income following his wife's death be distributed in a manner contrary to its payment to Susan by way of resulting trust; just as it was evident in *Canal National Bank* that the settlor in that case had given no consideration to the possibility of excess income, it is evident that Mr. Brown in the present case simply failed to consider the need to provide for the distribution of income under Article IIIB. In attempting to divine what Mr. Brown would have directed as to the income had he considered its distribution, again, it is more than likely that, because Susan is the only beneficiary having a fixed interest following Anne P. Brown's death, he would have wished Susan to receive such payments during her life. Therefore, the indication is that the general rule should apply to the effect that Susan should be entitled to the income following her mother's death via resulting trust.

See also *Riggs National Bank v. Holtman*, 221 F. Supp. 599 (D.D.C. 1963), in which the testator directed in his testamentary trust that the trustee pay certain individuals, including the testator's daughters, specified monthly amounts. The will called for the trust to terminate 20 years after the testator's death; at that time the trust property was to be sold and the "net proceeds" were to be distributed. Specified amounts were to be paid to certain individuals, and the remainder was to be divided into four equal shares, each share to be paid to a different charity. The will did not contain a residuary clause. It became clear that the income yielded by the trust would be in excess of the amount needed to make the specified

payments. The settlor's daughter contended that the surplus income should be payable to her by intestacy (the term "resulting trust" was not used in the opinion, but it is clear that the resulting trust concept was involved). The charities argued that they deserved to receive the surplus income on the basis that the term "net proceeds" in the trust provision directing the final distribution was broad enough to include surplus income. The court found that the charities' interpretation was strained; the court construed the will "as not disposing of the accumulated surplus income from the real property left in trust. Hence there is an intestacy as to this accumulation and, therefore, it passes to the next of kin, in this case, the daughter." *Id.* at 601. Likewise in the present case, there is no basis for distributing the income under Article IIIB of the trust other than by way of resulting trust to Mr. Brown's sole heir at law, Susan H. Webley.

Although it is reasonable to presume that if the settlor had considered the distribution of income during the period following Mrs. Brown's death he would have directed that the income be paid to Susan, there would also be the possibility of an accelerated distribution of the income to the presumptive remaindermen, Susan's issue. The concept of acceleration normally applies to a remainder interest where the preceding life-income interest has failed and it is determined that the only reason that distribution of the remainder interest was postponed was to allow the enjoyment of the life-income interest. In such a case, there is an immediate distribution of the remainder interests and the income interest simply disappears. However, where the delay in distribution of the remainder interests is not merely to allow the life-income interest to run its course, and it is therefore determined that there can be no immediate distribution of the remainder, the possibility arises that the failed income interest

can itself be accelerated and become payable to the presumptive remaindermen. These points all played a part in the South Carolina case, *Pate v. Ford*, 360 S.E.2d 145 (S.C. Ct. App. 1987), *rev'd on other grounds*, 376 S.E.2d 775 (S.C. 1989).

In *Pate*, William W. Pate Sr. (Mr. Pate) and his wife Alethea Fennell Pate executed separate wills seeking to establish a common plan for the distribution of their estates. Under Mr. Pate's will, the residuary estate was devised to a trust under which Mrs. Pate was to receive the income for her life. Upon her death, the trust corpus was to be divided into three equal parts, with the first part to be held in continuing trust, the net income to be paid to Mr. Pate's son, Billy Pate, for life; upon Billy's death, the share was to be distributed in equal portions *per stirpes* to Mr. Pate's "natural born grandchildren." The second part was to be distributed under identical terms as the first, except that Mr. Pate's other son, Wallace Pate, was to be the income beneficiary. The third part was to be distributed immediately upon the death of Mrs. Pate to Mr. Pate's natural born grandchildren. Mrs. Pate's will called for the same distribution of her estate immediately upon her death, assuming that she survived Mr. Pate (she in fact survived her husband). The court first dealt with issues concerning the time at which the class of natural born grandchildren was to be determined and the effect of the term *per stirpes*; the class was held not to be limited to the five grandchildren in existence at the time of the wills' execution but was to include all grandchildren (or the descendants of a deceased grandchild (as per the *per stirpes* direction) in existence as of the time of each of the three distributions (Billy's death as to the first share; Wallace's death as to the second; Mrs. Pate's death as to the third)). The court then turned to the issue that is presently relevant: whether the distribution of the second share, tied to the death of Wallace Pate,

