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Pour-over Trust in Missouri, The

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THE POUR-OVER TRUST IN MISSOURI

I. INTRODUCTION

A pour-over provision in a will is an attempted testamentary transfer to a trust created by some other act or instrument.[1] Typically, a decedent uses the provision to "pour over" assets of his estate into the corpus of an existing trust created during his lifetime. For example, a pour-over provision might read, "I leave the residue of my property to the Trustee named in the inter vivos trust instrument I have previously executed, to be held on the terms of such trust."[2] The testator usually desires that all his property—that in the inter vivos trust as well as that being added to it—be administered and distributed as part of one trust. Absent statutory provisions, however, the authorities are split over whether the poured-over assets constitute a separate testamentary trust or whether they augment the corpus of the existing inter vivos trust.[3]

Pour-over trusts can be used to (1) obtain the benefit of trustee management while retaining to the settlor the power to amend the trust;[4]

1. BLACK'S LAW DICTIONARY 1052 (5th ed. 1979); Polasky, *"Pour-over Wills": Use with Inter Vivos Trusts*, 17 SW. L.J. 410, 410-11 (1963).

2. *See, e.g.*, St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 774 (Mo. 1962); Annot., 12 A.L.R.3d 56, 60 n.2 (1967).

3. *See* Fratcher, *Trusts and Succession in Missouri*, 27 MO. L. REV. 594, 596 (1962); Part V *infra*.

4. For a discussion of the advantages of a revocable trust estate plan, see Keydel, *Advantages of the Revocable Trust Estate Plan*, 54 MICH. B.J. 22 (1975). The

(2) avoid a public record of the exact distribution of the property, which probate would entail; (3) minimize the cost of administration;[5] (4) obtain the same professional management for the poured-over property as for the property already in the living trust; (5) create flexibility for the proceeds of insurance policies; (6) minimize taxes;[6] (7) simplify administration of the estate; and (8) avoid the extra administration costs of a separate testamentary trust.[7] The most significant of these purposes are the privacy of an unpublished record of distribution and the avoidance of probate delay and expense.[8]

Courts have relied on various theories to uphold transfers from a will to an inter vivos trust. One, the doctrine of integration, is little used in the context of pour-overs because it requires that the settlor execute the trust

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article discusses how to set up an estate plan using the pour-over trust, but it assumes passage of the Uniform Testamentary Additions to Trusts Act and does not discuss common law problems with the pour-over trust.

5. This seems to be the rationale accepted in St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770 (Mo. 1962). The settlor in *Blue* revoked an insurance trust and poured the assets into a family trust he had created. The trustee of the defunct insurance trust was to receive no compensation and the assets that would have been administered under it were exported to the family trust. *Id.* at 774. If the insurance trust had not been revoked, the funds would have been administered under two separate but identical trusts. The net result would have been increased costs of administration. Courts sometimes reach this result, despite the testator's intent. *See, e.g.*, President of Manhattan Co. v. Janowitz, 260 A.D. 174, 179, 21 N.Y.S.2d 232, 237 (1940).

6. For the estate to save taxes, the settlor generally must create an irrevocable inter vivos trust over which he has no control to avoid the problems of a "grantor trust." *See* 26 U.S.C. §§ 671-677 (1976). The pour-over itself saves no taxes, but it streamlines the testator's estate so that he can use the already existing trust to remove some assets from his estate. Assets that are already held in a non-grantor trust are not included in the estate tax estate. The pour-over uses the lifetime trust to administer assets from the estate. *See generally* Adams, *Irrevocable Life Insurance Trusts*, 120 TR. & EST. 6 (1981); Friedman, *Estate Planning Strategies Through Life Insurance Trusts Under the 1981 Tax Act*, 60 TAXES 349 (1982); Keydel, *supra* note 4; Lowe, *Combining Life Insurance Proceeds with Other Estate Assets*, 47 MO. L. REV. 661 (1982); Moore, *New Horizons in the Grant and Exercise of Discretionary Powers*, 15 INST. ON EST. PLAN. ¶ 600 (1981).

7. The continuing jurisdiction of the courts over a testamentary trust often causes a problem. Where testamentary trusts are subject to periodic accountings in those courts, extra fees and other expenses will be incurred in the administration. *See* McClanahan, *Bequests to an Existing Trust—Problems and Suggested Remedies*, 47 CALIF. L. REV. 267, 269 (1959). In Missouri, the court has jurisdiction over a court-appointed successor trustee. MO. REV. STAT. § 456.210 (1978). The statutes, however, give an independent personal representative liberal powers that he may exercise if he acts reasonably for the benefit of all interested parties. *Id.* § 473.810 (Supp. 1982).

8. *See generally* Fratcher, *supra* note 3.

instrument—and all amendments, if they are to be effective—with all the formalities of a will.[9] The separate documents are gathered together and treated as the testator's will; the trust that results is thus created by the will. Since one purpose of a pour-over is to avoid testamentary trusts, this theory may fail to carry out the testator's intent. Most courts will therefore evaluate pour-overs under the doctrines of incorporation by reference or independent significance.[10]

The doctrine of incorporation by reference allows a document not executed with testamentary formality to be treated as part of a will if (1) the will manifests an intention to incorporate the document; (2) the will contains a sufficient description of the document to permit its identification with reasonable certainty; (3) the will refers to the document as already in existence; (4) the document actually was in existence at the time the will was executed; and (5) the document can be proved to be the one identified in the will.[11] Under this doctrine, the terms of the trust are imported into the will and the usual result is the creation of a separate testamentary trust.[12]

The doctrine of independent significance permits recognition of the inter vivos trust as a fact or event having significance apart from the testamentary bequest.[13] Under this theory, the testator may make an extraneous act, whether by himself or another, or some event unaffected by human action determinative of who will receive the bequest.[14] If the act or

9. *See* 79 AM. JUR. 2D *Wills* § 194 (1975). A will may be comprised of two or more separate documents which are taken together. *See* Bradshaw v. Pennington, 225 Ark. 410, 414, 283 S.W.2d 351, 354 (1955); *In re* Tollefson's Estate, 198 Wis. 538, 540, 224 N.W. 739, 740 (1929).

10. *See* Scott, *Pouring Over*, 97 TR. & EST. 189, 189 (1958); Note, *Pour-Over Trusts: Consequences of Applying the Doctrines of Incorporation by Reference and Fact of Independent Significance*, 34 N.Y.U. L. REV. 1106, 1116 (1959).

11. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 80 (2d ed. 1953); Fratcher, *supra* note 3, at 595. *See* 79 AM. JUR. 2D *Wills* § 209 (1975). Missouri courts recognize the doctrine. *See, e.g.*, Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382, 390 (Mo. 1958); Ray v. Walker, 293 Mo. 447, 477, 240 S.W. 187, 196 (1922). Some cases have held that incorporation creates a separate testamentary trust. *See* Montgomery v. Blankenship, 217 Ark. 357, 365, 230 S.W.2d 51, 56 (1950); Forsythe v. Spielberger, 86 So. 2d 427, 431 (Fla. 1956); Stouse v. First Nat'l Bank, 245 S.W.2d 914, 920 (Ky. Ct. App. 1951); *In re* Weber's Estate, 22 Misc. 2d 290, 291, 195 N.Y.S.2d 337, 338 (Sur. Ct. 1959); Fifth Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 79, 70 N.E.2d 920, 922 (1946). Other cases have found that a pour-over provision upheld by the doctrine of incorporation or independent significance simply augments the corpus of the inter vivos trust. *See* Canal Nat'l Bank v. Chapman, 157 Me. 309, 316, 171 A.2d 919, 922 (1961); *In re* York's Estate, 95 N.H. 435, 436, 65 A.2d 282, 283 (1949).

12. *See, e.g.*, St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962).

13. *See* T. ATKINSON, *supra* note 11, § 81.

14. *Id.* The will may designate the beneficiary or the property given by refer-

event is dependent upon human volition, its purpose, at least in substantial part, must be something other than carrying out the terms of the particular will.[15] This doctrine exports the property from the will to the inter vivos trust, leaving a single trust to dispose of all of the property.[16]

Which theory is used becomes especially important if the settlor amends an inter vivos trust. For example, if the doctrine of incorporation by reference is applied, the trust becomes incorporated into and thus a part of the settlor's will. If the trust is amended subsequent to execution of the will, the testamentary disposition may be declared void because it does not comply with the formalities required by the statute of wills. However, under the doctrine of independent significance, this problem does not arise.

II. THE CURRENT STATE OF MISSOURI LAW

Every state except Missouri has enacted a statute to deal with the problems of validating pour-over trusts.[17] For the present, any question dealing with pour-over trusts in Missouri must be referred to case law dealing with the doctrines of incorporation by reference or independent significance. But Missouri case law is sparse, so courts must look to old decisions from other states—cases that arose before those states passed their statutes—for help in interpreting the common law.[18] Missouri courts appear willing to uphold the pour-over on the ground of independent significance where the testator desired one trust, but a Missouri court might also use incorporation by reference if the decedent intended to create two separate trusts. Other courts, however, have held certain pour-overs invalid based on these two doctrines. The lack of a statute in Missouri has thus perpetuated uncertain treatment of pour-overs.

