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# The Pour-over Trust

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ONE OF THE MOST important features of the inter vivos trust is its function as the receptacle of a pour-over provision in a will. The pour-over device is utilized when a disposition by a will provides, often in the residuary clause, for the devise or bequest of additional property to a previously created inter vivos trust.[1] This avoids the necessity of repeating in the will all the terms of the trust, and the estate conveyed to the trust is not thereafter involved in probate proceedings.[2] The grantor of an amendable inter vivos trust can thus create and remodel an estate plan without relinquishing any control over the assets during his lifetime.[3]

Accompanying the benefits, however, are a myriad of legal problems. Over the past twenty years the pour-over provision has become the subject of troubled controversy and conflicting judicial opinion.[4] The problem is clearly manifested by Vice-Chancellor Parker, who stated,

> A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil.[5]

The difficulty is encountered when the trust is amendable or revocable or both and the testator, after executing his will with

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1 Prock, Devises or Bequests to Trustees—Pour-Over From a Will to Intervivos Trust, 13 Baylor L. Rev. 301 (1961). See good definition in Restatement (Second), Trusts § 54 comment f (1959).

2 See Prefatory Note to Uniform Testamentary Additions to Trusts Act, drafted by the National Conference of Commissioners on Uniform State Laws and approved by that Conference in Aug., 1960 and approved by Am. Bar Asso. at its Sept., 1960 meeting.

3 Shattuck & Farr, An Estate Planner's Handbook 85 (2d ed. 1953). Heyert and Rachlin, Pourover Trusts: Consequences of Applying the Doctrines of Incorporation by Reference and Fact of Independent Significance, 34 N. Y. U. L. Rev. 1106 (1959).

4 See Scott, Trusts and the Statute of Wills, 43 Harv. L. Rev. 521 (1930); Palmer, Testamentary Dispositions to the Trustee of an Intervivos Trust, 50 Mich. L. Rev. 33 (1951); Lauritzen, Can a Revocable Trust be Incorporated by Reference?, 45 Ill. L. Rev. 583 (1950); McClanahan, Bequests to an Existing Trust—Problems and Suggested Remedies, 47 Calif. L. Rev. 267 (1959); Prock, *op. cit. supra* n. 1; Heyert and Rachlin, *op. cit. supra* n. 3.

5 Johnson v. Ball, 5 De G & S 85, 64 Eng. Rep. 1029 (1851); noted in 21 A. L. R. 2d 220, 226 (1952).

the pour-over provision, amends or partially revokes the inter vivos trust but does not alter the will.[6] Where the inter vivos trust is amended subsequent to the execution of the will the question arises as to how the testamentary disposition is affected, *i.e.*, is it modified, or does it follow the original terms of the living trust, or does it fail altogether?[7]

The devolution of a person's assets is controlled by local legislation and the right to alter such disposition by will is strictly statutory.[8] A person may dispose of his property during his lifetime by either deed or gift, but only by the use of a will is he able to direct its disposition at death.[9]

The objection to the pour-over provision attempting to dispose of the estate corpus under trust provisions foreign to the will and not executed in pursuance of the statute of wills[10] has been partially defeated by the courts through the use of the doctrines of Incorporation by Reference and Independent Significance.[11] Any remaining doubt as to the validity of a pour-over into an amended inter vivos trust created by the testator has been almost entirely eliminated by passage of state legislation.[12]

### Doctrine of Incorporation by Reference

The doctrine of Incorporation by Reference[13] dates back to the old rule of English Law of Wills.[14] The principle stated by Justice Wilson was that

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[6] In 1 Scott, Trusts Sec. 54.3 (2d ed. 1956), Prof. Scott states there is no problem "where the inter vivos trust is amended by instruments which comply with the formalities required for the execution of wills . . . . and that the property disposed of by the will should pass in accordance with the terms of the inter vivos trust as amended." See Roth, Estate Planning in Florida: The Revocable Inter Vivos Trust, 16 U. Fla. L. Rev. 34 (1963).

[7] 1 Scott, *id.*

[8] In Re Andrus' Will, 156 Misc. 268, 281 N. Y. Supp. 831 (1935); Atkinson, Wills Sec. 4 (2d ed. 1953); 1 Bowe-Parker: Page on Wills Sec. 3 (1960).

[9] Trustees etc. v. Hall, 48 Ill. App. 536 (1892); Ransom v. Pottawattamie County, 168 Iowa 570, 150 N. W. 657 (1915); Ates v. Ates, 189 Miss. 226, 196 So. 243 (1940); Atchison v. Atchison, 198 Okla. 98, 175 P. 2d 309 (1946); see also Lauritzen, *op. cit. supra* n. 4.