should be made immediately, in view of the fact that Wallace Pate formally disclaimed his life-income interest. The master in chancery held that Wallace's disclaimer accelerated the remainder interest in the second share and that the five grandchildren were therefore entitled to the immediate distribution of the second share; under that view, the income interest under the second share disappeared into the accelerated remainder. The appellate court stated that

where property is placed in trust for one beneficiary for life with a remainder to another, if the express trust fails as to the life interest, a resulting trust in favor of the settlor does not arise. *Instead, the remainderman is entitled to immediate enjoyment of the property if, under the terms of the trust, the only reason for postponing enjoyment of the remainder interest is to allow the life beneficiary to enjoy his interest.* *Key v. Weathersbee*, 43 S.C. 414, 21 S.E. 324 (1895); *Keesler v. North Carolina National Bank*, 256 N.C. 12, 122 S.E.2d 807 (1961). In such cases, there is said to be an "acceleration" of the remainder. *Id.* *If all remainder interests have vested, there is no reason, once the life beneficiary is barred, to postpone enjoyment of the estate until the life beneficiary dies.* *Key v. Weathersbee, supra.* *On the other hand, if, by the terms of the trust, the remaindermen are to be determined at the death of the life beneficiary, enjoyment of the remainder interest will be postponed until the death of the life beneficiary, when all the remaindermen can be ascertained.* *Carrick v. Errington*, (1726) 2. P. Wms. 361; *United States Trust Co. of New York v. Douglass*, 143 Me. 150, 56 A.2d 633 (1948); *Trenton Banking Co. v. Hawley*, 7 N.J.Super. 301, 70 A.2d 896 (1950)[.]

360 S.E.2d at 153 (emphasis added). The appellate court determined that because the settlor did not intend that the second share of the trust be distributed until Wallace's death such intent must prevent the accelerated distribution of the share despite Wallace's disclaimer. The appellate court rejected the application of S.C. Code Ann. § 21-37-50(a) (Law. Co-op. 1976), which provided for the acceleration of a remainder interest in the event that the income interest is disclaimed unless "another disposition" of the remainder interest were provided for in the event of disclaimer. The appellate court ruled that the trust's direction

that the remainder interest in question was not to be distributed until Wallace's death qualified as "another disposition" for purposes of the statute.

Given its decision against acceleration of the remainder interest in the second share of the trust, the appellate court turned its attention to the course of distribution of the income under the second share. The court first announced that it was called upon to determine the disposition of income that most nearly conformed to what the settlor would have wanted. Since Mrs. Pate had survived Mr. Pate, it was Mrs. Pate's will and trust that governed. The court determined on the basis of a succession clause in Mrs. Pate's will that she would have wished the natural born grandchildren, the presumptive remaindermen, to receive the income that Wallace would have received had he not disclaimed. The appellate court noted that this result was also mandated by the acceleration statute mentioned above, S.C.C.A. § 21-37-50(a). The court had refused to apply the statute so as to accelerate the remainder interest under the second share because the court had determined that the "other disposition" exception applied so as to prevent acceleration of the remainder. However, there was no such other disposition as to the income interest under the second share. It was on the appellate court's reading of "other disposition" under § 21-37-50(a) that the Supreme Court of South Carolina reversed and held that an accelerated distribution of the remainder interest in the second share of the trust was required. The supreme court did not find an "other disposition" of the interest under the trust in the event of disclaimer because the trust never referred to the possibility of disclaimer. The principles enunciated by the appellate court as to the acceleration of income interests, however, were not questioned. On the basis of those principles, it is evident that the income under Article IIIB of the Conrad Brown trust should

not be distributed on an accelerated basis to the presumptive remaindermen. Under Article IIIC and Article IIID of the Brown trust, the remaindermen were not to be determined until Susan H. Webley's death, when (1) her exercise of her testamentary power of appointment under Article IIIC in favor of her issue will become effective (even with Susan's exercise of her power of appointment, the distribution of the trust assets to Susan's issue could still be delayed if, as set forth under Article IIIC, Susan's husband, Charles A. Webley, qualifies to receive one-third of the trust for the period of his life), or (2) in the event of Susan's failure to exercise her power of appointment, the dispositive scheme of Article IIID would apply. Under either course of disposition, it is clear that the income interest under Article IIIB of the Brown trust is not compatible with the concept of accelerated distribution to the presumptive remaindermen. Such a distribution would directly violate the settlor's intent that the remaindermen not be ascertained and not benefit from the trust until Susan's death; Susan was to be the sole trust beneficiary during her life following her mother's death. Since neither an accelerated distribution of income nor an accumulation of the income would conform to Mr. Brown's presumed wishes, the resolution of the matter of income distribution by resulting trust for the benefit of Susan as Mr. Brown's sole heir is the only reasonable course of action. As the appellate court stated in *Pate*, the basic course of distribution for any failed interest under a trust is by resulting trust:

