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Trusted—“Pour-Over” From a Will to an Inter Vivos Trust Under Statute

Decedent, W, simultaneously executed an inter vivos trust and a “pour-over” will. W placed approximately four-fifths of her property in the trust; the remaining one-fifth was to pass under the will. W died three months later. The will provided that W’s husband, H, should receive a $5,000 legacy and some of W’s personal effects. The residue, $75,000, was devised to the trustee of the inter vivos trust and was to be added to and commingled with the other trust property. The executor-trustee sought to have the will admitted to probate. H argued that the will should not be admitted to probate without admitting the trust instrument because the trust agreement was incorporated in the will by reference and that he was deprived of his statutory marital rights. H’s real objective was the $280,000 in the inter vivos trust. The probate court admitted the will but did not require the admission of the trust instrument. Held, affirmed. The will did not incorporate the trust agreement by reference. The Probate Act allows testamentary additions to trusts and does not require that the trust agreement be admitted to probate with a “pour-over” will. In re Estate of Meskimen, 228 N.E. 2d 255 (Ill. App. 1967).

There have been few decisions on the validity of “pour-over” provisions of wills into inter vivos trusts in jurisdictions which have provided express statutory authorization for testamentary additions to trusts. In states like West Virginia which have enacted such legislation, the practicing lawyer who desires to take advantage of the utility of the “pour-over” device for his client faces a dilemma. Should he use the “pour-over” and take a slight chance that the court might not uphold all of the provisions of the “pour-over” will and receptacle trust under the uninterpreted statute? Or, should he forego the “pour-over” until the state of the law on statutory testamentary additions to trusts becomes relatively settled? The difficulty with the former alternative is that the courts really have no single theory to enable them to interpret consistently the “pour-over” statutes. This lack of underlying theory would pose no problem if current problems could be solved on the basis of the statutory language alone. But the language of the “pour-over” statutes is

3 Id. at 46.
generally much too vague to enable the courts to rely solely on it for guidance.4 Therefore, there is a need for a basic theory upon which to support and interpret the statute.

The "pour-over" device, when properly used, can be a very effective tool of the estate planner. Some of the reasons advanced for the use of "pour-over" wills are: (1) obtaining trustee management in later life and unity of management at death; (2) creating a receptacle trust on the death of the first spouse into which the surviving spouse can pourover and obtain unity of management; (3) creating a receptacle for life insurance proceeds where trustee management can afford greater flexibility in dispositive arrangements than the rigid dispositive schemes of settlement options; (4) eliminating probate costs on the portion of the estate placed in the inter vivos trust; (5) obtaining secrecy of distribution; (6) avoiding court costs in states in which the court retains jurisdiction over a testamentary trust; (7) avoiding some death and income taxes when the trust is irrevocable; and (8) allowing a choice of jurisdiction in which to administer the trust.5 In many jurisdictions a latent and more questionable objective for using the "pour-over" device, and a by-product of its use regardless of the primary purpose, is to restrict severely the surviving spouse's inheritance by preventing him (her) from electing against the portion of the estate placed in the inter vivos trust.6 In the principal case the surviving spouse was prevented from reaching four-fifths of the deceased spouse's estate.

Before testamentary additions to trusts statutes were adopted, courts were confronted with two problems in recognizing the validity of the "pour-over" will. Rarely was the trust instrument, or amendments to it after the execution of the will, executed in accordance with the Statute of Wills.7 To overcome this obstacle courts used two doctrines—incorporation by reference and facts of independent significance—to uphold "pour-overs" to trusts and amended trusts not meeting the requirements of the Statute of Wills.8 The