[10] Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907); Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513 (1st Cir. 1921).

[11] Where the inter vivos trust is irrevocable and not subject to modification see Restatement (Second), Trusts § 54 comment g (1959); if revocable and modifiable but it is not revoked or modified see Restatement (Second), Trusts § 54 comment h (1959). Also see Roth, *op. cit. supra* n. 6.

[12] For a detailed compilation of state statutes see *infra* n. 66.

[13] Exhaustive discussions may be found in Evans, Incorporation by Ref-

(Continued on next page)

> If a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it.[15]

It is the trust instrument which is incorporated into the will, not the trust.[16]

Certain prerequisites must be met before the inter vivos trust is incorporated by reference into the will. The reference in the pour-over provision must be to a written trust instrument.[17] The trust instrument must be referred to in the will and must be in existence at the time of execution of the will.[18] It must be established from the language of the will that the testator intends to incorporate the extrinsic inter vivos trust.[19]

The greatest conflict of judicial opinion in the applicability of the doctrine of incorporation by reference arises when an

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erence, Integration, and Non-Testamentary Act, 25 Col. L. Rev. 879 (1925); Evans, Nontestamentary Acts and Incorporation by Reference, 16 U. Chi. L. Rev. 635 (1949); Lauritzen, Can a Revocable Trust be Incorporated by Reference?, 45 Ill. L. Rev. 583 (1950); Lauritzen, Pour Over Wills, 95 Trusts & Estates 992 (1956); Comment, 27 Miss. L. J. 220 (1956); Atkinson, Wills Sec. 80 (2d ed. 1953); 1 Scott, Trusts § 54.1 (2d ed. 1956); 1 Bogert, Trusts and Trustees § 106 (2d ed. 1951); 2 Bowe-Parker: Page on Wills § 19.17 (1960).

[14] Earliest case was Molineux v. Molineux, 4 Cro. Jac. 144, 79 Eng. Rep. 126 (1607), cited by Lauritzen, *op. cit. supra* n. 4.

[15] Habergham v. Vincent, 2 Ves. Jr. 204, 30 Eng. Rep. 595 (1793); noted in 144 A. L. R. 714 (1943).

[16] 1 Scott, *op. cit. supra* n. 6 at 367; Montgomery v. Blankenship, 217 Ark. 357, 230 S. W. 2d 51 (1950).

[17] Wilcox v. Atty. Gen. 207 Mass. 198, 93 N. E. 599 (1911); 144 A. L. R. 714 (1943).

[18] Kinnear v. Langley, 209 Ark. 878, 192 S. W. 2d 978 (1946); Simor v. Grayson, 15 Cal. 2d 531, 102 P. 2d 1081 (1940); Appeal of Bryan, 77 Conn. 240, 58 Atl. 748 (1904); In Re Cameron's Estate, 215 Iowa 63, 241 N. W. 458 (1932); Shulsky v. Shulsky, 98 Kan. 69, 157 P. 407 (1916); Daniel v. Tyler, 296 Ky. 808, 178 S. W. 2d 411 (1944); Bemis v. Fletcher, 251 Mass. 178, 146 N. E. 277 (1925); Appeal of Sleeper, 129 Me. 194, 151 Atl. 150 (1930); Re Hull, 164 Md. 39, 163 Atl. 819 (1933); Re Dimmitt Estate, 141 Neb. 413, 3 N. W. 2d 752 (1942); Hastings v. Bridge, 86 N. H. 247, 166 Atl. 273 (1933); First-Mechanics Nat. Bank v. Norris, 134 N. J. Eq. 229, 34 A. 2d 746 (1943); Re Bressler's Estate, 155 Mich. 567, 119 N. W. 1104 (1909); Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089 (1913); Re Bunting, 30 Ohio Op. 269, 15 Oh. Supp. 54 (Prob., 1945); Re Hogue's Will, 135 Pa. Super. 543, 6 A. 2d 108 (1939); Richardson v. Byrd, 166 S. C. 251, 164 S. E. 643 (1932); Lawless v. Lawless, 187 Va. 511, 47 S. E. 2d 431 (1948). See annot., 144 A. L. R. 714 (1943) and 3 A. L. R. 2d 682 (1949) for additional U. S. and English cases.

