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The Pour over as an Estate Planning Device - And Its Availability in North Dakota

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THE POUR OVER AS AN ESTATE PLANNING DEVICE—AND ITS AVAILABILITY IN NORTH DAKOTA

I. INTRODUCTION

North Dakota in 1961 enacted a Uniform Testamentary Additions to Trusts Act[1] identical to that adopted by the Commissioners of Uniform State Laws in 1960.[2] The purpose of this act was to alleviate problems which arise from the doubt that exists as to whether the pour over provisions[3] in a will to an inter vivos trust are valid in view of the general requirements of the statute of wills.

In recent years the pour over provision has become the most controversial of all current estate planning devices.[4] There are many variations of the pour over but the most common one arises when a man executes a will in which it is provided that his estate, or a part of it, shall be distributed to an inter vivos trust created by the testator or another, either contemporaneously with, or prior to the execution of the will. Difficulties are encountered when the trust is amendable or revocable or both; and the controversy is highlighted when the testator thereafter amends the trust but leaves the will untouched.

Although not a new concept, the attempt to make a gift by will to an existing trust has made its most significant gains in the past generation.[5] Much credit for the progress

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1. N.D. Cent. Code §§ 56-07-01 to -04 (Supp. 1961).
2. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 198-99 (1960).
3. A provision in a will adding property to an inter vivos trust is called a "pour over" provision. See STEPHENSON, DRAFTING WILLS AND TRUST AGREEMENTS § 19.1 (1955). Pour over provisions may also be used to pour over from a will to another will, from a trust to another trust, and from a trust to a will. See **In re** Fowles' Will, 222 N.Y. 222, 118 N.E. 611 (1918); **In re** Piffard's Estate, 111 N.Y. 410, 18 N.E. 718 (1888).
4. For a general discussion of this device see SHATTUCK & FARR, AN ESTATE PLANNER'S HANDBOOK § 13 (2d ed. 1953); CASNER, ESTATE PLANNING 90-261 (3d ed. 1961); BOWE, ESTATE PLANNING AND TAXATION § 6.30 (1st ed. 1957).
5. See Johnson v. Ball, 5 De G. & Sm. 85, 64 Eng. Rep. 1029 (Ch. 1851) which is one of the earliest cases involving a writing in the form of a trust in which the will referred to a memorandum to trustees "to hold the same upon the uses appointed by letter signed by them and myself." Most American litigation has arisen since the decision in the leading case of Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513 (1st Cir. 1921).

of the pour over must be given to the text writers who have advocated its acceptance.[6] However, the credit owing to its inherent advantages, and to the sound reasons attorneys and testators have for implementing it, should not be forgotten. For an insight into the desire for its implementation consider some of the following: (1) the grantor without relinquishing control over his property may test the plan which will control his estate after his death; (2) it permits the unified administration of trust and probate property; (3) it may eliminate the cost of administration on the property added to the trust; (4) it avoids otherwise necessary court supervision; (5) it simplifies management and administration of the estate; (6) publicity may be avoided concerning the family and business plans which otherwise would become part of the public record upon admission to probate; (7) it assures elderly property owners of professional management and counsel when management and investment burdens become heavy; (8) it may reduce income, estate and inheritance taxes; and (9), in general, it affords much flexibility in the disposition of probate assets.[7]

Despite its short career this device has encountered much litigation[8] and critical comment.[9] The primary objection to the testamentary pour over provision is found in its attempt to dispose of property in accordance with provisions not found in the will and not embodied in a writing executed with the formalities required by the statute of wills.[10]

As the cases involving this objection were litigated the courts tried to measure this device within the framework of certain doctrines already well known and generally accepted in the law of wills. To explore the legal justification and

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6. See I SCOTT, TRUSTS § 54.3 (2d ed. 1956); Evans, **Nontestamentary Acts and Incorporation By Reference,** 16 U. Chi. L. Rev. 635 (1949); McClanahan, **Bequests to an Existing Trust,** 47 Calif. L. Rev. 267 (1959); Palmer, **Testamentary Disposition to the Trustee of an Inter Vivos Trust,** 50 Mich. L. Rev. 33 (1951); Polasky, **"Pour-Over" Wills,** 98 Trusts & Estates 949 (1959); Shattuck, **Some Practical Aspects of the Problems of the Alterable and Revocable Inter Vivos Trust in Massachusetts,** 26 B.U.L. Rev. 437 (1946).

7. See McClanahan, **op. cit. supra** note 6, at 268.

8. See generally SCOTT, **op. cit. supra** note 6, § 54.3.

9. See Lauritzen, **Can a Revocable Trust Be Incorporated by Reference?,** 45 Ill. L. Rev. 583 (1950); Shattuck, **"Pour Over" Trusts—A Renewed Warning to Draftsmen,** 91 Trusts & Estates 207 (1952).