Where the beneficiary of an express trust disclaims his interest, the express trust fails and the trustee generally will be deemed to hold the property upon a resulting trust for the settlor or his estate. *Jervis v. Wolfertan*, (1874) 18 Eq. 18; Restatement (Second) of Trusts § 411 & comment g (1959). A resulting trust will not arise, however, if the settlor intends a different disposition of the property upon failure of the express trust. *Sidney v. Shelly*,

(1815) 19 Ves. 352; *Dexter v. President & Fellows of Harvard College*, 176 Mass. 192, 57 N.E. 371 (1900); Restatement (Second) of Trusts § 412.

360 S.E.2d at 152-53.

It is interesting to note that the New York legislature has codified a rule covering the situation where there has been a failure to dispose of an income interest under a trust. As a basic provision, New York has effectively endorsed the concept of a resulting trust in favor of the settlor's estate where there has been a failure to dispose of a particular interest in trust property:

Interest remaining in creator of trust

Every legal estate and interest not embraced in an express trust and not otherwise disposed of remains in the creator.

N.Y. Est. Powers & Trusts Law § 7-1.7 (McKinney 1992). However, N.Y.E.P.T.L. § 9-2.3 creates an exception to the foregoing rule in the case of the failure of the settlor to dispose of an income interest under a trust:

Undistributed income

When an income is not disposed of and no valid direction is given for its accumulation it passes to the persons presumptively entitled to the next eventual estate.

This is thus a compromise position between the resulting trust and the accelerated remainder. In the case of a failed income interest, the statute does not call for an acceleration of the remainder interests so as to terminate the trust but rather calls for the payment of the failed income interest to the presumptive remaindermen. As pointed out in 5 Scott & Fratcher, *supra*, § 412.1, N.Y.E.P.T.L. § 9-2.3 is applicable even where the remainder beneficiaries' interest is subject to defeasance or contingent. However, the authors point out that if the

persons entitled to the accelerated distribution cannot be ascertained there is a resulting trust of the undisposed income. The case cited by the authors for the latter proposition is *United States Trust Co. v. Soher*, 70 N.E. 970 (N.Y. 1904). Of course, it must be remembered that Massachusetts has not adopted a trust interest acceleration statute as have South Carolina and New York. Therefore, under Massachusetts law, acceleration of the Article IIIB income interest could be established only on the basis that there was evidence supporting such disposition that was sufficient to rebut the presumption of resulting trust. The same is true as to any thought that Article IIIB income should be accumulated. There is no authorization in the Brown trust for the accumulation of Article IIIB income or of any other income interest for that matter.

II. Can Extrinsic Evidence Be Introduced To Rebut The Presumption Of A Resulting Trust As To Article IIIB Income?

As discussed under Question 1, due to the settlor's failure to provide under Article IIIB for the distribution of trust income upon Mrs. Brown's death, the presumption arises that such income reverts to the settlor by way of resulting trust and therefore passes to Susan H. Webley as the settlor's sole heir. The presumption of a resulting trust in a situation such as this is not absolute, and the general rule is that "trusts by operation of law [resulting and constructive trusts] may be contradicted or rebutted by parol evidence." 76 Am. Jur. 2d *Trusts* § 697 at 684 (1992) (footnote omitted); accord *Gowell v. Twitchell*, 306 Mass. 482, 28 N.E.2d 531 (1940) (in a purchase-money resulting trust situation involving the purchase of corporate stock by one person but with title placed in the name of another, the inference

that the titleholder was holding the shares in a resulting trust for the purchaser's benefit was held by the court to be rebuttable). It is also generally true that in the case of an alleged purchase-money resulting trust there is no bar to the introduction of parol testimony in order to prove the trust. 76 Am Jur. 2d, *supra*, § 697. However, where, as in the present case, the resulting trust arises out of a failure of an express trust or of part of such a trust, the foregoing rule as to parol testimony does not apply. The rule in this regard is set forth as follows in comment g to § 412 of the Restatement. Section 412 provides as follows:

Rebutting the Resulting Trust

Where the owner of property transfers it upon a trust which fails, the transferee does not hold the trust estate upon a resulting trust if the transferor properly manifested an intention that no resulting trust should arise upon the failure of the trust.