[19] Bottrell v. Spengler, 343 Ill. 476, 175 N. E. 781 (1931); annot., 3 A. L. R. 2d 682 (1949).

amendable, inter vivos trust is changed subsequent to the execution of the will without the execution of a complementary codicil to the will. The first important case on this point was *Atwood v. Rhode Island Hospital Trust Co.*,[20] where after execution of his will the testator added four beneficiaries to his living trust and cancelled a part of the original trust without supplementing his will with a codicil. It was held that the pour-over of the residue of the will into the living trust was ineffectual because it abrogated the statute of wills. The court displayed absolute adherence to the rigid formalities of complete conformance with the provisions of the statute of wills.[21]

The stringent rule set forth in the *Atwood* case was soon thereafter modified in *Koeninger v. Toledo Trust Co.*[22] and *Old Colony Trust Co. v. Cleveland.*[23] These cases held that the amendment to the inter vivos trust after the execution of the will was wholly inoperative. But, the incorporated trust was given validity as to the original unamended trust as it existed at the time of execution of the will. The court, in *Old Colony Trust Co.*, gave for its reason that

> the will . . . . could not give the residue in trust for purposes . . . . (which) remained to be defined by later amendment of the trust deed.[24]

In *Koeninger,* a similar reason was offered by the court.

A more recent decision giving effect to incorporation by reference similarly held that the mere possibility of an amendment of the trust does not make the will or trust void when the trust is incorporated in the will by reference.[25] But here there were

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[20] *Supra* n. 10; which relied on the English case of Johnson v. Ball, *supra* n. 5 and Olliffe v. Wells, 130 Mass. 221 (1881). See discussion in McClanahan, *op. cit. supra* n. 4, and Palmer, *op. cit. supra* n. 4.

[21] Further discussion on the same will as in the Atwood v. Rhode Island Hospital Trust Co. may be found in Boal v. Metropolitan Museum of Art, 298 Fed. 894 (2d Cir. 1924). But cf., Merrill v. Atwood, 48 R. I. 72, 135 Atl. 402 (1926).

[22] 49 Ohio App. 490, 197 N. E. 419 (1934).

[23] 291 Mass. 380, 196 N. E. 920 (1935); but cf., Second Bank-State St. Trust Co. v. Pinion, 170 N. E. 2d 350 (Mass. 1960), which upheld the pour over upon a different rationale.

[24] Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N. E. 920 (1935).

[25] Re York's Estate, 95 N. H. 435, 65 A. 2d 282 (1949). The case cites First-Central Trust Co. v. Claflin (C. P.) 49 Ohio L. Abs. 29, 73 N. E. 2d 388 (1947), based upon Ohio Rev. Code Sec. 2107.05 (Page 1954), which allows the incorporation of an amenable and revocable inter vivos trust "which is referred to as being in existence at the time the will is executed."

no amendments subsequent to the execution of the will, although the incorporated trust had contained amendments prior to the will.

It appears that the modern weight of authority will not invalidate a living trust as testamentary merely because the grantor of the trust reserves a life estate and a power to revoke and amend.[26]

Following the strict construction of the doctrine of Incorporation by Reference, even the most minor amendment of the inter vivos trust instrument would not place it in the same condition at the death of the testator as it was when the will was executed.[27] The reason for this is that the amended trust instrument was non-existent at the time of execution of the will.[28] Since the amended section of the trust instrument was not in existence at the will's execution, it could therefore not be referred to as existing. The barriers against incorporating the amended trust instrument into the will can be rapidly removed by adherence to the doctrine of independent significance.

### Doctrine of Independent Legal Significance

The courts[29] have considered the doctrine of independent significance "as a partial escape device from the rigors of the incorporation by reference rule." [30] The doctrine states that a living trust stands by itself as a self-sufficient entity and is not dependent upon the terms of a will to be the recipient of a pour-over disposition.[31] "It is not the trust instrument, but the trust

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[26] National Shawmut Bank v. Joy, 315 Mass. 457, 53 N. E. 2d 113 (1944); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N. E. 2d 381 (1944); Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 Atl. 139 (1929); Dunnett v. Shields, 97 Vt. 419, 123 Atl. 626 (1924); Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535 (1911); Barnes, The Pour-Over Trust in New England, 41 B. U. L. Rev. 520 (1961).

[27] McClanahan, *op. cit. supra* n. 4.

[28] *Id.* at 273.

[29] In re Estate of Evans, 165 Ohio St. 27, 133 N. E. 2d 128 (1956); State ex rel. Citizens National Bank v. Superior Court, 236 Ind. 135, 138 N. E. 2d 900 (1956); Forsythe v. Spielberger, 86 So. 2d 427 (Fla. 1956); Continental Ill. National Bank & Trust Co. v. Art Institute, 409 Ill. 481, 100 N. E. 2d 625 (1951); In re York's Estate, 95 N. H. 435, 65 A. 2d 282 (1949); Wells Fargo Bank & Union Trust Co. v. Superior Court, 32 Cal. 2d 1, 193 P. 2d 721 (1948); Estate of Tower, 115 N. Y. L. J. 1889, Col. 7 (Surr. Ct. 1946); Swetland v. Swetland, 102 N. J. Eq. 294, 140 Atl. 279 (1928); Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513 (1st Cir. 1921) (dissent). See Heyert and Rachlin, *op. cit. supra* n. 3.