10. See Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907); In Atwood v. Rhode Island Hospital Trust Co., **supra** note 5, the court held the attempted gift to the trustee by the residuary clause of the will to be void, stating that the plan of the will and the trust was obnoxious to the statute of wills.

background of the testamentary dispositions it becomes necessary to examine the two doctrines most frequently used to uphold the pour over disposition in the absence of statute, namely, the doctrine of incorporation by reference and the doctrine of independent legal significance.

It should be noted that if the provisions of the testamentary trust are set out in full in the will, without reference to or reliance on the provisions of the inter vivos trust, no concern need be given to the exceptions found in the doctrine to be discussed.

II. INCORPORATION BY REFERENCE

Incorporation by reference, a long recognized exception to the requirements of the statute of wills, is a judicially constructed doctrine which provides that a validly executed will may, by appropriate language, incorporate another document even though the incorporated document does not satisfy the statutory requirements regarding wills.[11] The courts are in general accord that there can be no incorporation unless five conditions are satisfied: (1) the incorporating document must describe the writing with reasonable certainty; (2) the writing must be described as in existence when the incorporating document is executed; (3) the will must evidence an intention of the testator to incorporate the document; (4) the writing must conform to the description contained in the incorporating document; and (5) the writing in fact must have been in existence when the incorporating document was executed.[12] The absence of any of the above is considered fatal to incorporation by reference.[13]

There are no additional requirements that the writing be of any particular type, that it possess any independent legal efficacy, or that the writing be signed by the testator or any other person. Consequently, the extrinsic documents which have been presented to the courts for incorporation are of various types. Some of the more common are: the executed

11. See Newton v. Seaman's Friend Soc'y, 130 Mass. 91, 39 Am. Rep. 433 (1881); ATKINSON, WILLS § 80 (2d ed. 1953); 2 BOWE-PARKER: PAGE ON WILLS § 19.17 (3d ed. 1960); Evans, **Incorporation by Reference, Integration and Non-Testamentary Act,** 25 Colum. L. Rev. 879 (1925).

12. See ATKINSON, **op. cit. supra** note 11, § 80; 2 BOWE-PARKER. **op. cit. supra** note 11, § 19.18.

wills of others,[14] prior invalid wills or, more precisely, papers in the form of a will of the testator,[15] undelivered deeds,[16] contracts,[17] and, of particular importance here, trust instruments.[18]

Incorporation by reference, generally accepted in England and most American jurisdictions,[19] had its beginning prior to the enactment of the Wills Act in 1837.[20] The doctrine has previously been rejected in Connecticut;[21] however, Louisiana[22] and New Jersey,[23] stating they do not recognize it, have reached results similar to incorporation.[24] The remaining jurisdictions either accept the doctrine or have not been confronted with it. Apparently North Dakota falls in the latter category.[25]

III. INDEPENDENT LEGAL SIGNIFICANCE

The doctrine of independent legal significance permits a court to refer to facts which exist apart from the will to determine the meaning of provisions in the will.[26] It is based on the fact that courts must often receive evidence of acts and events extraneous to the will in order to clarify the meaning of the provisions contained therein. The requirements