Comment g provides:

g. Parol evidence where trust created inter vivos. If property is transferred inter vivos by a written instrument declaring the intended trust, and the trust fails, the only evidence admissible as to the intention of the transferor is the instrument itself as interpreted in the light of all the circumstances. *Declarations as to the intention of the transferor not contained in the instrument are not admissible to rebut the inference of a resulting trust.* This is true not only in the case of land but also in the case of personal property.

(Emphasis added.) Thus, while surrounding circumstances that existed at the time of the trust's execution may be introduced into evidence, there can be no evidence as to the settlor's declarations pertaining to his intent as to any eventuality, including the failure of the trust or part of the trust, that is not covered by the trust provisions.

Although no Massachusetts case was found to be directly on point with the question of the admissibility of extrinsic evidence to rebut a resulting trust that has been imposed due

to a failed express trust or portion thereof, the early Connecticut case, *Bryan v. Bigelow*, 60 A. 266 (Conn. 1905), dealt directly with this question. Under his will, the testator, Philo S. Bennett, in ¶ Second, bequeathed \$75,000 and devised three houses, along with all paintings, furniture, jewelry, and bric-a-brac, to his widow, Grace Imogene Bennett. Under a subsequent provision, ¶ Twelfth, the testator bequeathed to his widow "fifty thousand dollars (\$50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will." *Id.* at 266. Under ¶ Thirty-Fourth, the testator left his residuary estate to his wife (one-half), his sister Delia A. Bigelow (one-fourth), and his half-brother (one-fourth). The residuary legatees claimed that the bequest under ¶ Twelfth was invalid and that the \$50,000 should have been distributed by way of resulting trust as part of the residuary estate. There was a sealed letter, as mentioned in ¶ Twelfth, which was addressed to the testator's wife and directed her to pay the \$50,000 bequeathed under ¶ Twelfth to William Jennings Bryan to aid him in the furtherance of his political principles. A typewritten duplicate of the letter was found in a safe at the testator's place of business. Both the original and duplicate letters were drafted and executed at the same times that the will was drafted and executed.

The court first dealt with the question of whether the letter could, by itself, serve as the means of distribution of the \$50,000 to the trust under ¶ Twelfth. The court held that the letter was of a dispositive and testamentary character and therefore could not be an operative declaration of trust because of the letter's failure to comply with the Statute of Wills. The court then turned to the issue that is of present importance—can the letter be introduced into evidence for the purpose of showing the testator's full intent under ¶ Twelfth and so enable

the court to properly construe the will (the court conceded that the letter clearly manifested the settlor's intent as to the ¶ Twelfth trust)? In deciding in the negative, the court stated:

While extrinsic evidence may be admitted to identify the devisee or legatee named, or the property described in a will, or to make clear the doubtful meaning of language used in a will, it is never admissible, however clearly it may indicate the testator's intention, for the purpose of showing an intention not expressed in the will itself, or for the purpose of proving a devise or bequest not contained in the will. "It is a settled principle that the construction of a will must be derived from the words of it, and not from extrinsic averment." *Greene v. Dennis*, 6 Conn. 293-299, 16 Am. Dec. 58.

Id. at 269. The court then concluded that the letter was not admissible into evidence for the purpose of resolving a latent ambiguity because ¶ Twelfth did not contain an ambiguity of any kind. As the court pointed out, ¶ Twelfth clearly expressed what the testator intended to say in that provision—that a bequest of \$50,000 was to be made in trust to the testator's widow as trustee. The court then explained that the letter could not be admitted into evidence for the purpose of rebutting the presumption that the \$50,000 passed to the testator's residuary estate by resulting trust:

The excluded evidence was not admissible to rebut a resulting trust to the residuary legatees. "The resulting trusts which can be rebutted by extrinsic evidence are those claimed upon a mere implication of law, not those arising on the failure of an express trust for imperfection or illegality." *Woodruff v. Marsh*, 63 Conn. 125-141, 26 At. 846, 852, 38 Am. St. Rep. 346.

Id. at 270.