The leading Missouri case on the subject is *St. Louis Union Trust Co. v. Blue*.[19] In 1932, Oreon Scott created an amendable and revocable insurance trust for the benefit of his children. In 1950, he executed an irrevocable family trust, reserving the right to enlarge the trust estate. In his will, executed in 1954, he bequeathed to the trustees of the 1950 family trust sufficient property to increase the fair market value of the family trust property to $800,000. That bequest was viewed by the Missouri Supreme Court

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ence to an act of the testator, beneficiary, or a third person, provided that the act has ordinary independent significance.

15. *See, e.g.*, Clark v. Citizens Nat'l Bank, 38 N.J. Super. 69, 80, 118 A.2d 108, 114 (1955) (trust held invalid because agreement had no significance apart from testamentary disposition).

16. St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962).

17. These statutes are cited in notes 165-66 *infra*.

18. Since most of the relevant statutes were enacted in the 1960's, there are few recent cases relying on the common law. *See generally* UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT (1960), 8 U.L.A. 629 (1972).

19. 353 S.W.2d 770 (Mo. 1962). For a discussion of the *Blue* case, see Fratcher, *supra* note 3.

as an addition to the family trust, not a separate trust.[20] Scott also amended the 1932 insurance trust several months after the will was executed. The amendment provided that the insurance proceeds be paid to the trustees of the 1950 trust, at which time the trustee of the 1932 trust would be discharged.[21] The issue in the case was whether the pour-over from the insurance trust should be counted toward the $800,000 testamentary pour-over.

The *Blue* court, in construing the amended insurance trust with the will and the 1950 trust, sought to effect Scott's intent. Examining the entire estate plan, the court concluded that he intended to terminate the insurance trust upon collection of the proceeds and to eliminate duplication of administration expenses.[22] He did not intend that the amendment create a new trust, but rather wished to add to the corpus of an existing trust.[23]

Under the doctrine of incorporation by reference, the provisions of the family trust would have been imported into the separate insurance trust.[24] But the *Blue* court held that the amendment exported the insurance trust to the independently significant family trust.[25] The court recognized in dicta that a settlor who executes an inter vivos trust and leaves additional property by his will to be held upon that trust creates only one trust augmented by the testamentary transfer.[26]

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20. 353 S.W.2d at 776.

21. *Id.* at 774.

22. *Id.* at 778.

23. *Id.* at 778-79. The court paraphrased the decision in a New York case, *In re* Rausch's Will, 258 N.Y. 327, 331, 179 N.E. 755, 756 (1932): "The legacy when given was not the declaration of a trust, but the enlargement of the subject-matter of a trust declared already."

24. 353 S.W.2d at 778. This would have been contrary to Scott's apparent intent. The terms of the family trust were not blended, or assimilated, into the insurance trust. No amendment to the insurance trust expressly incorporated the family trust into the insurance trust. Scott apparently intended to create a single trust, not a separate trust of the insurance proceeds apart from the family trust.

25. *Id. See also* T. ATKINSON, *supra* note 11, § 81; Fratcher, *supra* note 3, at 596.

26. 353 S.W.2d at 778. *See* Swetland v. Swetland, 102 N.J. Eq. 294, 299, 140 A. 279, 280 (1928); 1 A. SCOTT, THE LAW OF TRUSTS § 54.3, at 407 (3d ed. 1967). In *In re* Rausch's Will, 258 N.Y. 327, 179 N.E. 755 (1932), the testator intended only one trust, and the court sustained that intent by using the doctrine of incorporation by reference, which in other circumstances is not recognized in New York. *Id.* at 331, 179 N.E. at 756. In Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382 (Mo. 1958), the court held that where the insured changed the beneficiary of his life insurance policy to the trustee of his estate, a separate inter vivos trust was created, apart from the estate. *Id.* at 390. The will set out the terms of the trust, and the inter vivos trust incorporated by reference the terms of the trust created by the will. Thus, the testator created two separate trusts, one inter vivos and the other testamentary. *Id. Accord* Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 1038, 111 S.W.2d 12, 17 (1937). For a discussion of the problem of judicial supervision of pour-over trusts, see Annot., 12 A.L.R.3d 56, 102-03 (1967). Whether the court will

The *Blue* court dealt only with the issue of a pour-over from one inter vivos trust to another. The parties did not contest the pour-over from the will, so the court did not rule on that issue.[27] Several Missouri cases, however, indicate that a court should use the doctrine of incorporation by reference rather than independent significance to construe the terms of a pour-over from a will.[28]

A testator who provides for a pour-over into an existing trust usually intends a single trust.[29] But if the doctrine of incorporation by reference is used, a separate trust may be created.[30] That trust would fail to effect the testator's intent to create a pour-over, because nothing would be poured over into the existing trust. Worse yet, the pour-over might fail altogether for noncompliance with the statute of wills if the trust was amendable and was, in fact, amended after execution of the will.[31] Alternatively, the pour-over into an amended inter vivos trust might be valid, but only on the terms

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find one or more trusts depends on the testator's expressions of intent found in the trust instrument. Where the trust states that it can be increased by provisions of the settlor's will, the court will usually find that the testator intended to create a single trust. The California Supreme Court has held that jurisdiction of the probate courts of that state is limited to testamentary trusts, and therefore the inter vivos trust with the pour-over is not subject to probate. Wells Fargo Bank & Union Trust Co. v. Superior Court, 32 Cal. 2d 1, 5, 193 P.2d 721, 723 (1948).

27. 353 S.W.2d at 776.

28. *See* Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382, 390 (Mo. 1958); Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 1038, 111 S.W.2d 12, 17 (1937). In *Rollier*, the testator named as beneficiaries of his insurance policy the trustees designated by his will. He accomplished this by executing a change of beneficiary form in 1930. The testator did not at that time designate the beneficiary of the trust or declare the terms under which the trustee was to hold the property. He executed a will in 1934 naming the bank as trustee of the testamentary trust set out in the will. The court stated that the original statement of trust in 1930 was effective to create a possible trust at that time, provided the testator later executed instruments to show the existence of the trust. 341 Mo. at 1037, 111 S.W.2d at 16. The court held that the will created a testamentary trust apart from the existing inter vivos trust. The court thus prevented the insurance proceeds from going into the estate and becoming subject to a $6,000 bequest to a third person. By incorporating the terms of the testamentary trust into the insurance trust, the court recognized the existence of two trusts, each to be administered separately. *Id.* at 1038, 111 S.W.2d at 17. *See also* 1 A. SCOTT, *supra* note 26, § 54.3, at 390-91.

29. A single trust is presumed unless the testator clearly intended two separate trusts. *See, e.g.*, St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 777 (Mo. 1962).

30. *See id.* at 777; Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382, 390 (Mo. 1958); Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 1038, 111 S.W.2d 12, 17 (1937); 1 A. SCOTT, *supra* note 26, § 54.3, at 406.

31. The Missouri statute of wills is found in MO. REV. STAT. § 474.320 (1978): "Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

of the trust before it was amended.[32] Thus, results contrary to the testator's intent may be reached if incorporation by reference is used. Given the few Missouri decisions on pour-overs, numerous questions remain regarding how Missouri courts would construe pour-over provisions in different situations. The following discussion will analyze existing case law from each type of inter vivos trust according to the two major doctrines employed by the courts.[33]

III. NON-AMENDABLE INTER VIVOS TRUSTS

If the settlor has reserved no power to revoke or amend an inter vivos trust created prior to the execution of the will, the testamentary trust can be upheld under either incorporation by reference or independent significance.[34] The New York Court of Appeals, in *In re Rausch's Will*,[35] recognized incorporation by reference and upheld a testamentary disposition to a trust company under the terms of a previous trust agreement though the trust terms were not set forth in the will.[36] The testator was allowed to import the terms of the trust agreement into his will because he was not merely incorporating "his unexecuted plans."[37] Judge Cardozo wrote that it was proper to look beyond the will itself to determine the testamentary disposition,[38] but did not specify whether the holding relied on incorporation by reference or independent significance.[39] He did state that the will

32. *See* Stouse v. First Nat'l Bank of Chicago, 245 S.W.2d 914, 920 (Ky. Ct. App. 1951) (amendments executed in accordance with requirements for wills were valid parts of will); Fratcher, *supra* note 3, at 596.

33. The analysis of the differing factual situations that may arise is based on that suggested by 1 A. SCOTT, *supra* note 26, § 53.4, at 389; McClanahan, *supra* note 7, at 281-301; Annot., 12 A.L.R.3d 56, 56-57 (1967).

34. 1 A. SCOTT, *supra* note 26, § 54.3, at 391-92.

35. 258 N.Y. 327, 179 N.E. 755 (1932).

36. *Id.* at 331, 179 N.E. at 756.

37. *Id.* New York courts have held that a testator could not import into his will an unattested memorandum of his plans for distributing the estate. *See* Booth v. Baptist Church of Christ, 126 N.Y. 215, 247, 28 N.E. 238, 243 (1891). *But see* Brown v. Clark, 77 N.Y. 369, 377 (1879) (incorporation of written testamentary document allowed); Wood v. Vandenburgh, 6 Paige Ch. 277, 282 (N.Y. Ch. 1837) (one son of testator charged with payment to other children as evidenced by written agreement between testator and son). The court in *Rausch's Will* avoided the rule against incorporating an unattested document into the will by holding that the testator did not create a trust in his will but simply bequeathed property to the trustee, a legal entity readily identifiable, under terms of the valid inter vivos trust. 258 N.Y. at 331, 179 N.E. at 756. Subsequent New York cases have followed this rationale and allowed pour-overs into inter vivos trusts. These decisions have continued to refer to the doctrine of incorporation by reference. *See, e.g., In re* Ivie's Will, 4 N.Y.2d 178, 182, 149 N.E.2d 725, 727, 173 N.Y.S.2d 293, 295 (1958).