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14. Bemis v. Fletcher, 251 Mass. 178, 146 N.E. 277 (1925); Clark v. Dennison, 283 Pa. 285, 129 Atl. 94 (1925).
15. Allen v. Maddock, 11 Moore P.C. 427, 14 Eng. Rep. 757 (1858). The incorporation of a prior invalid will should be distinguished from the revival of a prior valid, though perhaps revoked, will.
16. **In re** Dimmitt's Estate, 141 Neb. 413, 3 N.W.2d 752 (1942).
17. Allday v. Cage, 148 S.W. 838 (Tex. Civ. App. 1912).
18. **In re** Willey's Estate, 128 Cal. 1, 60 Pac. 471 (1900); **In re** York's Estate, 65 A.2d 282 (N.H. 1949).
19. See ATKINSON, **op. cit. supra** note 11, at 385.
20. The incorporation doctrine originated before extensive formalities for the execution of wills were required by the Statute of Frauds, 1677. See Molineux v. Molineux, 4 Cr. Jac. 144, 79 Eng. Rep. 126 (1605). Application of the doctrine was seldom questioned in England until the Wills Act, 1837, added the requirement that wills be "signed at the end".
21. Hatheway v. Smith, **supra** note 10. A Connecticut statute now permits the incorporation of living trust provisions into a will. Conn. Gen. Stat. Ann. §§ 45-173-173A (Supp. 1961).
22. Succession of Ledet, 170 La. 449, 128 So. 273 (1930).
23. Murray v. Lewis, 94 N.J. Eq. 681, 121 Atl. 525 (Ch. 1923).
24. Hessmer v. Edenborn, 196 La. 575, 199 So. 647 (1940); Swetland v. Swetland, 100 N.J. Eq. 196, 134 Atl. 822 (Ch. 1926). The early New York cases recognized the doctrine, see Robert v. Corning, 89 N.Y. 225 (1882), but in a more recent case, Booth v. Baptist Church, 126 N.Y. 215, 28 N.E. 238 (1891), the court refused to recognize the doctrine. Later New York modified its position in **In re** Rausch's Will, 258 N.Y. 327, 179 N.E. 755 where the court said that the doctrine against incorporation of unattested documents "should not be carried to a dryly logical extreme."
25. **But see In re** Glavkee's Estate, 76 N.D. 171, 34 N.W.2d 300 (1948) where an extrinsic instrument specifically referred to in will and duly identified is admissible to aid in construction of will.
26. SCOTT, TRUSTS § 54.3 (2d ed. 1956); STEPHENSON, DRAFTING WILLS AND TRUST AGREEMENTS § 19.7 (1955).

for implementing this doctrine are best formulated by the following statement:

> "Beneficiaries may be pointed out generally in a will and may be limited and more precisely defined by a subsequent non-testamentary act. The will should (a) purport to dispose of the property; and (b) provide directions for determining the identity of the beneficiaries by giving a general description of them; but (c) the means so provided should not be any act whose sole or chief purpose is that of complementing the will. It should have the force and effect of an independent legal transaction."[27]

This rule may be applied to a general description of property subject to testamentary disposition as well.

At this point it might be well to note the distinction between this doctrine and the one of incorporation by reference. Where the latter permits certain extrinsic *writings* to be read as part of a will, the doctrine of independent legal significance permits certain *facts* to be shown in order to determine the beneficiaries and bequests of a will. The *writing*, in order to satisfy the incorporation by reference doctrine, must have been in existence at the time the will was executed. Whereas, under the independent legal significance doctrine, the *fact* may exist by virtue of acts performed either prior to, or subsequent to, the execution of the will. Almost any court would readily admit extrinsic evidence to determine the beneficiaries of a devise to "my wife," or to "my children." Also, despite the fact the court in determining the beneficiaries must refer to facts which exist independent of the will, there is little question as to the validity of bequests such as: to "such persons as shall be in my employ at my death,"[28] to "the party or parties . . .who may be farming my farm and taking care of me at the time of my death,"[29] or to "such person as shall maintain me and furnish me with medical treatment while I live."[30]

Gifts by location are also sustained under this doctrine. These are best illustrated in cases where the testator be-

27. Evans, **op. cit. supra** note 11, at 902,-03.
28. **In re** Hollingsworth's Estate, 37 Cal. App. 2d 432, 99 P.2d 599 (1940).
29. **In re** Reinheimer's Estate, 265 Pa. 185, 108 Atl. 412 (1919).
30. Dennis v. Holsapple, 148 Ind. 297, 47 N.E. 631 (1897).

queaths the contents of a specified trunk,[31] or of a safe deposit box.[32] The testator may increase or diminish the contents of the receptacle after the will is executed, but the resulting inference that the alterations were made solely for the purpose of modifying the will may give rise to difficulties.[33]

Following the same reasoning the "independent significance" test has been used to sustain the "pour over" by viewing the identities of the trustee and the trust agreement as facts of independent significance.[34] The trust agreement affects the property held inter vivos and consequently has significance unrelated to the disposition of property under the will.

In analyzing the situations where, in absence of statute, the above doctrines were used to sustain pour overs from a will into a living trust, categorization of the nature of the trust itself becomes necessary. These situations shall be considered in a sequence based upon the degree of difficulty to which they give rise.

A. The Irrevocable Unamendable Trust Pouring over to an irrevocable trust not subject to amendment or modifications[35] would seem to give rise to little difficulty, the disposition being sustained under either of the two doctrines. The leading case *In re Rausch's Will*,[36] wherein the testator-settlor bequeathed a portion of his residuary estate to the trustee of a previously executed, unamendable and irrevocable inter vivos trust in the following manner:

> "[U]nder the same terms and conditions embodied in the Trust Agreement . . . the principal to be disposed of as contained in the said agreement, and which agreement is hereby made part of this my will, as if fully set forth herein."

