Santa Clara University
School of Law

Santa Clara Law Review

Volume 6 | Number 1 Article 31

1-1-1965

California Adopts the Uniform Testamentary Additions to Trusts Act

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CALIFORNIA ADOPTS THE UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT

The California Legislature in its 1965 session adopted, without revision, the Uniform Testamentary Additions to Trusts Act.[1] The Act deals with pour-over provisions in wills and "the problem sought to be remedied arises from the doubt that exists as to whether the pour-over provisions are valid in view of the general requirements that a will be wholly in writing and signed in the presence of witnesses; in most cases, the existing trust is not so witnessed."[2]

The term pour-over is used to describe testamentary transfers to the trustee of a living trust, to be added to and administered as part of the trust along with its existing assets.[3] This comment discusses situations in which the testator in his will merely refers to the terms of the trust as they appear in another instrument rather than repeats the terms of the trust again in his will. A testator will take this approach for two reasons:

1. The drafting of the will is made much more convenient especially when the trust terms are long and involved.[4]

2. If the testator were to set out the terms of the inter-vivos trust again in the will, he would be creating a testamentary trust as to the portion of the estate passing under the will.[5] This result would be contrary to his desire to have the assets actually pour over into

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1 1965 Regular Session ch. 1640; CAL. PROB. CODE §§ 170-73.

2 Commissioners' Prefatory Note, 9C U.L.A. 142 (Supp. 1965), The Uniform Testamentary Additions to Trusts Act was approved by the Conference of Commissioners on Uniform State Laws and the American Bar Association in 1960. To date, nineteen states (excluding California) have adopted the Act. Arizona, Ariz. Rev. Stat. ch. 62, §§ 14-141-143 (1960); Arkansas, Ark. Stat. §§ 60-601-604 (1963); Connecticut, Conn. Gen. Stat. Ann. § 45-173a (1961); Idaho, Ida. Code ch. 182, §§ 68-1101-1104 (1963); Massachusetts, Mass. Gen. Laws Ann. ch. 203, § 3B (1963); Maine, Me. Rev. Stat. Ann. ch. 39, tit. 18, § 7 (1963); Michigan, Mich. Comp. Laws, §§ 555.461-464 (1962); Minnesota, Minn. Stat. Ann. ch. 13, § 525.223 (1963); New Hampshire, N.H. Rev. Stat. Ann. ch. 56, 563-A:1-A:4 (Supp.) (1961); New Jersey, N.J. Stat. Ann. ch. 241, 3A:3-16.1-16.5 (1962); New Mexico, N.M. Laws, ch. 26 (1965); North Dakota, N.D. Civ. Code 56-07-01-04 (1965); Oklahoma, 84 Okla. Stat. Ann. §§ 301-304 (1961); South Dakota, S.D. Session Laws, ch. 440 (1963); Tennessee, Tenn. Code Ann. ch. 303, § 32-307 (1961); Vermont, Vt. Stat. ch. 14, § 2329 (1961); West Virginia, W. Va. Code, ch. 159, 41-3-8-43-3-11 (1961).

3 Commissioners' Prefatory Note, 9C U.L.A. 142 (Supp. 1965).

4 See generally CASNER, ESTATE PLANNING 752 (3d ed. 1961); 1 BOWE, ESTATE PLANNING AND TAXATION 136 (1957); CASEY, ESTATE PLANNING DESK BOOK 645 (1961).

5 See 48 Cal. Jur. 2d *Trusts* § 83 (1959).

the receptacle inter-vivos trust. Furthermore, under section 1120 of the California Probate Code, testamentary trusts remain under probate jurisdiction after distribution.[6] In that event the testator's estate would be split between two trusts each under different court jurisdiction.[7] However, if the testator merely refers to the previously created trust, this portion of the estate will be added to and administered as part of the corpus of the previously created trust; a result which has been upheld in California on a theory of facts of independent significance.[8]

Other advantages of the pour-over include:

1. A unity of trust administration of assets from different sources is possible.

2. Since the extrinsic trust document need not be presented for probate as part of the will, the terms of distribution are not made public.

3. Because all of the assets poured over will be administered under the living trust, many of the costs and inconveniences involved in the retained probate administration over testamentary trusts are not involved.[9]

4. The testator has an opportunity to observe the management of a segment of the estate and is still able to make changes before his death makes the arrangement irrevocable. To obtain this advantage in estate planning requires that the inter-vivos trust be amendable and revocable by the trustor, testator.[10]

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[6] Section 1120 states: "When a trust created by a will continues after distribution, the Superior Court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust . . . ." The section also requires periodic accountings and reports by the trustee. This may involve added trust administration costs which is one of the reasons the retained jurisdiction is considered undesirable. California Probate Code Section 1132 provides a narrowly limited provision for relinquishing California probate court jurisdiction in favor of a trustee in another state, but it is applicable only to trusts created by the wills of nonresident decedents, and limited also to trusts not exceeding $7,500 in value. This then can provide an inconvenient tie with California courts if the trustee or beneficiaries reside outside of the State. For a good account of the history of the court's retained jurisdiction see Parkman v. Superior Court, 77 Cal. App. 321, 246 Pac. 334 (1926); see also Estate of Hubbell, 121 Cal. App. 38, 8 P.2d 530 (1932) (construing Prob. Code § 1120).