38. 258 N.Y. at 332, 179 N.E. at 757.

39. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 393. A subsequent New York case

must refer to an identifiable document, in existence at the time the will was made, and that the identification must be "precise and definite."[40]

It is not always clear whether the pour-over will add to the trust already in existence or will create a separate trust with terms identical to those of the existing trust. Missouri cases suggest that disposition of the pour-over funds will depend on both the intent of the testator and the particular theory used. In Missouri, the court apparently first determines the intent of the testator and then chooses the theory that will carry out that intent.[41] Some jurisdictions do not base the determination of single or separate trusts on the doctrine used. Instead, those courts may choose one doctrine and then manipulate it to reach the desired result. The New York court in *Rausch's Will*, for example, held that the pour-over enlarged the existing unamendable inter vivos trust while using language that could support the incorporation by reference doctrine.[42] In *Linney v. Cleveland Trust Co.*,[43] the Ohio Court of Appeals upheld a bequest of the residue of the testator's estate to a trust company as trustee of an existing trust for charitable purposes.[44] The court supported its decision on four grounds: the will

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denied incorporation of extraneous documents by reference into wills. *In re* Salmon's Estate, 46 Misc. 2d 541, 542, 260 N.Y.S.2d 66, 67 (Sur. Ct.), *modified*, 24 A.D.2d 962, 265 N.Y.S.2d 373 (1965). The court recognized, however, that New York permits incorporation by reference of trust instruments that are "clearly identified and of a variety which excludes the possibility of fraud and mistake such as a formal trust indenture clearly identifiable." 46 Misc. 2d at 542, 260 N.Y.S.2d at 67. New York has since adopted the Uniform Testamentary Additions to Trusts Act, which is discussed in Part VI *infra*. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-3.7 (McKinney 1981).

40. 258 N.Y. at 332, 179 N.E. at 756.

41. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962) (clear direction to discharge trustee of insurance trust indicated settlor's desire to have all proceeds held in remaining family trust); Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382, 387 (Mo. 1958) (where insured asked bank to serve as trustee "for his children," intent was that separate trust be created of insurance proceeds apart from testamentary trust); Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 1038, 111 S.W.2d 12, 17 (1937) (where testator made insurance proceeds payable to "trustee under the last will and testament of the insured," not estate, intent was that separate trust be created for insurance proceeds apart from any testamentary trust). The Missouri Supreme Court relied on the doctrine of incorporation by reference in *Rollier* and *Gatewood*, and on the doctrine of independent significance in *Blue*.

42. "[T]he rule [in New York] against incorporation, well established though it is, will not be carried to a dryly logical extreme." 258 N.Y. at 331, 179 N.E. at 756. The court also noted that it was proper in New York to "go beyond the will itself" when necessary "to understand the extent of the legacy." *Id.* at 332, 179 N.E. at 757.

43. 30 Ohio App. 345, 165 N.E. 101 (1928), *noted in* 13 MINN. L. REV. 749 (1929); 38 YALE L.J. 1144 (1929).

44. 30 Ohio App. at 367, 165 N.E. at 107. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 394.

incorporated the trust by reference, the trust had independent significance, the trustee had agreed to hold property on the intended trust, and the will showed that the trust was created for charitable purposes.[45] Notably, the testator did not create the trust himself; the will referred to a resolution creating the trust adopted by the board of directors of the trust company.[46] The property was held to augment the existing trust, despite the language suggesting incorporation by reference.[47]

Even where the inter vivos trust is not amendable or revocable, the testamentary disposition may fail if the inter vivos trust was not executed with the formalities required for a will. A disposition was ruled invalid in *Hatheway v. Smith*,[48] where the Connecticut court held the doctrine of incorporation by reference inapplicable.[49] A New Jersey court has held that no trust was created even when a trust agreement was executed on the same date as the will.[50] The court reasoned that since a trust was not created until some property was delivered to the trustee, a pour-over trust could not be upheld on the doctrine of independent significance where nothing was

45. 30 Ohio App. at 366, 165 N.E. at 107.

46. *Id.* The pour-over property joined the rest of the trust company's funds for the charity.

47. The court did not expressly hold that the trust instrument created by the company was incorporated by reference into the testator's will but reasoned that if it did not allow the residue to go to the charity on the terms of the trust the trustee would either use it for its own purposes or defeat the testator's express intent by giving it to the next of kin. *Id.*

48. 79 Conn. 506, 65 A. 1058 (1907).

49. *Id.* at 522, 65 A. at 1064. A trust deed was executed and delivered prior to the execution of the testatrix's will, but the deed was not recorded until two years after the execution. The Connecticut Supreme Court of Errors distinguished the public policy behind the English Statute of Wills, which allowed incorporation by reference, from the Connecticut Wills Act, which did not. The power to control the disposition of one's property after death is a common law right in England. Therefore, the Connecticut court reasoned, the English statute neither granted nor restrained that power, serving merely as a new statute of frauds to direct the manner of proving the disposition. *Id.* at 514, 65 A. at 1061. The English decisions do not exclude consideration of terms from unattested agreements as long as they were referred to in a duly attested writing. *See, e.g.*, Allen v. Maddock, 11 Moore P.C. 427, 441, 14 Eng. Rep. 757, 762 (1858) (discussing the problem). Connecticut chose to follow the general American policy that, since the right to dispose of property at death is a privilege granted by the state and exists only to the extent implied by law, the statute must be followed explicitly. 79 Conn. at 522, 65 A. at 1064. Since the testatrix did not place the actual bequest in the will, as required by the statute, the reference to the unattested instrument was wholly ineffective. *Id.*

50. Clark v. Citizens Nat'l Bank, 38 N.J. Super. 69, 80, 118 A.2d 108, 114 (1955). The court suggested that the trust was an empty shell at the time the will was executed, so the trust memorandum had no significance apart from the disposition of property in the will. *Id. See generally In re* Fowles' Will, 222 N.Y. 222, 118 N.E. 611 (1918). *But see* 1 A. SCOTT, *supra* note 26, § 54.2, at 388.

delivered to the trustee until after the execution of the will. Professor Scott has disagreed with that result, arguing that the disposition in the will should have been upheld because the trust existed at the time the testator died and it had independent significance prior to his death.[51]

The *Blue* case in Missouri indicated in dicta that a testamentary pour-over to an unamendable inter vivos trust is effective to augment the original trust rather than create a separate trust.[52] Other Missouri cases agree.[53] While the intent of the testator-settlor is given primary importance, and Missouri courts appear willing to uphold such dispositions if possible, unintended dispositions may still result. If the pour-over is not clearly defined, a court may misread the settlor's intention and create two trusts where one was intended, or vice versa.[54] Careful drafting should overcome this problem where the pour-over is to an unamendable trust.[55] Additional problems arise, however, with amendable and revocable trusts.

IV. AMENDABLE INTER VIVOS TRUSTS

Jurisdictions differ on the effect of a pour-over where the testator has created an amendable or revocable inter vivos trust before the execution of the will. In some cases, the testamentary bequest has been held completely invalid. In others, the bequest has been found valid if the trust was not, in fact, amended. Still others view the pour-over as valid whether or not the trust was amended, but the terms of the trust may be those as amended or, for the assets added by the will, those as they existed before the execution of

51. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 395.

52. St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962) (where testator has created inter vivos trust and leaves additional property by will to be held upon that trust, entire arrangement "should be treated simply as an inter vivos trust, the property of which has been augmented by the will").

53. In both Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382 (Mo. 1958), and Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 111 S.W.2d 12 (1937), the testator created a testamentary trust. He later changed the beneficiary of his life insurance policies to the trustee named in his will. Here, the pour-overs were not from the will to the trust, but from the policies to the estate. The *Rollier* court noted that, had the testator so intended, he could have had the insurance proceeds held in the same trust as the testamentary bequest. 341 Mo. at 1038, 111 S.W.2d at 17. The testator, however, incorporated the terms of the testamentary trust into the separate trust of the insurance proceeds. The insurance trust in *Rollier* was created upon the change of beneficiaries, contingent on the testator's wife surviving him and the designation of a trustee in the will. *Id.*

54. For example, if the testator in *Rollier* had stated that the beneficiary of the insurance policy would be the estate, a single trust probably would have resulted despite any intent of the testator to create two separate trusts. 341 Mo. at 1038, 111 S.W.2d at 17.

55. If the testator makes his intent plain in the will, it is likely that the court will give weight to his expressed wishes. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962) (settlor-testator's intent paramount).

the will. Major obstacles to the validity of the bequest exist, including compliance with the statute of wills[56] and the requirement that testamentary dispositions comply with the formalities required for the execution of wills.[57]

A. *Unamended*

Courts generally have upheld the pour-over where the power to revoke or amend the trust has not been exercised.[58] The reservation of a right to modify does not mean the instrument was nonexistent at the time the will was made, so the original trust instrument can be incorporated by reference into the will.[59] Similarly, the trust would have significance apart from the testamentary design of the settlor provided the original trust contained some property or funds. The trustee could take the pour-over residue from the will, as was done in *Blue*, without the necessity of incorporating the terms into the will.[60]

New York courts have held that an amendable but unamended trust can be incorporated by a pour-over provision as long as the requirements of incorporation by reference have been met by the original trust instrument.[61] Indeed, the pour-over should be upheld under incorporation by reference where the will manifests an intent to incorporate the document, the trust instrument can be identified from the description in the will, the instrument existed before the will was executed, and the instrument can be shown to be the one referred to in the will.[62] Ohio has reached a similar result. In *Bolles v. Toledo Trust Co.*,[63] the testator bequeathed the residue of

56. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 396.