[30] Atkinson, Wills § 81 at 397 (2d ed. 1953).

[31] 1 Scott, Trusts § 54.3 (2d ed. 1956).

itself, which has independent significance." [32] This doctrine permits a greater degree of flexibility in utilization of the pour-over provision than incorporation by reference, for this doctrine applies to amendments to the inter vivos trust after execution of the will as well as before.[33] The subsequent amendment is effective because it is based upon the equitable doctrine that subsequent acts of independent significance do not require attestation under the statute of wills.[34] Since the property added to the living trust is affected, the amendment has significance apart from the testamentary disposition.[35]

The doctrine of independent significance's basic proposition is that the missing identity of the beneficiary or estate asset is supplied by using extrinsic evidence of the specified act or place mentioned in the will as the means of identification.[36] There are a variety of circumstances in which it comes into play. Where property in a certain house, room or receptacle was bequeathed;[37] or bequests to employees of the testator at the time of his death;[38] or even to persons caring for the testatrix at her death[39] are vivid illustrations of the manner in which this doctrine works.[40]

The earliest decision bearing on independent significance was rendered by Chief Justice Cardozo *In the Matter of Rausch.*[41] The testator had bequeathed one-fifth of his residuary estate to a previously created unamendable and irrevocable

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[32] *Id.* at 367. Prof. Scott continues by stating: "Even though a disposition cannot be fully ascertained from the terms of a will, it is not invalid if it can be ascertained from their effect upon the disposition in the will."

[33] Evans, Nontestamentary Acts and Incorporation by Reference, 16 U. Chi. L. Rev. 635 (1949); Heyert and Rachlin, *op. cit. supra* n. 3 at 1110.

[34] See Second Bank-State St. Trust Co. v. Pinion, *supra* n. 23.

[35] 1 Scott, *op. cit. supra* n. 30 at 377.

[36] McClanahan, *op. cit. supra* n. 20 at 278.

[37] Buchwald v. Buchwald, 175 Md. 103, 199 Atl. 795 (1938); Gaff v. Cornwallis, 219 Mass. 226, 106 N. E. 860 (1914); Creamer v. Harris, 90 Ohio St. 160, 106 N. E. 967 (1914); Parrot v. Avery, 159 Mass. 594, 35 N. E. 94 (1893). See Atkinson, *op. cit. supra* n. 30 at 394.

[38] Metcalf v. Sweeney, 17 R. I. 213, 21 Atl. 364 (1891); In re Hirshorn's Estate, 120 Colo. 294, 209 P. 2d 543 (1949). See Atkinson, *op. cit. supra* n. 30.

[39] Dennis v. Holsapple, 148 Ind. 297, 47 N. E. 631 (1897); Hastings v. Bridge, 86 N. H. 247, 166 Atl. 273 (1933). See Atkinson, *op. cit. supra* n. 30.

[40] See supplementary examples in Comment, 46 Mich. L. Rev. 77 at 79 (1947).

[41] 258 N. Y. 327, 179 N. E. 755, 80 A. L. R. 98 (1932); Note, 21 Cornell L. Q. 492 (1936); Note, 32 Col. L. Rev. 917 (1932) Note 6 U. Cinc. L. Rev. 295 (1932).

inter vivos trust, and had manifested an intent to include it within his will. Cardozo held the bequest valid even though New York does not recognize incorporation by reference.[42] He suggested that the testamentary disposition to the trustee was analogous to "a gift to a corporation for the uses stated in its charter," [43] with the terms of the trust used as evidence in identifying the distributee.

A similar analogy as that used by Cardozo in the *Rausch* decision was effectively used in a New Jersey case,[44] in which a pour-over bequest from the will to a *revocable* living trust was held valid through utilization of independent significance. The court held that the trust was in factual existence and stood independent from any bequests in the will.[45]

It was not until *President and Directors of Manhattan Co. v. Janowitz*[46] that an important decision was rendered which refused to utilize facts of independent significance to validate an unattested amendment to an inter vivos trust which was made after the execution of a will with a pour-over provision. The testator had created a modifiable and revocable inter vivos trust previous to the execution of a will containing a pour-over provision. Subsequent to the time of the will's execution, he amended the trust by changing one of its beneficiaries without executing a codicil. The court held not only that the subsequent amendment failed but that the entire trust failed. It distinguished the case from the *Rausch* decision on several grounds: (1) the trust was amendable and revocable; (2) the trust indenture was in fact modified subsequent to the will's execution; and (3) the settlor reserved the right to alter and revoke the trust indenture.[47] The court went on to say that:

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[42] Matter of Fowles' Will, 222 N. Y. 222, 118 N. E. 611 (1918); see discussion in Evans, *op. cit. supra* n. 33, and Palmer, Testamentary Dispositions to the Trustee of an Intervivos Trust, 50 Mich. L. Rev. 33 at 55-58 (1951).