[7] See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING § 435 (1965).

[8] Wells Fargo Bank v. Superior Court, 32 Cal. 2d 1, 193 P.2d 721 (1948).

[9] See note 6 *supra*.

[10] See McClanahan, *Bequests to an Existing Trust—Problems and Suggested Remedies*, 47 CALIF. L. REV. 267 (1959).

Prior to the Uniform Testamentary Additions to Trusts Act, two evidentiary theories were relied upon to ascertain the terms and objects of pour-over provisions in wills—incorporation by reference[11] and facts of independent significance.[12] Although the above two doctrines have been accepted in California, the case law in the area is sparse and unsettled. The pour-over situation in California, as mentioned earlier, has also been complicated by the court jurisdiction question.

The first California case involving a pour-over provision was *In re Willey's Estate*.[13] The terms of an inter-vivos trust were incorporated by reference into the will. Three days before making a will, Willey had executed and delivered to two others a deed of trust containing provisions setting forth how the trust assets were to be administered. He had reserved the power to amend or revoke the trust but had not done so prior to his death. His will left all of his property, real and personal, to the trustees to be administered in compliance with the trust terms. The main issue presented to the court involved the validity of the trust deed. The court sustained its validity and accordingly its incorporation into the will. The court pointed out that there were two requirements to incorporate by reference the trust terms. The trust instrument must be referred to with certainty and the reference must be to a trust instrument in existence at the time the will was executed. Both of these requirements were met so the trust terms were incorporated into the will, the effect of which the court said was ". . . to make it ipso facto a portion of the will itself."[14] The court did not mention the jurisdiction question so it remained unsettled until *Wells Fargo Bank v. Superior Court*.[15] There, the testator had created an inter-vivos trust and then by will attempted to add to this trust. The trust was amendable but had not been modified subsequent to the execution of the will. The Supreme Court found that the assets did become part of the inter-vivos trust and therefore the Probate Court had no jurisdiction over them after distribution. The doctrine of incorporation by reference was rejected as a means of allowing the trust terms to be used to complete the disposition of the will because use

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11 *In re* Willey's Estate, 128 Cal. 1, 60 Pac. 471 (1900).

12 Wells Fargo Bank v. Superior Court, 32 Cal. 2d 1, 193 P.2d 721 (1948). See generally ATKINSON, WILLS § 80 (2d ed. 1953); 1 BOGERT, TRUSTS AND TRUSTEES § 106 (2d ed. 1951); 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956); RESTATEMENT (SECOND), TRUSTS § 54 (1959); Hawley, *The "Statutory Blessing" and Pour-Over Problems*, 102 TRUSTS & ESTATES 896 (1963); 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).

13 128 Cal. 1, 60 Pac. 471 (1900).

14 *Id.* at 8, 60 Pac. at 472.

15 32 Cal. 2d 1, 193 P.2d 721 (1948).

of this doctrine would frustrate the testator's intent. Incorporation by reference would create a testamentary trust when clearly, in this case, the testator desired to have the assets added to and become part of the corpus of the inter-vivos trust. The pour-over provision was given effect on the theory of facts of independent significance. The inter-vivos trust is a fact of independent significance. The court, quoting Justice Cardozo, said: "The legacy when given was not the declaration of a trust, but the enlargement of the subject matter of a trust declared already."[16] It would seem, although the court does not say so, that the only way a true pour-over provision could be given effect in California after the *Wells Fargo* case was by the use of the doctrine of facts of independent significance.

Wells Fargo, which was the last California case involving a pour-over provision, left many questions unanswered. Would the court allow testamentary additions to trusts amended after the execution of the will?[17] Would the court regard such an amendment as an attempted testamentary disposition which is not witnessed and therefore find it invalid?[18] If so, does the whole gift fail or is the property allowed to pour over to the trust as it existed at the time the will was executed?[19] How substantial must the corpus of the receptacle trust be in order to be considered as a fact of sufficient significance independent of the testamentary addition? Could an unfunded life insurance trust support a pour-over using the theory of facts of independent significance?[20] Must the pour-over be only to trusts created by the testator?

The Uniform Testamentary Additions to Trusts Act provides answers to some of these questions. Under this Act, gifts are now valid to trusts created by the testator and those created by others. The trust terms can appear in instruments not executed with the formalities required for wills or the terms can appear in the will of another. The type of trust available to the testator as a receptacle expressly includes a ". . . funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of

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[16] *Id.* at 11, 193 P.2d at 727.