57. *See* Stouse v. First Nat'l Bank of Chicago, 245 S.W.2d 914, 920 (Ky. Ct. App. 1951).

58. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 402; Annot., 12 A.L.R.3d 56, 71 (1967).

59. *In re* Protheroe's Estate, 77 S.D. 72, 77, 85 N.W.2d 505, 508 (1957). The actual exercise of the right, after the will has been executed, is controlling. *See In re* Edwards' Will Trusts, [1948] 1 All E.R. 821, 825, *modifying* [1947] 2 All E.R. 521 (Ch.) (original trust incorporated despite testator's intent to incorporate possible future amendments or instruments).

60. St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 777 (Mo. 1962).

61. *See In re* Snyder's Will, 125 N.Y.S.2d 459, 463 (Sur. Ct. 1953), *appeal dismissed*, 284 A.D. 856, 134 N.Y.S.2d 174 (1954). By a 1947 codicil to his will, the testator left the residue of his estate to the trustee of his 1938 inter vivos trust. The inter vivos trust was not modified or amended by the testator subsequent to the execution of the will. Further, the testator specifically stated in the codicil that he did not intend to incorporate into his will any future amendments to the trust. 125 N.Y.S.2d at 460. The court held that the disposition to the inter vivos trust was effective. *Id.* at 463. The case is criticized in 28 ST. JOHN'S L. REV. 318 (1954).

62. *See* T. ATKINSON, *supra* note 11, § 80.

63. 144 Ohio St. 195, 58 N.E.2d 381 (1944). The case was overruled on other grounds in Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961).

his estate to a trust company to be held under the terms of an amendable trust created contemporaneously with the execution of the will. At the time of the suit, Ohio had a statute that allowed incorporation into a will if the extrinsic document was already in existence.[64] The *Bolles* court held that the mere possibility of an amendment to the trust would not render the trust void.[65] Similarly, a trust has been held to be incorporated into a will where a subsequent amendment simply eliminated the power of amendment and revocation.[66]

Although some states do not accept the doctrine of incorporation by reference,[67] Missouri does, and probably would follow those states that allow the terms of an amendable but unamended trust to be incorporated by reference.[68] Under the general rules of that doctrine, however, a separate testamentary trust probably would be created.[69]

A pour-over from a will to an existing inter vivos trust may also be upheld under the doctrine of integration.[70] Under this theory, the will integrates the inter vivos trust agreement only if the trust document is executed with all the formalities of a will.

Under the doctrine of incorporation by reference, if the trust is executed after the will, the lawyer can execute a codicil to the will after creat-

64. OHIO REV. CODE ANN. § 2107.05 (Page 1976). This is a codification of the general rule allowing incorporation by reference; it permits an existing revocable and amendable inter vivos trust agreement to be incorporated by reference into a will. The common law was superseded by *id.* § 2107.63, based on UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1960), which specifically allows a trust modification made after execution of the will to control disposition of the bequest.

65. 144 Ohio St. at 210, 58 N.E.2d at 389.

66. *In re* Ivie's Will, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958). The court apparently used the doctrine of independent significance, since the "requirement of 'existence' is lacking as the trust was amended after the execution of the will." *Id.* at 182, 149 N.E.2d at 726, 173 N.Y.S.2d at 295. *See* Note, *Wills: Pour Over to Living Trust*, 45 CORNELL L.Q. 135, 141 n.33 (1959). *But see In re* Salmon's Estate, 46 Misc. 2d 541, 542, 260 N.Y.S.2d 66, 67 (Sur. Ct. 1965).

67. *See, e.g., In re* Rausch's Will, 258 N.Y. 327, 331, 179 N.E. 755, 756 (1932). *See also* 1 A. SCOTT, *supra* note 26, § 54.1, at 385; *cf.* Will of Norris, 123 Vt. 116, 120, 183 A.2d 519, 521 (1962) (Vermont law unsettled, so appellant who would take bequest could appeal probate court's rejection of incorporation).

68. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 777 (Mo. 1962) (dictum). In Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382, 390 (Mo. 1958), the settlor was allowed to incorporate by reference the terms of the testamentary trust into the insurance trust.

69. St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962), implies that when incorporation is used, an express trust separate from the inter vivos trust will be found.

70. Annot., 12 A.L.R.3d 56, 61 (1967). The aggregate of several testamentary writings may constitute the decedent's will. Bradshaw v. Pennington, 225 Ark. 410, 414, 283 S.W.2d 351, 354 (1955) (quoting 57 AM. JUR. *Wills* § 228 (1948)). *See* 79 AM. JUR. *Wills* § 194 (1975).

ing the trust, avoiding testamentary requirements for the trust. Lawyers in Missouri apparently have relied on this cumbersome method to effect pour-overs to unamended trusts.[71]

B. *Amended*

1. Amendment After Execution of Will

The problem becomes more complex when the pour-over is to an amendable trust actually amended after the execution of the will. The amendment may result in modification of the testamentary disposition, retention of the testamentary disposition in the will, or failure of the disposition altogether.

In *Atwood v. Rhode Island Hospital Trust Co.*,[72] the testator attempted to distribute the proceeds of his residuary estate to an inter vivos trust created prior to, but amended after, execution of the will. The 1921 decision by the United States Court of Appeals for the First Circuit suggested that the amendment was not executed as required by the Rhode Island statute of wills and thus could not be incorporated by reference into the will.[73] The court referred to the English case of *Johnson v. Ball*,[74] which set out the general rule that "[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."[75] Following this rule, the *Atwood* court held the bequest totally void. The testator could not incorporate the instrument as it existed at the date of his death, and his amendments showed that he did not intend to incorporate the trust as it existed at the date of the will.[76]

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71. *See* Part IV.B.2 *infra*.

72. 275 F. 513 (1st Cir. 1921), *cert. denied*, 257 U.S. 661 (1922).

73. *Id.* at 521.

74. 5 De G. & Sm. 85, 64 Eng. Rep. 1029 (Ch. 1851).

75. *Id.* at 91, 64 Eng. Rep. at 1032.

76. 275 F. at 521. The *Atwood* dissent argued that an extraneous fact referred to in a will, having significance apart from any effect it might have on a testamentary disposition, could be shown by parol evidence without violating the statute of wills. *Id.* at 528 (Bingham, J., dissenting). Professor Scott also disagrees with the majority's handling of the case. 1 A. SCOTT, *supra* note 26, § 54.3, at 400. A result similar to that in *Atwood* was achieved in a subsequent case involving the same will. In Boal v. Metropolitan Museum of Art, 298 F. 894, 901 (2d Cir. 1924), the court specifically disapproved of the testator's attempt to create prospectively a power to change the testamentary disposition of his art collection, otherwise than by an instrument executed by his will or codicil with statutory formalities. The *Atwood* and *Boal* results were later changed in Merrill v. Boal, 47 R.I. 274, 279, 132 A. 721, 724 (1926), in which the state court held that the two trust instruments should be probated as part of the will because subsequent amendments were executed with two witnesses and the formalities required by Rhode Island law. The original *Atwood* decision was overruled in Atwood v. Rhode Island Hospital Trust Co., 34 F.2d 18, 19 (1st Cir. 1929).

In *President of Manhattan Co. v. Janowitz*,[77] the bequest to the trustees was held wholly invalid.[78] The New York court reasoned that the testator did not intend to incorporate the trust instrument as it existed on the date of the will or else he would not have changed it. The earlier decision in *In re Rausch's Will*[79] was distinguished on the ground that it had involved an unamendable trust;[80] the court noted the general New York policy of disallowing incorporation by reference. It recognized that the settlor's intent would require disposition of the property according to the amended trust. The court assumed that the testator would prefer the bequest to fail entirely rather than be upheld on the terms of the original trust.[81] But had the *Janowitz* court, like the *Blue* court, used the doctrine of independent significance, the testator's intent would have been carried out.[82]

In a subsequent case, *In re Ivie's Will*,[83] the New York court used incorporation by reference to hold a similar pour-over provision valid.[84] Relying on *Rausch's Will*, it ruled that the testator intended the trust to be administered under all its amendments. The court viewed the trust as something more than an unattested memorandum of desires, expectations, and unexecuted plans. The terms of the trust were readily ascertainable.[85] Significantly, the amendments to the trust made after the execution of the will were only administrative changes—changing successor trustees and relinquishing power to amend the trust—and as such did not violate the rule against incorporation by reference. The court was willing to uphold the pour-over on the terms of the amended trust because the original trust instrument was in existence when the will was executed, it was properly identified by the will, and there was no practical opportunity for fraud.[86]

Several jurisdictions have held that an amendable trust document may

77. 260 A.D. 174, 21 N.Y.S.2d 232 (1940).

78. *Id.* at 180, 21 N.Y.S.2d at 237.

79. 258 N.Y. 327, 179 N.E. 755 (1932).