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8 Id.
doctrine of "incorporation by reference" recognizes that a valid will may incorporate into it an extrinsic document not executed in accordance with the Statute of Wills, if the document is in existence when the will is executed and referred to in the will as an existing document.9 The doctrine of "facts of independent significance" states that in certain cases one may look to facts contained in a non-testamentary instrument to add significance to the will. The classic examples are bequeaths of "the contents of my safety deposit box" and "to each of my employees at my death". In both instances the subject or recipient of the disposition is determined from facts having significance apart from the will. Therefore, the test is whether the facts have significance apart from the disposition of the bequeathed property.10 Under the doctrine of "incorporation by reference" the trust instrument must exist at the time the will is executed, but under the doctrine of "facts of independent significance," only the fact that a trust exists at the time of the testator's death need be proved.11 If the intent of the testator is to keep the probate court from having jurisdiction of the trust in order to maintain secrecy of distribution, the doctrine of "facts of independent significance" must be the theory under which the "pour-over" is validated. This is because the doctrine of "incorporation by reference" incorporates the trust instrument into the will thereby making the trust agreement come within the province of the probate court as a testamentary disposition of property.12

Today forty-four jurisdictions have adopted testamentary additions to trust acts, or what are often called "pour-over" statutes.13 The purpose of the statutes was to authorize expressly the "pour-over" device which had become a favored estate-planning tool. The statutes were needed because the courts were having difficulty validating "pour-overs" under common law rules. Of these forty-four, twenty states, among them West Virginia, have adopted the Uniform Testamentary Additions to Trusts Act or some from of it.14

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9 See Annot., 21 A.L.R.2d 220, 221 (1952); 57 Am. Jur. Wills § 233 (1948); 1 Scott § 54.1 (1956).
10 See Swetland v. Swetland, 102 N.J. Eq. 214, 140 A. 279 (1928); 1 Scott § 54.2 (1956); Scott, Trusts and the Statute of Wills, 43 Harvard L. Rev. 521, 547 (1930).
14 Id.
Research has disclosed in addition to the MesKimen case only four decisions\(^\text{15}\) pertaining to statutory "pour-overs." An analysis of these cases does not reveal any one consistent theory under which conclusions as to the validity of what can be termed statutory "pour-overs" has been decided.

The earliest reported case involving a "pour-over" statute is In re Guggenheimer's Estate.\(^\text{16}\) The settlor devised the property to the trustee. The income was to be distributed to two beneficiaries for life and a small life annuity to a third beneficiary. Then the income was to be for the use of poor people. The settlor directed that if certain of his relatives were poor they were to be given preference in the distribution of the income from the trust to poor people. The beneficiary of the life annuity predeceased the settlor. The will created a testamentary trust and poured over the residue of the settlor's estate to the trust. The trustee sought construction of the will under a New York statute which allowed "pour-overs" to trusts promoting the well-being of mankind.\(^\text{17}\) The court held that the "pour-over" to the existing testamentary trust was valid.\(^\text{18}\) The court validated the "pour-over" because it was executed in accordance with the provisions of the statute.\(^\text{19}\) No statement was made as to any general theory under which the "pour-over" was upheld.

The first case which really construed the effect of a "pour-over" statute was Bircher v. Wasson.\(^\text{20}\) The inter vivos trust provided the income was to be distributed for the use of the settlor's grandchildren, and upon the death of any of them his share to the use of the surviving grandchildren. The principal was to be distributed to the surviving grandchildren twenty-one years after the settlor's death. The testator's will, executed the same day as the trust, funneled all of the testator's real property into the inter vivos trust. Bircher, one of the settlor-testator's children brought a petition for construction of the will contending that for the "pour-over" to be valid the trust agreement must be incorporated by reference into the will. The lower court held that the trust agreement was incorporated into the will and the "pour-over" was valid. In affirming on appeal, the

\(^{15}\) In one of the four, Bank of Del. v. Bank of Del., 39 Del. Ch. 187, 161 A.2d 430 (1960), the court made its decision without having to consider the effect of the "pour-over" statute.

\(^{16}\) 168 Misc. 1, 5 N.Y.S.2d 137 (1938).

\(^{17}\) N.Y. PERSONAL PROPERTY LAW § 12 (Cahill 1937).

\(^{18}\) In re Guggenheimer's Estate, 168 Misc. 1, 5 N.Y.S.2d 137, 144 (1938).

\(^{19}\) Id.