[17] See generally Canal Nat'l Bank v. Chapman, 157 Me. 309, 171 A.2d 919 (1961); Second Bank-State St. Trust Co. v. Pinion, 141 Mass. 366, 170 N.E.2d 350 (1960). Both cases allowed pour-over provisions to add property to the trusts as amended and both did so without statutory aid.

[18] See generally ATKINSON, WILLS § 80 (2d ed. 1953).

[19] See generally Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934) (property allowed to pour over into trust as it existed at the time the will was executed); Atwood v. Rhode Island Hosp. Trust Co., 275 Fed. 513 (1st Cir. 1921) (gift failed altogether).

[20] See generally State *ex rel.* Citizens Nat'l Bank v. Superior Court, 236 Ind. 135, 138 N.E.2d 900 (1956).

the insurance contracts . . . ."[21] The testamentary addition is also valid ". . . regardless of the existence, size, or character of the corpus of the trust . . . ."[22] This eliminates the problems that were inherent in the use of the facts of independent significance doctrine.

Requirements imposed on the testator by this Act are few. The trust to receive the assets must be adequately identified in the will. The terms of the trust must be set forth in another instrument. If the extrinsic instrument is not the will of another, it must have been executed prior to or concurrently with the execution of the testator's will. The Act does not require that the trust actually be in existence when the will is executed but only that the trust *instrument* be in existence. Therefore, the pour-over provision is valid although the transfer of the *res* of the trust may occur after the execution of the will. When the terms of the receptacle trust are set forth in the will of another, the valid addition is limited to those situations where the second testator predeceases the testator whose will contains the pour-over provision. This limitation eliminates the possibility of a pour-over to an ambulatory will.

The effect of the pour-over under the Act is important. The addition is not invalid because the recipient trust is amendable or revocable and is in fact amended after the execution of the will. In this respect, the Act extends the possible uses of the pour-over device beyond the limitations of the existing case law. The property to pour over is not held under a testamentary trust of the testator but becomes part of the trust to which it was given, unless the will provides otherwise. Consequently, the testator has an opportunity to provide for a different disposition if he desires but only if such intention is made clear in his will. If the testator has not provided otherwise, the property poured over is to be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments made before or after the execution of the testator's will. Therefore the trust provisions as they exist at the testator's *death* govern the assets poured over. The Act also allows a testator, if he so states in his will, to direct that the portion of his estate poured over shall be administered in accordance with the trust instrument as it is amended after his death. The Act as it reads presumes that the testator is content with the trust the way it was at his death and if amendments made to the trust after his death are to have any effect on the assets poured over, the will must provide for such a situation.[23]

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[21] CAL. PROB. CODE § 170.
[22] *Ibid.*
[23] See Osgood, *Pour Over Will*, 104 TRUSTS & ESTATES 768 (1965).

Because of this presumption, it is extremely important that the testator clearly indicate his intent when he desires to pour over to a trust where the power of amendment is held by another. If the trust is revoked prior to the testator's death, the gift lapses.

It should be noted that nowhere in the Act is reference made to either the incorporation by reference or facts of independent significance theories. No doubt it was believed that such theories were entirely inadequate to validate pour-overs as evidenced by the unsettled area prior to the enactment. But some writers have criticized new legislation such as the Uniform Act, saying that it does not provide adequate legal theory which will rationalize the result. It is argued that only an underlying theory can provide the basis for achieving consistency in dealing with pour-overs created before the statute was enacted.[24] One possible way to rationalize the result attained by the Uniform Act has been suggested. Rather than viewing an amendment to the trust as an unattested amendment to the will and therefore in conflict with the Wills Statutes, the will should be viewed as an amendment to the trust. It is urged that the evils sought to be prevented by the Wills Statutes are less likely to exist in the pour-over situation or at least are no more subject to fraud than the holographic will, nuncupative will, Totten trust, or gift *causa mortis*. Most trustees are professionals and inter-vivos trust agreements are carefully drawn. Both factors reduce the possibilities of fraud.[25]

There is one basic question that must be resolved by the courts in California. Does the Uniform Act validate pour-overs under certain conditions and invalidate by implication all others? One state that adopted the Uniform Act provided for such a situation.[26] California's solution to this problem is yet to be decided.

The Uniform Testamentary Additions to Trust Act has resolved a great many doubts and uncertainties relating to the use of the pour-over trust in California. The Act is going to have a profound effect on the estate planner who now more than ever before has a useful, practical, modern estate planning device which can be used with relative certainty and safety.

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[24] See Hawley, *The "Statutory Blessing" and Pour Over Problems*, 102 TRUSTS & ESTATES 896 (1963); Osgood, *Pour Over Will*, 104 TRUSTS & ESTATES 768 (1965).

[25] *Ibid.*

[26] New Jersey answered this question by adding a section to its version of the Act which reads: "This Act shall not be construed as providing an exclusive method for making devises or bequests to trustees of trusts created otherwise than by the will of the testator making such devise or bequest." N.J. Stats. Ann. § 3A: 3-16.4 (1962).