Although the *Bryan* court did not discuss the point, it is obvious that the rule barring the introduction of extrinsic evidence for the purpose of rebutting a resulting trust that has arisen due to the failure of an express trust (or the failure of a trust provision) is derived from the general rule that bars the introduction of extrinsic evidence to explain, alter, or add to the

provisions of an express trust where those provisions do not contain an ambiguity (a latent ambiguity under the traditional common-law formulation). In other words, if a trust has failed to provide for a particular event that affects the disposition of trust income or principal, extrinsic evidence cannot be introduced to show what the settlor would have intended had he contemplated the circumstances that eventuated; in terms of the rule governing the introduction of extrinsic evidence, no such evidence can be introduced to explain the omission from the trust because an omission does not constitute an ambiguity. This is simply an application of the parol evidence rule. As stated in 76 Am. Jur. 2d, *supra*, § 695 at 682, "[u]nder the parol evidence rule, parol evidence of an express trust is generally inadmissible to vary, *add to*, or contradict a written instrument giving rise to an express trust, or affecting such a trust" (emphasis added; footnote omitted). Thus, the same parol or extrinsic evidence that would rebut a resulting trust by showing that the settlor's intent under the facts that have eventuated was inconsistent with the disposition under a resulting trust would also be evidence that would fill the gap in the trust as to the settlor's intent under the events that were not provided for. From either viewpoint, that of rebutting a resulting trust or of supplying an omission in an express trust, the parol evidence rule prevents the introduction of extrinsic evidence such as testimony as to statements made by the settlor bearing on his intent. In the present case, the rule would prevent the attorney who drafted the Sixth Restatement of the Conrad H. Brown Trust from testifying as to Mr. Brown's statements concerning the disposition of income under Article IIIB of the trust following Mrs. Brown's death.

The foregoing application of the general rules regarding extrinsic evidence is demonstrated in the early Massachusetts case, *Richardson v. Adams*, 171 Mass. 447, 50 N.E. 941 (1898). George Higginson was indebted to Alfred Richardson in the amount of \$7,000. Mr. Richardson died in 1851, and in 1881 George Higginson wished to pay the amount of the indebtedness plus interest to Mr. Richardson's heirs. Mr. Higginson, under an arrangement with one of Mr. Richardson's heirs (Charles Richardson), transferred the total amount due, \$43,697, to Charles Richardson's employer, defendant John Quincy Adams, to be held in trust for the benefit of Alfred Richardson's heirs. Mr. Higginson and Mr. Adams knew of only six such heirs. Therefore, in his written declaration of trust, Mr. Adams stated that he was holding the fund for the benefit of the six named heirs, with one-sixth of the trust's income to be paid to each heir for life. At the death of each heir, a one-sixth interest of the corpus of the trust was to be paid to the deceased heir's child or children or the issue of a deceased child or children. The plaintiff was the son of a deceased son of Alfred Richardson, and, under the theory that he had been erroneously omitted from the roster of beneficiaries, he sought to have the trust reformed so as to include him as a beneficiary. The plaintiff, in support of his case, offered into evidence a letter that Mr. Higginson wrote to him in response to his letter seeking Mr. Higginson's assistance in having him included as a beneficiary. In the letter, Mr. Higginson explained that the fund was to be divided among Alfred Richardson's heirs but that once the trust for that purpose was established his (Mr. Higginson's) interest in the disposal of the fund ended and he was not in a position to assist the plaintiff.

In the course of holding that it was powerless to alter unambiguous trust terms despite the evidence that all of Alfred Richardson's heirs were intended to be included, the court held that the letter from Mr. Higginson to the plaintiff could not be admitted into evidence:

The letter from Mr. Higginson to the plaintiff was properly excluded. It was written nearly eight years after the execution of the declaration of trust and the payment of the trust fund. The terms of the declaration of trust could not be varied or affected by statements made by the creator of the trust after it had been executed and carried into effect, and in the absence and without the knowledge or assent of the other parties interested. *Dodge v. Nichols*, 5 Allen, 548. Bill dismissed.

50 N.E. at 943.

Thus, even in the absence of Massachusetts authority directly dealing with the admission of extrinsic evidence for the purpose of rebutting a resulting trust, the adherence of Massachusetts courts to the parol evidence rule is sufficient to establish that extrinsic evidence should not be admitted in the present case to rebut the presumption of a resulting trust as to income under Article IIIB following Mrs. Brown's death.