[43] In The Matter of Rausch, 258 N. Y. at 331, 179 N. E. at 758.

[44] Swetland v. Swetland, 102 N. J. Eq. 294, 140 Atl. 279 (1928); Note, 37 Yale L. J. 1002 (1928).

[45] See Fifth-Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 70 N. E. 2d 920 (1946), wherein an Ohio Court of Appeals held that where a *revocable* inter vivos trust was incorporated in the will, and since the attempted revocation of the trust was not executed in conformity with the formalities of the statute of wills, the attempted revocation failed.

[46] 260 App. Div. 174, 21 N. Y. S. 2d 232 (1940); see discussion in Scott, The Law of Trusts 1941-1945, 59 Harv. L. Rev. 157 at 167; Palmer, *supra* n. 40 at 53.

[47] See Annot., 8 A. L. R. 2d 614, 616 (1949).

> The reservation of power to amend the trust indenture and its repeated exercise eliminated all independent significance that might be attached to the trust indenture.[48]

The first inroad in validating a pour-over disposition to an amended living trust was made *In Matter of Ivie*.[49] The court held that a bequest of stock to a pre-existing, inter vivos, charitable trust was valid, even though the trust was amended subsequent to the execution of the will. It should be mentioned that the amendment eliminated the testator's power to modify and revoke the trust, and thus the net effect left the trust in substantially the same form as when it was originally executed.[50] Although the modification to the trust was negligible, the decision laid a foundation for increased and varied uses of the pour-over. No longer was a pour-over provision restricted to an irrevocable and unamendable living trust, or one which had not been amended subsequent to the execution of the will.

Finally, the Massachusetts case of *Second Bank-State Street Trust Co. v. Pinion*[51] was the first decision to unequivocally hold, without the aid of a statute, that a pour-over provision could be conveyed under the terms of an unattested instrument amending a living trust and drafted subsequent to the execution of the will. The court based its holding on the equitable doctrine that subsequent acts of independent significance do not require attestation under the statute of wills,[52] and thereby repudiated any reliance on incorporation by reference.[53] The result is diametrically opposite to that found in the earlier Massachusetts decision of

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[48] 260 App. Div. at 179, 21 N. Y. S. 2d at 237.

[49] 4 N. Y. 2d 178, 149 N. E. 2d 725 (1958); see discussion in 45 Cornell L. Q. 135 (1959); Scott, Pouring Over, 97 Trusts & Estates 189 (1958); Comment, 57 Mich. L. Rev. 81 at 87 (1958).

[50] The court stated in 4 N. Y. 2d 178 at 181, 149 N. E. 2d at 726, (that) "where the trust itself remains unimpaired and substantially the same as it was at the time of execution of the will, and certainly where the amendments are concerned solely with the administrative provisions of the trust deed, it cannot be said to come within the purview of the rule against incorporation by reference." Also see Note, The Desirability of Pour Over Legislation, 44 Minn. L. Rev. 131, 137 (1959).

[51] 170 N. E. 2d 350 (Mass. 1960); Note, 59 Mich. L. Rev. 1276 (1961).

[52] See Restatement (Second), Trusts Sec. 54 comment i (1959).

[53] The court stated in 170 N. E. 2d at 352 "The doctrine of incorporation by reference, even if applicable at all where an intent to incorporate in the usual sense is negatived . . . . could not import the nonexistent amendment."

*Old Colony Trust Co. v. Cleveland,*[54] which was referred as being "inconsistent with present legal thought." [55] The reliance on independent significance was the rationale upon which the court validated the subsequent amendment.[56]

The *Pinion* decision was soon backed up by *Canal National Bank v. Chapman,*[57] which also sustained the validity of an unattested amendment based on independent significance. The court reasoned that the testatrix's manifested intent was not to create a testamentary trust, but to add property to an existing non-testamentary trust as it existed at the time of her death.[58] In light of this intent, the court found no solid ground for not giving validity to the amended trust in view of the fact that the trust was in existence and referred to in the will.[59]

The preceding cases present a lucid illustration of the difficulties encountered when the amended trust instrument was non-existent at the time of the execution of a will with a pour-over provision. There are three possible alternatives in resolving the conflict as presented in the prior cases: (1) recognition of the validity of the trust amendment; or (2) sustaining the validity of the trust in its original terms at the time of execution of the will; or (3) defeating the testamentary disposition to the trust in total.[60] The soundest and most favored proposition is the first, which can be accomplished by reliance on facts of independent significance.[61] By upholding the amendment, the court

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[54] *Supra* n. 23, wherein the case held that the will could not give the residue of the estate for purposes which remained to be defined by later amendment of the trust indenture.