80. The Appellate Division, in effect, limited the Court of Appeals' decision in *Rausch's Will* to its own facts. The *Janowitz* court refused to permit disposition made by "the shifting provisions in the trust instrument." 260 A.D. at 179, 21 N.Y.S.2d at 236 (citing Atwood v. Rhode Island Hospital Trust Co., 275 F. 513, 521 (1st Cir. 1921)).

81. 260 A.D. at 179, 21 N.Y.S.2d at 237. A Kentucky court came to a contrary conclusion in Stouse v. First Nat'l Bank of Chicago, 245 S.W.2d 914 (Ky. Ct. App. 1951), noting that it was better to uphold the original trust than to totally defeat the testator's intent. *Id.* at 920.

82. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778-79 (Mo. 1962).

83. 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958).

84. *Id.* at 182, 149 N.E.2d at 727, 173 N.Y.S.2d at 295.

85. The testator added "to the subject-matter of an existing trust by identifying the trust deed and the extent and nature of the increment." *Id.*

86. *Id.* at 181, 149 N.E.2d at 726, 173 N.Y.S.2d at 294-95. Using language similar to that in *Rausch's Will*, the court noted that as long as adequate safeguards are employed, the rule against incorporation by reference need not be carried to "a

be incorporated by reference into a will, but that subsequent amendments to the trust will not be given effect unless executed with testamentary formality.[87] Amendments to the trust that do not meet the testamentary requirements are disregarded, based on the principle that a document not in existence when the will is executed cannot be encompassed by the attestation clause. In *Old Colony Trust Co. v. Cleveland*,[88] the Massachusetts court held that under the doctrine of incorporation by reference the will bequeathed the residue to the trustee upon the original terms of the trust, not the amended terms.[89]

The doctrine of incorporation by reference is ill-suited to carrying out a testator's intent where the testator desires that the pour-over bequest be administered on the terms of an amended trust. Missouri courts, like those in other states that accept incorporation by reference, require that the document to be incorporated actually be in existence at the time the will is executed.[90] Should they use this doctrine, they would probably follow the majority rule that subsequent amendments to the trust will not control. Contrary to the testator's intent, the bequest likely would be held on a separate trust, probably on the terms of the unamended trust.

Under the doctrine of independent significance, however, subsequent amendments to the inter vivos trust are deemed to have significance apart from the testamentary disposition of the pour-over and so do not require attestation.[91] A single trust, administered under the amended terms, always results.[92] Two leading cases that use independent significance to uphold pour-overs into amended inter vivos trusts are *Canal National Bank v. Chapman*[93] and *Second Bank-State Street Trust Co. v. Pinion*.[94] In *Chapman*, the Maine court upheld a will provision that bequeathed property "to be added

drily logical extreme." *Id.* at 182, 149 N.E.2d at 726, 173 N.Y.S.2d at 295 (quoting *In re* Fowles' Will, 222 N.Y. 222, 233, 118 N.E. 611, 613 (1918)).

87. *See, e.g.*, Stouse v. First Nat'l Bank of Chicago, 245 S.W.2d 914, 920 (Ky. Ct. App. 1951); Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 382, 196 N.E. 920, 921 (1935); Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 495, 197 N.E. 419, 420-21 (1934); *see also* Fratcher, *supra* note 3, at 596.

88. 291 Mass. 380, 196 N.E. 920 (1935).

89. *Id.* at 383, 196 N.E. at 921. While the incorporation of an amendable trust provision into a will was valid, subsequent amendments to the instrument executed without testamentary formalities were disregarded. The *Cleveland* holding was criticized in a later decision from the same court, Second Bank-State St. Trust Co. v. Pinion, 341 Mass. 366, 368-69, 170 N.E.2d 350, 352 (1960).

90. *See* T. ATKINSON, *supra* note 11, at 388; Fratcher, *supra* note 3, at 595; *see also* Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382, 390 (Mo. 1958); Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 1038, 111 S.W.2d 12, 17 (1937).

91. *See* National Shawmut Bank v. Joy, 315 Mass. 457, 471, 53 N.E.2d 113, 122 (1944).

92. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 779 (Mo. 1962).

93. 157 Me. 309, 171 A.2d 919 (1961).

94. 341 Mass. 366, 170 N.E.2d 350 (1960).

to and made a part of the Trust Fund," though the trust had been amended without testamentary formalities both prior to and subsequent to the execution of the will.[95] The court rejected incorporation by reference because it would have frustrated the testatrix's intent to add property to the trust as it existed at her death, rather than at the time the will was executed. Instead, the court found the amended trust independently significant, reasoning that the original trust was valid and had contained substantial assets continuously from its inception.[96] Following the court's logic, a trust that lacked significant assets, created solely as a receptacle for a subsequent pour-over, might lack significance apart from the testamentary disposition.[97]

In *Pinion*, the testator amended an inter vivos trust after executing a will containing a pour-over provision.[98] The Massachusetts court held that the bequest to the trustee of the existing trust stood on its own merits, much like a bequest to a corporation. The court also held the pour-over valid under the doctrine of independent significance.[99] The poured-over assets were exported into the amended trust.

The approach used in *Chapman* and *Pinion* is preferable to the application of incorporation by reference to an amended trust where the testator intended a single trust. After *Blue*, Missouri courts may be willing to apply independent significance in that situation.[100] Both *Blue* and *Pinion* accept the doctrine of independent significance. The Massachusetts court in *Pinion*, however, held that the creation and amendment of an amendable, revocable inter vivos trust are inherently facts of independent significance,[101] while Missouri courts would probably require that the inter vivos trust contain significant assets. Massachusetts courts could always rely on independent significance to uphold the validity of such a trust, but Missouri courts must first ascertain which doctrine to apply, based on the testator's intent. If a Missouri court chose to use independent significance, the pour-over would be upheld, as in *Blue*. If it chose incorporation by reference, it would either create a separate testamentary trust or hold the disposition ineffective altogether because of the post-will amendment to the trust.

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95. 157 Me. at 310-12, 171 A.2d at 919-20.

96. *Id.*

97. This "shell" problem has apparently been eliminated by a uniform provision, adopted in nearly all states, which provides that a bequest to a trust is valid "regardless of the existence, size, or character of the corpus of the trust." UNIF. TESTAMENTARY ADDITIONS TO TRUST ACT § 1 (1960). This phrase has been omitted from a proposed version of the Uniform Act introduced into the Missouri legislature. *See* H.R. 1733, 81st Gen. Assem., 2d Reg. Sess. (1982). This bill and the Uniform Act are discussed in Part VI *infra*.

98. 341 Mass. at 370, 170 N.E.2d at 353. The testator wanted to avoid probate jurisdiction over the property by pouring it over into the inter vivos trust.

99. *Id.* at 370-71, 170 N.E.2d at 353.

100. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778-79 (Mo. 1962).

101. 341 Mass. at 370, 170 N.E.2d at 353 (citing National Shawmut Bank v. Joy, 315 Mass. 457, 469-78, 53 N.E.2d 113, 121-26 (1944)).

2. Amendment After Execution of Will but Prior to Codicil

A settlor-testator may amend the inter vivos trust after execution of the will but before execution of a codicil republishing the will. Where the codicil effectively republishes the will, the provisions in the will that refer to the inter vivos trust are re-executed as of the date of the codicil.[102] The pour-over then complies with both the statute of wills and the doctrine of incorporation by reference because the codicil sets the effective date for all testamentary transfers, and therefore the amendment existed prior to the execution of the testamentary disposition.[103] The last act that affects the will must occur after the final act that affects the trust.[104]

First-Central Trust Co. v. Claflin[105] used this reasoning to validate a pour-over under incorporation by reference.[106] The testator, in his will, exercised a power of appointment over part of the corpus of a trust established by his mother; he sought to have that trust property and the rest of his residuary estate administered under the terms of an amended inter vivos trust executed twenty years earlier. The trust was amended after execution of the will but before execution of a codicil. The Ohio court held that the codicil, by republishing the will, was effective to incorporate the inter vivos trust agreement into the will.[107] The pour-over provision did not add the proceeds to the inter vivos trust but rather created a separate testamentary trust composed of those proceeds with terms identical to the inter vivos trust.[108] This result—two separate trusts, each administered under the same terms—can be expected under the doctrine of incorporation by reference.

The *Claflin* analysis was relied on in *In re York's Estate*,[109] where the testator bequeathed his residuary estate to an inter vivos trust on the terms of the original trust instrument and all amendments. Subsequent to the last amendment, the testator executed a codicil that purported to pour assets from the will into the existing trust. The New Hampshire court found that

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102. *See, e.g.*, First-Central Trust Co. v. Claflin, 73 N.E.2d 388, 393 (Ohio C.P. 1947).

103. *But see* Hourigan v. McBee, 130 S.W.2d 661, 664-65 (Mo. App., K.C. 1939). The codicil makes the original will speak from the date the codicil is executed to the extent that the original will is not altered or revoked by the codicil. *See* Continental Ill. Nat'l Bank & Trust Co. v. Art Inst. of Chicago, 341 Ill. App. 624, 634, 94 N.E.2d 602, 608 (1950), *aff'd*, 409 Ill. 481, 100 N.E.2d 625 (1951).

104. *See* Annot., 12 A.L.R.3d 56, 94 (1967).

105. 73 N.E.2d 388 (Ohio C.P. 1947).