\(^{20}\) 133 Ind. App. 27, 180 N.E.2d 118 (1962).
Indiana court held that the "pour-over" was incorporated into the will by reference and valid under the existing "pour-over" statute.\(^{21}\) By contrast, the appellate court in the principal case found the trust was not incorporated into the will by reference. The Indiana court further decided that the trust was not testamentary in character.\(^{22}\) The Indiana statute is narrow in scope.\(^{23}\) Therefore, in most instances it can be interpreted on the statutory language alone. This removes the necessity for an underlying theory as a guide to construction. However, the broad, all-inclusive language of the Uniform Testamentary Additions to Trusts Act requires a theory for consistent interpretation. The Indiana court did not hint as to any such theory in Bircher.

In Knowles v. Knowles\(^ {24}\) the settlor simultaneously executed an inter vivos trust and a will pouring over to it. The purported corpus of the trust consisted of life insurance policies of which the beneficiary was the settlor's wife. The settlor did not change the beneficiary of the policies to the trustee, his brother. The policies were never delivered to the trustee. The settlor's wife brought an action to construe the will and determine the validity of the trust. The court first held the inter vivos trust void for lack of a res.\(^ {25}\) Yet, the court said by dictum that the statute in Ohio validates "pour-overs" to inter vivos trusts and established the doctrine of "facts of independent significance" as the underlying theory of the statute.\(^ {26}\) However, a mandatory requirement of the Ohio statute is that there must be a res into which the residue of a will can pour over.\(^ {27}\)

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\(^{21}\) *Burns' Anno. Stats.* § 6-601 (1953 Repl.).

\(^{22}\) Bircher v. Wasson, 133 Ind. App. 27, 43, 130 N.E.2d 118, 125 (1962).

\(^{23}\) *Burns' Anno. Stats.* § 6-601 (j) (1953 Repl.).


\(^{26}\) *Id.*

\(^{27}\) *Ohio Revised Code Anno.* § 2107.63 (Page 1954).

A testator may by will, devise, bequeath, or appoint real or personal property, or any interest in such property, to a trustee of a trust which is evidenced by a written instrument executed by the testator . . . 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 a part of the trust estate, shall be subject to the jurisdiction of the court having
Although the "pour-over" device failed because the inter vivos trust failed, the court found an intent to create a testamentary trust. Even though the inter vivos trust was void, the trust instrument was held to be incorporated into the will by reference and was said to be the basis for a testamentary trust. The court then decided that the settlor's wife held the proceeds in constructive trust and must pay the proceeds of the policies to the trustee. Then the trustee was to distribute the income from the trust funds in accordance with the terms of the void inter vivos trust.

Neither the Indiana nor Ohio statutes allowed "pour-overs" to trusts "regardless of the existence of the corpus of the trust" as the West Virginia statute does. Although the West Virginia statute provides that the trust instrument must be executed before or concurrently with the will whether the West Virginia court will validate a "pour-over" to a naked trust instrument without an existing trust corpus remains to be seen. The West Virginia court can decline to validate such a trust by saying that the Uniform Act was designed to validate "pour-overs", not to change existing trust law. Or the court can take the suggestion of one writer that the Uniform Act is a statutory adoption of a liberal incorporation by reference doctrine and uphold a "pour-over" to a trust without a res.

The West Virginia statute provides that the court shall construe the act in accordance with its construction in other jurisdictions to preserve uniformity in decisions under the act. In view of the lack of concrete judicial interpretation of the act one might consider the possibility of an adverse decision by the West Virginia court before using the "pour-over" device in West Virginia. Perhaps a safer 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.


W. Va. Code ch. 41, art. 3, § 8 (Michie 1966); For other problems with statutory "pour-overs" see note 4, supra.

Id.


It makes no difference that the trust has not come into legal existence by delivery of the corpus to the trustee, so long as the instrument creating the trust was already in existence or came into existence concurrently with the execution of the will.

W. VA. CODE ch. 41, art. 3, § 10 (Michie 1966).
alternative is to set up the inter vivos trust in a jurisdiction such as Massachusetts where the validity of "pour-overs" has been well-established by case law.\textsuperscript{33}

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