[55] Second Bank-State Street Trust Company v. Pinion, 170 N. E. 2d at 352.

[56] But see Barnes, The Pour-Over Trust in New England, 41 B. U. L. Rev. 520, 526 (1961), wherein he states that even with facts of independent significance, the Pinion case would not sustain an amendment to a $5 trust corpus where the testator attempted to pour-over $100,000, for such amendment is clearly testamentary.

[57] 157 Me. 309, 171 A. 2d 919 (1961); see Barnes, *id.* at 531, 532. The case is the latest one sustaining an unattested trust amendment.

[58] The living trust therefore continues to have an active, independent life of its own.

[59] But see Comment, 29 Fordham L. Rev. 143, 149 (1960), wherein it was stated that based on the assumption that the trust instrument is of independent legal significance, the fact that the trust was created before or after the execution of the will is of little concern as long as it is in existence at the time of the settlor's death.

[60] 1 Scott, *op. cit. supra* n. 31 at 375.

[61] It is this alternative upon which the states have relied in legislation giving effect to the pour-over.

does not frustrate the testator's probable intent that the pour-over should pass to the trust as it exists at his death. Since the third alternative appears to have the greatest objection,[62] those jurisdictions not sustaining the doctrine of independent significance follow the second alternative. As one court appropriately held:

> If the testator's intent is to be considered, is it not better to give substantial effect to the intent, by upholding the will and the original trust instrument, than to defeat the intent in toto by holding invalid all of the attempted testamentary disposition?[63]

The abundancy and conflict of litigation in this area can be primarily attributed to strong public policy behind the statute of wills.[64] Recent decisions have mitigated this support. They hold that the underlying concepts behind the statute of wills, to guard against fraudulent elements, which may also enter into the motive for making the trust amendment, is satisfied by the formal execution of the trust indenture and the solemn transfer of the trust res to the trustee.[65]

### Pour-Over Statutes

Because of the dilatory movement and vagueness of the courts in substantiating not only the pour-over provision of a will but an unattested amendment to a pre-existing trust as well, the states within the past decade have turned to legislative action.[66] Although the statutes vary by a small degree,[67] they go

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[62] See President and Directors of Manhattan Co. v. Janowitz, *supra* n. 44.

[63] Stouse v. First National Bank of Chicago, 245 S. W. 2d 914, 920 (Ky. App. 1951), noted in 32 A. L. R. 2d 1261 (1953).

[64] A codicil must have been executed to validate an amendment to the trust which was the receptable of a pour-over provision.

[65] See Second Bank-State Street Trust Co. v. Pinion, *supra* n. 48; and Canal National Bank v. Chapman, *supra* n. 57.

[66] The following statutes comprise a complete list of legislation dealing with the pour-over problem: Ala. Code tit. 61, § 4(1) (Supp. 1961). Ariz. Rev. Stat. Ann. § 14-141 (Supp. 1961). Ark. Stat. Ann. § 60-601 (Supp. 1963). Colo. Rev. Stat. Ann. § 152-5-45 (1959). Conn. Gen. Stat. Ann. § 45-173 (Supp. 1961). Del. Code Ann. tit. 12, § 111 (Supp. 1957). Fla. Stat. Ann. § 736.17 (1963). Ida. Code Ann. § 68-1101 (Supp. 1963). Ill. Rev. Stat. ch. 3, § 43(a) (Supp. 1961). Ind. Stat. Ann. § 6-601(j) (Burns 1953). Iowa Probate Code § 633.275 (Supp. 1963). Me. Rev. Stat. ch. 169 § 17-A (Supp. 1963). Md. Ann. Code art. 93, §§ 350A, 350B (Supp. 1959). Mass. Ann. Laws ch. 203, § 3B (Supp. 1963). Mich. Stat. Ann. § 26.78(1) (Supp. 1963). Minn. Stat. Ann. § 525.223 (Supp. 1963). Miss. Code Ann. § 661.5 (Supp. 1962). Mont. Rev. Code Ann. § 91-321 (Supp. 1963). Neb. Rev. Stat. § 30-1806 (Supp. 1959). N. H. Rev. Stat. Ann. § 563-A:1 (Supp 1961). N. J. Stat. Ann. § 3 A:

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to the center of the problem by providing that if a modifiable and revocable living trust is in existence at the time of executing the will and is identified therein, subsequent unattested amendments by the testator to the trust are valid.[68] This eliminates the burden of republication or re-execution. The result is that only one trust has independent significance, that being the inter vivos trust which obtains plenary control over the disposition of the trust res.[69]

Recently, with the trend toward increased state reciprocity, the Uniform Testamentary Additions to Trusts Act[70] has been adopted by nearly 50 percent of those states which have passed

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3-16.1, 16.2 (Supp. 1962). N. C. Gen. Stat. § 31-47 (Supp. 1963). N. D. Cent. Code § 56-07-01 (Supp. 1961). Okla. Stat. Ann. tit. 84, §§ 301-304 (Supp. 1961). Ohio Rev. Code § 2107.63 (Supp. 1963). Pa. Stat. Ann. tit. 20, § 180.14 (a) (Supp. 1960). R. I. Gen. Laws Ann. § 33-6-33 (Supp. 1960). S. C. Code Ann. § 19-296 (Supp. 1961). S. D. Laws ch. 440, p. 495 (1963). Tenn. Code Ann. § 32-307 (Supp. 1961). Tex. Prob. Code Ann. § 58(a) (Supp. 1961). Utah Code Ann. § 74-3-23 (Supp. 1961). Vt. Stat. Ann. tit. 14, § 2329 (Supp. 1961). Va. Code Ann. § 64-71.1 (Supp. 1960). Wash. Rev. Code § 11.12.250 (1959). W. Va. Code Ann. § 4058(1) (Supp. 1961). Wis. Stat. Ann. § 231.205 (Supp. 1964). Wyo. Comp. Stat. Ann. § 2-53 (Supp. 1957).

[67] For detailed analysis of legislation on pour-over dispositions see McClanahan, *supra* n. 4 at 295; Comment, 57 Mich. L. Rev. 89 (1958); Polasky, "Pour-Over" Wills and the Statutory Blessing, 98 Trusts & Estates 949, 955 (1959).

[68] A typical statute may be found in Ohio Rev. Code § 2107.63, wherein it is provided that "A testator may by will devise, bequeath, or appoint real or personal property, to a trustee of a trust which is evidenced by a written instrument executed by the testator or any other person either before or on the same date of the execution of such will and which is identified in such will.

The property or interest so devised, bequeathed, or appointed to such trustee shall be added to and become part of the trust estate, shall be subject to the jurisdiction of the court having jurisdiction of such trust, and shall be administered in accordance with the terms and provisions of the instrument creating such trust, including, unless the will specifically provides otherwise, any amendments or modifications thereof made in writing before, concurrently with, or after the making of the will and prior to the death of the testator. The termination of such trust, or its entire revocation prior to the testator's death, shall invalidate such devise, bequest, or appointment to such trust."

Similar statutes may be found in Ala., Fla., Md., R. I., Tex., Utah, Va., Wash., and Wyo., *supra* n. 66.

A discussion of the manner in which the Ohio statute would alter the result in Koeninger v. Toledo Trust Co., *supra* n. 22, may be found in Legislation, Decedents Estates—Independent Legal Significance and Pour-Over Wills, 13 W. Res. L. Rev. 795, 796 (1962).

The Ohio Act also reverses the decision rendered in Fifth-Union Trust Co. v. Wilensky, *supra* n. 45.

[69] 1 Scott, *op. cit. supra* n. 31, Re York's Estate, *supra* n. 25.

[70] See *supra* n. 2; Note, 36 Conn. Bar J. 267 (1962).

pour-over legislation.[71] The Act provides that pour-over devolutions of property to a pre-existing, amendable and revocable trust are valid. The trust shall be administered in pursuance of the trust provisions including all amendments made without testamentary formality before the testator's death, even though the amendments are made subsequent to the execution of the will. If the will so provides, amendments to the trust after the testator's death shall be valid.[72] Finally, under the Act, any revocation of the inter vivos trust prior to the testator's death would render the trust void.[73]

The utilization of uniform legislation is significant in several respects. It upholds any testamentary disposition which an uninformed person may make. For those persons who are presumed to comprehend the Act and its many involved problems, there naturally results greater certainty and simplicity in effecting planned dispositions.[74]

The vitalization of pour-over provisions by state legislation based upon the doctrine of independent significance is readily apparent.

> The test (with these statutes) is not whether the facts are subject to the control of the testator, but whether they are facts which have significance apart from the disposition of the property bequeathed.[75]

Most of the statutes sagaciously provide that "the terms of the will shall govern the effect of the amendment."[76] This creates a new exception to the statute of wills, for as the testator periodically changes the terms of the inter vivos trust, he, in effect, is changing the terms of his will without the requisite testamentary formality of supplementing it with a codicil.[77] Those statutes supporting amendments to the trust even subsequent to the

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[71] Those states adopting the Uniform Testamentary Additions to Trust Act are Ariz., Ark., Conn., Id., Ia., Mass., Me., Mich., Minn., N. H., N. J., N. D., Okla., S. C., S. D., Tenn., Vt., W. Va.