106. *Id.* at 393.

107. *Id. See* OHIO REV. CODE ANN. § 2107.05 (Page 1976) ("An existing document, book, record or memorandum may be incorporated in a will by reference, if referred to as being in existence at the time the will is executed.").

108. The conclusion was arguably contrary to the testator's intent, since his directive was that his residuary estate should be administered according to his inter vivos trust. 73 N.E.2d at 393.

109. 95 N.H. 435, 65 A.2d 282 (1949).

the inter vivos trust identified in the will attained its final form before execution of the codicil, so the document could be incorporated by reference notwithstanding the requirements of the statute of wills.[110] The court also expressly adopted the doctrine of independent significance.[111] Since the doctrine of independent significance, unlike incorporation by reference, does not require that the instrument exist before execution of the will, it should not matter whether the amendment to the trust occurred prior to the codicil. The significance of *York's Estate* lies in its holding that the residuary estate could pass not by creation of a separate testamentary trust—as in *Claflin*—but by addition to the previously created trust.[112]

Under present law, Missouri could employ either incorporation by reference or independent significance where a trust is amended *after* execution of the will but *before* execution of a codicil.[113] The doctrine employed in a given case should depend on whether the testator wanted to create a separate trust or wanted to have the pour-over administered as part of the existing trust. Since Missouri has recognized both doctrines, courts in the state would likely uphold the trust on some ground where the amendment to the trust occurs prior to execution of the codicil.

Since the decision of which doctrine to use is based on the testator's intent, the draftsman must make the testator's intent very clear in the terms of the will. To guard against the failure of a court to use the doctrine of independent significance, the testator who leaves property to an existing trust amended after execution of the will should always execute a codicil following the amendment, which will republish the will and permit the court to use incorporation by reference.[114]

C. *Revocable but Unrevoked Trusts*

A bequest to be held on trust under the provisions of an existing revocable trust is proper where the trust has not been revoked by the settlor.[115]

110. *Id.* at 436, 65 A.2d at 283.

111. *Id.* at 437, 65 A.2d at 283-84.

112. *Id.* at 436, 65 A.2d at 283.

113. *See, e.g.*, St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962) (independent significance); Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 1037, 111 S.W.2d 12, 16 (1937) (incorporation by reference).

114. This appears to be the standard practice among Missouri attorneys, and it is recommended by trust companies: "Out of an abundance of caution, the Will should be re-executed or a Codicil should republish the Will after each amendment to the insurance trust agreement." Mercantile Trust Co., St. Louis, Mo., Specimen Form of Living Trust and Agreement Using the Marital Deduction with Pourover Wills, at 31 (1983).

115. *See* Swetland v. Swetland, 102 N.J. Eq. 294, 297, 140 A. 279, 279 (1928). While previous decisions had held such bequests void as indefinite where the court was unable to identify the ultimate beneficiaries of the trust, the *Swetland* court held that identification of the beneficiaries was unnecessary so long as the trust was in existence and the beneficiaries were capable of identification by the trustee. *Id.* at

As in the case where an amendable inter vivos trust is not amended, neither doctrine should bar the pour-over. Courts have used independent significance to find that the testator transferred property to a previously existing legal entity where the residuary estate of the will augmented an unrevoked inter vivos trust.[116] On similar facts, courts have relied on incorporation by reference to create a separate testamentary trust.[117] Missouri courts could reach either result.

D. *Revoked Trusts*

If the inter vivos trust has been revoked, no trust exists into which property may be poured, nor is there a trust in existence at the time of the testator's death which would have any independent significance. Yet if the inter vivos trust was created prior to the will, the bequest could be held valid under the doctrine of incorporation by reference. The Ohio court in *Fifth Third Union Trust Co. v. Wilensky*[118] held that revocation of an inter vivos trust without testamentary formality after execution of a will would revoke the existing inter vivos trust but would not revoke a bequest disposed according to trust terms imported into the will.[119] The will incorporated the trust instrument, although the trust was inactive.[120] Alternatively, a court might hold such a bequest valid on the ground of independent significance, because the trust agreement could be readily ascertained and served a primary function—while it existed—apart from the testamentary disposition.[121] Generally, however, a testator who revokes an inter vivos trust in-

298, 140 A. at 280. *See also* Clark Estate, 8 Pa. D. & C.2d 665, 666-70 (1956); Estate of Steck, 275 Wis. 290, 298-300, 81 N.W.2d 729, 734 (1957).

116. *See* Swetland v. Swetland, 102 N.J. Eq. 294, 299, 140 A. 279, 280 (1928); Estate of Steck, 275 Wis. 290, 298-300, 81 N.W.2d 729, 734 (1957). The *Swetland* court upheld the pour-over on the doctrine of independent significance; it noted that the testator could have reached the same result by giving corpus funds to a bank during his life to be held under a certain trust. The trust could provide that whatever property the testator left to the bank in his will should be added to the trust fund. A bequest by the testator to his bank, without mention of the trust agreement, would be valid. The trust beneficiaries could enforce the terms of the trust to the funds received by the bank under the will. *Swetland*, 102 N.J. Eq. at 297, 140 A. at 279-80.

117. *See* Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382, 387-90 (Mo. 1958); Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 1039, 111 S.W.2d 12, 16-17 (1937).

118. 79 Ohio App. 73, 70 N.E.2d 920 (1946).

119. *Id.* at 79, 70 N.E.2d at 922.

120. *Id.* The trust agreement was executed with full testamentary formalities, but the revocation was not. Thus the living trust, but not the bequest, was revoked. Significantly, perhaps, Ohio had adopted the rule that facts should be construed so as to avoid intestacy. *See* Fitzgerald v. Bell, 39 N.E.2d 186, 188 (Ohio Ct. App. 1941).

121. This would be similar to a bequest to "the person who was my advisor in

tends that nothing pass under the terms of that trust. A court attempting to implement the testator's intent should therefore hold that the property does not pass according to the revoked trust instrument.[122]

The result in Missouri would be identical if either doctrine was used. Under independent significance, the residue from the will would be poured over into the shell of the defunct trust; under incorporation by reference, the terms of the inoperative trust would be imported into the will. In either situation only one trust would result. If the will is held to incorporate the instrument, however, the new trust might be deemed testamentary and subject to the supervision of the probate court.[123]

A similar problem arises when either no inter vivos trust was created until after the will was executed or no inter vivos trust was created at all. If the settlor executes a proper trust instrument but does not actually convey any property to the trustee prior to the settlor's death, some courts might not uphold the disposition under the doctrine of independent significance since no trust ever existed.[124] Such a disposition may be upheld, however,

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law school." The will may set out the bequest before the testator ever enters school or before he leaves. The testator may not die until several years after leaving school. The person who was the advisor would no longer be, yet the bequest could be upheld on the basis of independent significance. *See* 1 A. SCOTT, *supra* note 26, § 54.2, at 388; *see also* Moss v. Axford, 246 Mich. 288, 293, 224 N.W. 425, 427 (1929); Smoot v. McCandless, 461 S.W.2d 776, 783 (Mo. 1970); Annot., 74 A.L.R.3d 1073, 1078 (1976).

122. *Cf.* Bank of Delaware v. Bank of Delaware, 39 Del. Ch. 187, 189, 161 A.2d 430, 431 (1960) (will explicitly stated that bequest should not go to trust unless it was in existence). The problem is solved by UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1960), which provides that a revocation or termination of the trust causes the devise or bequest to lapse.

123. *See* In re Devincenzi's Estate, 65 Nev. 158, 163-65, 190 P.2d 842, 845 (1948); McClanahan, *supra* note 7, at 269. Jurisdiction over testamentary trusts was granted to probate courts under MO. REV. STAT. § 456.225 (1978), but that jurisdiction has been held unconstitutional. First Nat'l Bank v. Mercantile Bank & Trust Co., 376 S.W.2d 164, 170 (Mo. en banc 1964). The result in the case may have been affected by the 1979 amendment to the Missouri Constitution transferring jurisdiction of the probate court to the circuit court. *See* MO. CONST. art. V, § 27 (1979). For a discussion of the *First National Bank* case, see Fratcher, *Trusts and Succession in Missouri*, 30 MO. L. REV. 82, 82-84 (1965).

124. *See* Knowles v. Knowles, 4 Ohio Misc. 153, 159, 212 N.E.2d 88, 93 (Prob. Ct. 1965) (citing 1 A. SCOTT, *supra* note 26, § 54.3, at 405); *In re* Jones, [1942] 1 Ch. 328, 329-35. A contrary result would be reached in states adopting UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1960) (allowing pour-over regardless of existence, size or character of trust corpus). The settlor may pour over to a trust to be created in the future so long as it is created within the period for perpetuities and has independent significance. This situation merely recognizes that events occurring after death can be facts of independent significance. For example, a bequest to "the first person who is baptized in the River Jordan five years after my death" would be appropriate.

under incorporation by reference, since an instrument that can be imported into the will may still be in existence.[125]

Either incorporation by reference or independent significance should effect the pour-over in the following situation: (1) the trust instrument is executed but no property is transferred to the trust, (2) the will is then executed, and (3) property is then delivered to the trustee prior to the settlor's death. Under incorporation by reference, the terms of the instrument, not the inter vivos trust itself, are imported into the will.[126] Since the document was drawn up before the execution of the will, the requirements of incorporation by reference are met. The New Jersey court in *Clark v. Citizens National Bank*,[127] however, held that in such a situation the trust terms could not be incorporated by reference because no trust was in existence before the will was attested.[128] This application of incorporation by reference is incorrect, since only the document, not the trust itself, need be in existence at the time the will is executed.[129] The court also held that independent significance could not effect the pour-over because the instrument had no significance apart from the testamentary disposition.[130] But an inter vivos trust should be deemed independently significant so long as the trust in fact contained property during the life of the testator, whether before or after the execution of the will.[131] Moreover, the testator likely desired to pour assets into the trust under those circumstances.