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31. Appeal of Magoohan, 117 Pa. 238, 14 Atl. 816 (1887).
32. **In re** Thompson, 217 N.Y. 111, 111 N.E. 762 (1916).
33. See Hastings v. Bridge, 86 N.H. 247, 166 Atl. 273 (1933) where the court held that sufficient designation of both beneficiary and property given him is essential to a valid legacy.
34. SCOTT, **op cit. supra** note 27, at 376-77.
35. N.D. Cent. Code § 59-02-18 (1961) provides: "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, without the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."
36. 258 N.Y. 327, 179 N.E. 755, 756 (1932); see President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232, at 236 (1940), where the court said that the trust involved in the Rausch case was unamendable and irrevocable.

The New York Court upheld the bequest despite the fact that they had, in earlier decisions, refused to recognize the Doctrine of Incorporation by Reference.[37] It would seem that Justice Cardozo in delivering the opinion relied to some degree upon both doctrines.[38] Though this situation would seem to give rise to a clear case of incorporation by reference, the trust's existence prior to the execution of the will was not stressed nor was the fact that it was irrevocable and unamendable mentioned in the opinion.

B. The Revocable, Amendable Trust In a situation which involves "pouring over" to an inter vivos trust which is revocable and subject to amendment or modification,[39] some difficulties are encountered. As to the validity of the revocable trust the Supreme Court of Massachusetts, in *National Shawmut Bank v. Joy*,[40] overruled an earlier decision[41] and held that a reservation by the settlor of the power to control investments did not impair the validity of the trust and such trust was not a testamentary disposition despite its failure to comply with the statute of wills. The weight of modern decisions supports this view.[42]

In cases where the revocable trust has never in fact been amended or revoked the courts have generally validated the pour over from the will to the trust under both incorporation by reference[43] and independent legal significance.[44] Where

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37. **E.g.,** Booth v. Baptist Church, 126 N.Y. 215, 28 N.E. 238 (1891).
38. See SCOTT, **op. ct. supra** note 26, at 370.
39. A typical example is where the testator has transferred property to a trustee in trust for another but the testator has, by express terms in the trust instrument, reserved the power to revoke or amend the trust and if he does revoke, the corpus of the trust is returned to him. Variations may arise depending upon who has the revoking power. See CASNER, ESTATE PLANNING 94 (3d ed. 1961).
40. 315 Mass. 457, 53 N.E.2d 113 (1944).
41. McEvoy v. Boston Five Cent Savings Bank, 201 Mass. 50, 87 N.E. 465 (1909) held that an inter vivos trust is invalid because it is in substance testamentary. See also Warsco v. Oshkosh Savings and Trust Co., 183 Wis. 156, 196 N.W. 829 (1924).
42. Randall v. Bank of America Nat'l Trust and Savings Ass'n, 48 Cal. App. 2d 249, 119 P.2d 754 (1941); Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 Atl. 139 (1929); National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Rose v. Rose, 300 Mich. 73, 1 N.W.2d 458 (1942); Talbot v. Talbot, 32 R.I. 72, 78 Atl. 535 (1911); RESTATEMENT (SECOND), TRUSTS § 57 (1959).
43. Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d (1950). **But see** Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513 (1st Cir. 1921), **cert. denied** 257 U.S. 661 (1922).
44. Swetland v. Swetland, 102 N.J. Eq. 294, 140 Atl. 279 (1928). The court, although doubtful as to whether the doctrine of incorporation by reference was applicable in New Jersey, held the trust valid because the trust instrument, being non-testamentary, might be referred to in order to ascertain and give effect to the terms of the trust, thus recognizing

the revocable trust has been amended prior to the execution of the will it seems apparent that again both doctrines could be applied to sustain the pour over if it can be shown that the testator's intention is that the property be disposed of in accordance with the trust terms as they existed at the time the will was executed.[45]

C. The Revocable, Amendable Trust, Amended Subsequent to Will The greatest difficulties in this area arise in pouring over from a will to a revocable, amendable, inter vivos trust and subsequently attempting to amend the trust. In such a situation it is obvious that the provision cannot be upheld under the incorporation by reference doctrine because the amended trust was not in existence at the time the will was executed.[46] Equally obvious is the validity of the amendment if made by codicil which meets the formalities required by the statute of wills. Here application of incorporation by reference or independent legal significance is not necessary to establish the validity of the amendment.[47]

The decisions indicate that the courts have generally refused to uphold a pour over into a trust as amended subsequent to the execution of the will.[48] In the case of *Old Colony Trust Company v. Cleveland*,[49] where subsequent to the execution of the will the trust was modified without the formalities required for testamentary disposition, the court held that the bequest should be subject to the terms of the trust as they were at the time the will was executed. A liberalizing trend began with the case of *Matter of Ivie*,[50] where the New York Court upheld a bequest to an existing trust which had undergone minor administrative changes subsequent to the execution of the will. Exemplifying this trend is *Second Bank-State Street Trust Company v. Pinion*,[51] where the testator created an inter vivos trust, reserving a power to amend or

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the independent legal significance of the trust. See also **In re** Willey's Estate, 128 Cal. 1, 60 Pac. 471 (1900); **In re** York's Estate, 95 N.H. 435, 65 A.2d 282 (1949); **In re** Snyder's Will, 125 N.Y.S.2d 459 (Surr. Ct. 1953).