[72] Of those states not adopting the Act only Fla., Ind., and Pa. have incorporated this provision. Its propriety appears questionable. See Polasky, *op. cit. supra* n. 67.

[73] See 21 A. L. R. 2d 220 (Supp. 1964).

[74] See Polasky, *op. cit. supra* n. 67 at 962.

[75] 1 Scott, *op. cit. supra* n. 31 at 376.

[76] States not so providing are Conn., Fla., Ore., and Wis. See discussion in Polasky, *op. cit. supra* n. 74 at 958.

[77] See Note, The Desirability of Pour Over Legislation, 44 Minn. L. Rev. 131 (1959).

death of the testator[78] carve out a noteworthy exception to one of the requisites of the doctrine of incorporation by reference, i.e. that the inter vivos trust be in existence at the time of the execution of the will.[79] They have also devised an innovation to revocation by allowing a will, or any part thereof, to be revoked by revocation of an independent, non-testamentary instrument.[80]

The statutes do not appear to be limited in scope as to the type of trust which could be the receptacle of a pour-over provision. It may be directed to a private or charitable trust.[81] The testamentary disposition may be made to a trust in which the testator was not the settlor. An estate planner is cognizant of the beneficial implications to be extracted from this interpretation, in that, it permits a living trust created by one member of a family to be incremented by other members of the same family.[82] It therefore appears that the utility to be extracted from these statutory enactments have many salutary facets.

## Conclusion

The estate planner is aware of the fact that the coordination of the living trust and will is an integral part of a person's estate plan and therefore an amendment of the trust may serve both a testamentary and non-testamentary function.[83] Of the many useful features of the pour-over device in estate planning, several of the more salient ones are as follows: [84]

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[78] *Supra* n. 72.

[79] E.g., Lawless v. Lawless, 187 Va. 511, 47 S. E. 2d 431 (1948); *supra* n. 18. See also Legislation, 44 Va. L. Rev. 1405, 1406 (1958).

[80] E.g., Ohio Rev. Code § 2107.63 *supra* n. 68. See Bank of Delaware v. Bank of Delaware, 161 A. 2d 430 (Del. Ch. 1960), which under the Delaware statute, *supra* n. 66, held where the testatrix's will provided that the pour-over should be effective only if the trust were in existence at the time of her demise, in view of an amendment directing that the corpus of the intervivos trust be paid over to the executor of the testatrix, a revocation of the trust resulted. Also see Legislation, 44 Va. L. Rev. 1405, 1406 (1958).

[81] But see comment in Indiana statute *supra* n. 66, wherein the statute is applicable only to gifts to an existing Public Charitable Trust.

[82] Note, Incorporating Non-Testamentary Documents into a Will, 15 Wyo. L. J. 58, 60 (1960).

[83] Evans, Incorporation by Reference, Integration, and Non-Testamentary Act, 25 Col. L. Rev. 879 (1925).

[84] See Roth, Estate Planning in Florida: The Revocable Inter Vivos Trust, 16 U. Fla. L. Rev. 34 (1963); Note, 59 Mich. L. Rev. 1276 (1961); McClanahan, Bequests to an Existing Trust—Problems and Suggested Remedies, 47 Calif. L. Rev. 267 (1959); Shattuck & Farr, An Estate Planner's Handbook § 13 at 84 (2d ed. 1953).

1. Unification of administration of trust and probate corpus, in that, management of the trust property will not be interrupted by the death of the settlor;
2. Minimization of administration expenses;
3. Avoidance of costly court supervision and accounting procedures required of the testamentary trustee;
4. More flexibility of administration, in that, the consolidated trust and estate corpus leads to greater diversification and less risk;
5. Minimization of income, trust, estate and inheritance taxes;
6. Greater degree of certainty over trust amendments;
7. Grantor of trust is able to determine the competency and discretion of the trustee who will manage the property after the grantor's death;
8. Avoidance of any family publicity attaching to the probate of the will;
9. Avoidance of ancillary administration of estate assets located in another jurisdiction;
10. Creditors may find greater difficulty in reaching trust property than nontrust property;
11. Any heirs who contest the will may find it more difficult to upset a long established trust than a will.

In light of recent judicial recognition and legislative action affording the pour-over a new vitality based on independent significance, the law regarding pour-over dispositions does not appear to be as uncertain and confused as it had been a decade ago. Reliance upon statutes should be light until there is judicial accord in each jurisdiction.