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125. *See* Clark v. Citizens Nat'l Bank, 38 N.J. Super. 69, 78, 118 A.2d 108, 112-13 (1955).

126. St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962); 1 A. SCOTT, *supra* note 26, § 54.3, at 390.

127. 38 N.J. Super. 69, 118 A.2d 108 (1955).

128. *Id.* at 79, 118 A.2d at 113. A trust does not come into existence until its subject matter is delivered to the trustee. Where the settlor manifests an intent to transfer future property to the trust, no trust arises until the transfer actually is made. *Id.* at 78, 118 A.2d at 113; DeMott v. Nat'l Bank of New Jersey, 118 N.J. Eq. 396, 401-04, 179 A. 470, 472-74 (1935). In *Clark*, the will and trust agreement were created on the same day, but the subject matter of the trust was not delivered until two days later. 38 N.J. Super. at 78-79, 118 A.2d at 113.

129. *See* T. ATKINSON, *supra* note 11, § 80; Fratcher, *supra* note 3, at 595. The court apparently confused the existence of the trust with the existence of the trust agreement.

130. 38 N.J. Super. at 80, 118 A.2d at 114. The designation in the memorandum was an attempt to dispose of the property by a non-testamentary instrument; the memorandum existed for no other purpose.

131. In St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770 (Mo. 1962), the settlor created a second trust nine months after executing his will. Had the pour-over been to that second trust (instead of the first, which was the actual subject of the case), the court's rationale in upholding the pour-over still would have applied. It would have augmented the corpus of an identifiable trust, existing at the time of the testator's death. *See id.* at 778. Therefore, it is arguable that the instrument or trust need not exist prior to the execution of the will, so long as it is in existence at the time of death and has independent significance.

Where an inter vivos trust is held invalid,[132] a testamentary disposition to the trust cannot be upheld on the basis that the trust was independently significant. The trust is deemed void from its creation, so there is nothing into which the bequest can be exported.[133] The document purporting to create the trust, however, can be incorporated by reference into the will if it was in existence when the will was executed. The trust instrument's ineffectiveness to carry out the settlor's intent would not affect the validity of the incorporation.[134] To find a testamentary trust under this set of facts, Missouri courts would have to rely on incorporation by reference. That result should salvage some of the testator's intent, since he would not have created the pour-over had he not desired that the property pass according to the trust terms.[135]

V. AUGMENTED OR SEPARATE TRUSTS

An issue critical to estate planning, already discussed in part, is whether the property passing under the pour-over provision constitutes a separate testamentary trust or enlarges the corpus of the existing inter vivos trust.[136] Analytically, a separate testamentary trust should result if a court relies on the doctrine of incorporation by reference.[137] While several New York cases following *In re Rausch's Will*[138] have allowed property from the will to pass to the existing inter vivos trust without creating a separate trust under incorporation by reference,[139] the majority of jurisdictions rely on

132. As, for example, when it is testamentary in character. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 405. The pour-over, however, should always be upheld where the trust instrument itself complies with the statute of wills. *See id.* §§ 56-56.7, 57.2.

133. *See id.* § 54.3, at 406. Similarly, there would be no independent significance if the trust contained only nominal property. *See In re* Edwards' Will Trusts, [1948] 1 All E.R. 821, 822-25, *modifying* [1947] 2 All E.R. 521 (Ch.).

134. *See* Montgomery v. Blankenship, 217 Ark. 357, 362, 230 S.W.2d 51, 55 (1950).

135. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 777-78 (Mo. 1962).

136. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 406; Annot., 12 A.L.R.3d 56, 101 (1967).

137. *See, e.g.*, Montgomery v. Blankenship, 217 Ark. 357, 361, 230 S.W.2d 51, 54 (1950); Forsythe v. Spielberger, 86 So. 2d 427, 431 (Fla. 1956); Stouse v. First Nat'l Bank of Chicago, 245 S.W.2d 914, 920 (Ky. Ct. App. 1951); *In re* Weber's Estate, 22 Misc. 2d 290, 291, 195 N.Y.S.2d 337, 338 (Sur. Ct. 1959); Fifth Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 78-79, 70 N.E.2d 920, 922 (1946).

138. 258 N.Y. 327, 179 N.E. 755 (1932).

139. The cases, though they do not say so directly, suggest this. *See, e.g., In re* Salmon's Estate, 46 Misc. 2d 541, 542, 260 N.Y.S.2d 66, 67 (Sur. Ct. 1965). The result seems contrary to the rationale for the doctrine of incorporation by reference. The doctrine does not export the trust property from the will to the existing trust, it imports the terms of the trust agreement into the will. The existing trust is not affected. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962); Annot., 12 A.L.R.3d 56, 101 (1967). Nevertheless, several New York cases have

independent significance in holding that the poured-over property becomes a part of the corpus of the inter vivos trust, free from probate supervision.[140] This majority rule is logical. The assets pour over to the trustee of the inter vivos trust in his capacity as trustee,[141] and the bequest exports the proceeds from the will to the original trust.[142]

Although courts are divided over the question whether a separate testamentary trust is created under incorporation by reference, courts consistently hold that the original trust is enlarged if independent significance is used.[143] In *Swetland v. Swetland*,[144] the New Jersey court used independent significance to uphold a pour-over as an addition to an existing trust where the beneficiaries were readily identifiable.[145] Where the trustee is the stated legatee, some courts require that the beneficiaries of the trust be identified in the will itself.[146] Others, like the court in *Swetland*, hold that where the document referred to in the will names the beneficiaries and the bequest is to the trustee to hold for the beneficiaries, the pour-over is valid.[147]

VI. UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT

In response to the inconsistencies of the common law doctrines of incorporation by reference and independent significance, states began enact-

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reached the same result. *See In re* Waterbury's Trust, 35 Misc. 2d 723, 727, 231 N.Y.S.2d 208, 213 (Sup. Ct. 1962); *In re* Hammer's Estate, 33 Misc. 2d 674, 675, 224 N.Y.S.2d 717, 718 (Sur. Ct. 1962); *In re* Furst's Estate, 27 Misc. 2d 589, 590, 213 N.Y.S.2d 266, 267 (Sur. Ct. 1961); *In re* Tiffany's Estate, 157 Misc. 873, 880, 285 N.Y.S. 971, 979-80 (Sur. Ct. 1935). *See also* Bolles v. Toledo Trust Co., 144 Ohio St. 195, 209-10, 58 N.E.2d 381, 389 (1944), *overruled on other grounds*, Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961).

140. *See* Wells Fargo Bank & Union Trust Co. v. Superior Court, 32 Cal. 2d 1, 10, 193 P.2d 721, 726 (1948); Continental Ill. Bank & Trust Co. v. Art Inst. of Chicago, 409 Ill. 481, 491, 100 N.E.2d 625, 630 (1951); State *ex rel.* Citizens Nat'l Bank v. Superior Court, 236 Ind. 135, 145, 138 N.E.2d 900, 905 (1956); Canal Nat'l Bank v. Chapman, 157 Me. 309, 315-16, 171 A.2d 919, 922 (1961); Second Bank-State St. Trust Co. v. Pinion, 341 Mass. 366, 370-71, 170 N.E.2d 350, 353-54 (1960); *In re* York's Estate, 95 N.H. 435, 437, 65 A.2d 282, 284 (1949); Swetland v. Swetland, 102 N.J. Eq. 294, 299, 140 A. 279, 280 (1928); *In re* Playfair, [1951] 2 Ch. 4, 9-10.

141. *See* Swetland v. Swetland, 102 N.J. Eq. 294, 296, 140 A. 279, 279 (1928).

142. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778 (Mo. 1962).

143. *See* cases cited in note 140 *supra*.

144. 102 N.J. Eq. 294, 140 A. 279 (1928).

145. *Id.* at 299, 140 A. at 280. The trustee-legatee is as distinct and definite an entity as an individual or corporate legatee, and the trust is capable of identification. *Id.* at 297, 140 A. at 279. The trust agreement was not testamentary in character and hence did not have to be executed in the same form as a will. *Id.* at 299, 140 A. at 280.

146. *See id.* at 298, 140 A. at 280.

147. *Id.* at 299, 140 A. at 280.

ing statutes codifying the law of pour-overs.[148] New laws validated the pour-over trust, even where the inter vivos trusts had been amended subsequent to execution of the will.[149] By enacting special rules for pour-over trusts, each state dealt with its own peculiar problems. These different rules caused problems for testators who owned property in several states. In response to the need for simplified estate planning, the Uniform Testamentary Additions to Trusts Act[150] was promulgated in 1960 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The Uniform Act permits the pour-over of property through a will into an existing trust, even if amended.[151] While Professor Scott states that it is not based on either incorporation by reference or independent significance,[152] an Ohio case says that the Uniform Act sets out, in statutory form, the doctrine of independent significance.[153] The statute's underlying common law rationale matters little, however, so long as its results are desirable.