45. RESTATEMENT (SECOND) TRUSTS § 54(i) (1959).

46. **Ibid.**

47. SCOTT, TRUSTS § 54.3, at 373 (2d ed. 1956); Stouse v. First National Bank, 312 Ky. 405, 245 S.W.2d 914 (1952).

48. Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934).

49. 291 Mass. 380, 196 N.E. 920 (1935).

50. 4 N.Y.2d 725, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958).

51. 341 Mass. 366, 170 N.E.2d 350 (1960); **accord.** Canal Nat'l Bank v. Chapman, 157 Me. 309, 171 Atl. 2d 919 (1961).

revoke. Thereafter he executed his will which left the residue of his estate to the trustee to be used according to the terms of the trust. Later the testator executed an unattested instrument which altered the beneficial interest in the trust property. Upon request by the executor for instructions as to whether or not the residue passed to the trustees to hold under the trust as amended, the Massachusetts Supreme Court held, without the aid of statute, that the bequest passed to the trustee to be held under the terms of the amended trust. In reaching this decision the Court said:

> ". . . we agree with modern legal thought that a subsequent amendment is effective because of the applicability of the established equitable doctrine that subsequent acts of independent significance do not require attestation under the statute of wills."[52]

Thus the *Pinion* case has the distinction of being the first to hold, without the aid of statute, that bequests can pass according to the dispositive terms of an unattested amendment made after the execution of the will.

Looking back, we see that the pour over has encountered great difficulties in the courts and its chances for survival have often looked quite dim. The accomplishment, however, in the *Pinion* case, absent any aid from statute, would seem to indicate that it has at least endured the struggle if not won the battle. This decision and the recent enactment, since 1953, of statutes in several states which authorize it in some form[53] indicate the growing acceptance and approval of the pour over.

An examination of the case law reveals a "confused and confusing area of the law"[54] especially in situations where the trust has been amended subsequent to the execution of the will. Of the statutes enacted to remove these uncertainties only the most liberal ones have accomplished that effect. It is submitted that the only statutes which are of any real

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52. Second Bank-State Street Trust Co. v. Pinion, **supra** note 51, 170 N.E.2d at 352 (1960).
53. See BOGERT, TRUST & TRUSTEES § 106 (Supp. 1962) for breakdown of recently enacted statutes permitting gift by will to a trustee of a trust previously established.
54. McClanahan, **Bequests to an Existing Trust,** 47 Calif. L. Rev. 267, 291 (1959).

value to the estate planner are those declaring that a pour over may be sustained under either of the alternate grounds of incorporation by reference or independent significance thus alleviating the uncertainty as to the validity of amendments whether made prior to, or subsequent to the execution of the will. It would seem that the North Dakota statute has accomplished these effects. The statute in pertinent part reads:

> A devise or bequest . . . may be made by a will to the trustee . . . of a trust established . . . by the testator . . . 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 testator's will . . . regardless of the existence, size or character of the corpus of the trust. The devise or bequest shall not be 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 . . . the property so devised or bequeathed . . . shall become a part of the trust . . . and . . . be . . . disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust.[55]

Although there are no North Dakota cases in point the enactment of the statute is probably evidence that the problem has arisen on a non-judicial basis.

V. CONCLUSION

North Dakota's adoption of the Uniform Testamentary Additions to Trust Act is a commendable addition to our probate laws, overcoming many doubts concerning the pour over. It is not suggested that this statute is an answer to all the problems in this area. Necessarily some questions will be left for the courts when the various factual situations come before them. The court's construction of the statute remains to be seen.

The significance of this statute to the North Dakota estate planner is two fold: it opens wide the availability to them

55. N.D. Cent. Code § 56-07-01 (Supp. 1961); § 56-07-04 provides: "This act shall have no effect upon any devise or bequest made by a will executed prior to the effective date of this Act."

of a very valuable estate planning device, the use of which will withstand the test of litigation, and lastly, but perhaps most important, it lessens any need for resort to court action.

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