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148. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 409 (collecting statutes).

149. *See* Second Bank-State St. Trust Co. v. Pinion, 341 Mass. 366, 371, 170 N.E.2d 350, 353 (1960).

150. 8 U.L.A. 630 (1972). The Uniform Act also appears as UNIF. PROBATE CODE § 2-511 (1975).

151. UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1960) provides:

> A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee or trustees of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) 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 execution of the testator's will or in the valid last will of a person who has predeceased the testator (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 both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become part of the trust to which it is given and (b) shall 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 thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will) and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

152. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 410.

153. Knowles v. Knowles, 4 Ohio Misc. 153, 160, 212 N.E.2d 88, 92 (Prob. Ct. 1965).

The Uniform Act specifies that for property to pass from the will to trustees of an inter vivos trust, that trust must be set forth in a written instrument executed before or concurrently with the execution of the will.[154] The trust also may be set out in the last will of a person who has predeceased the testator. The trust may be a funded or unfunded life insurance trust. The pour-over is valid "regardless of the existence, size, or character of the corpus of the trust."[155] The poured-over property is to be held in one trust, the inter vivos trust, unless the testator expressly provides that the property is to be held under a separate testamentary trust. The pour-over or bequest is not rendered invalid by the fact that the trust may be amended or was, in fact, amended after the execution of the will. Those amendments will control administration of the poured-over property.[156] If the trust is terminated prior to the pour-over, the bequest lapses.[157]

State legislatures and commentators have responded to the Uniform Act with enthusiasm.[158] Forty-five American jurisdictions have adopted it.[159] Of the six states that have not, five have enacted their own statutes

154. UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1960).

155. *Id.* This provision solves the problem of trusts which contain only nominal property or which have never actually existed. *See* 1 A. SCOTT, *supra* note 26, § 54.3, at 410-11.

156. This provision, in effect, codifies the result in St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 777-79 (Mo. 1962), by allowing the testator's intent to govern the question whether the pour-over creates a separate trust.

157. The Uniform Act thus rejects the line of cases that, relying on incorporation by reference, allow a bequest to be administered under the terms of an inter vivos trust terminated without testamentary formalities prior to the testator's death. *See* Fifth Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 79, 70 N.E.2d 920, 922 (1946); Part IV.D *supra*. This probably reflects the testator's intent.

158. *See* Hawley, *The "Statutory Blessing" and Pour-Over Problems*, 43 TR. BULL. 42, 46-47 (1963); McClanahan, *The Pour-over Device Comes of Age*, 39 S. CAL. L. REV. 163, 171 (1966); Osgood, *Pour-over Will, Appraisal of Uniform Testamentary Additions to Trusts Act*, 104 TR. & EST. 768, 770 (1965).

159. ALA. CODE § 43-1-4 (1975); ALASKA STAT. § 13.11.200 (1972); ARIZ. REV. STAT. ANN. § 14-2511 (1975); ARK. STAT. ANN. §§ 60-601 to -604 (1971); CAL. PROB. CODE §§ 170-173 (West Supp. 1982); COLO. REV. STAT. § 15-11-511 (1973); CONN. GEN. STAT. ANN. § 45-173a (1981); D.C. CODE ANN. § 18-306 (1981); FLA. STAT. ANN. § 732.513 (West 1976); GA. CODE ANN. §§ 108-1001 to -1005 (1979); HAWAII REV. STAT. § 560:2-511 (1976); IDAHO CODE § 15-2-511 (1979); ILL. ANN. STAT. ch. 110½, § 4-4 (Smith-Hurd 1978); IND. CODE ANN. § 29-1-5-9 (Burns Supp. 1982); IOWA CODE ANN. §§ 633.275-.277 (West 1964); KAN. STAT. ANN. §§ 59-3101 to -3105 (1976); KY. REV. STAT. ANN. § 394.075 (Bobbs-Merrill 1972); ME. REV. STAT. ANN. tit. 18-A, § 2-511 (1981); MD. EST. & TRUSTS CODE ANN. §§ 4-411, -412 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 203, § 3B (West Supp. 1982); MICH COMP. LAWS ANN. §§ 555.461-.464 (West 1967); MINN. STAT. ANN. § 525.223 (West 1975); MISS. CODE ANN. § 91-5-11 (1972); MONT. CODE ANN. § 72-2-314 (1981); NEB. REV. STAT. § 30-2336 (1979); NEV. REV. STAT. §§ 163.220-.250 (1979); N.H. REV. STAT. ANN. §§ 563-A:1 to -A:4 (1974); N.J. STAT. ANN. §§ 38:4-1

dealing with pour-overs.[160] Missouri is the only state that lacks statutory law governing the validity of pour-over trusts.

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to :4-6 (West 1982); N.M. STAT. ANN. §§ 46-5-1 to -5-3 (1978); N.Y. EST. POWERS & TRUSTS LAW § 3-3.7 (McKinney 1981); N.C. GEN. STAT. § 31-47 (1976); N.D. CENT. CODE § 30.1-08-11 (1976); OHIO REV. CODE ANN. § 2107.63 (Page 1976); OKLA. STAT. ANN. tit. 84, §§ 301-304 (West 1970); OR. REV. STAT. § 112.265 (1981); 20 PA. CONS. STAT. ANN. § 2515 (Purdon 1975); S.C. CODE ANN. §§ 21-33-10 to -40 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. §§ 29-2-18 to -23 (1976); TENN. CODE ANN. § 32-307 (1977); TEX. PROB. CODE ANN. § 58a (Vernon 1980); UTAH CODE ANN. § 75-2-511 (1978); VT. STAT. ANN. tit. 14, § 2329 (1974); WASH. REV. CODE ANN. § 11.12.250 (1967); W. VA. CODE §§ 41-3-8 to -11 (1982); WYO. STAT. § 2-6-103 (1980).

160. Delaware, Virginia, Louisiana, Rhode Island, and Wisconsin have statutes which, though not taken from the Uniform Act, still reach the same result in most cases. Most significantly, the problems of the pour-over have been dealt with effectively by statute.

Delaware permits a testator to leave property to an inter vivos trustee provided the trust instrument is in existence when the will is executed and is identified in the will. The property is governed by all trust provisions, as amended, even if the changes were made after execution of the will. DEL. CODE ANN. tit. 12, § 211 (1979). *See also id.* § 3538 (certification of testamentary trusts).

Virginia's statute picks up much of the pour-over law from the Uniform Act. It allows a bequest to the trustees of either an inter vivos or testamentary trust, whether established by the testator or another. One of the trustees must be an individual resident of or a corporation authorized to do business in Virginia. The inter vivos trust may be an unfunded insurance trust with special provisions to take advantage of the federal estate tax provisions without thereby being deemed testamentary. The bequest is not invalid even though the trust is amendable or revocable or was amended after execution of the will. The property devised becomes part of the corpus of the trust to which it is poured over, and the trust is administered according to those terms in existence at the testator's death. The bequest is invalid if the entire trust is inoperative or has been revoked before the testator's death. If the trust is revoked after the death of the testator, the revocation has no effect on the bequest to the trustee unless the testator directed otherwise. The court may appoint a trustee if there is no qualified trustee acting at the time of death. Where the court has jurisdiction over the probate of the testator's will, it may appoint the trustee and instruct him on the performance of his duties. VA. CODE § 64.1-73 (Supp. 1982). The statute is discussed in Alford, *Wills, Trusts and Estates*, 44 VA. L. REV. 1405, 1405-06 (1958).

The Louisiana statutes also cover most of the Uniform Act's pour-over provisions. The central rule is that any person "may make additions of property to an existing trust by donation inter vivos or moris cause, with the approval of the trustee. The right to make additions may be restricted or denied by the trust instrument." LA. REV. STAT. ANN. § 9:1931 (West 1965). This provision allows a testator to pour over assets from his will to an inter vivos trust, which exports property from the estate to the trust. A testator may also incorporate the terms of an existing trust into the trust created by the will, which results in two separate trusts. *Id.* § 9:1754. A bequest to a named person, to be administered according to the testator's typed instructions, can lawfully dispose of the testator's entire estate and is not

Proposed legislation based on the Uniform Act was introduced in the Eighty-first Missouri General Assembly but has not yet been enacted.[161] The Missouri version differs in some respects from the Uniform Act. First, the Missouri act would extend the Uniform Act to pour-overs from inter vivos trusts and the designation of a beneficiary under life insurance policies.[162] This change, reflecting the *Blue* decision,[163] would allow a husband and wife each to set up an inter vivos trust, with income to be paid to the settlor for life, remainder to be paid to the spouse's reciprocal inter vivos trust.[164] Second, the proposed Missouri statute deletes the requirement that the written instrument evidencing the inter vivos trust, into which the pour-over flows, be executed before or concurrently with execution of the testator's will.[165]

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void as containing a prohibited substitution. *See* Girven v. Miller, 219 La. 252, 260-61, 52 So. 2d 843, 846 (1951).

Rhode Island permits a bequest in a validly executed will to be made to the trustee of a trust which has been executed prior to and is in existence at the time the will is executed. The size and character of the trust are irrelevant. The trust may be amendable or revocable; the trust and its amendments need not be executed with testamentary formalities; the trust may have been, in fact, amended. The pour-over bequest becomes part of the principal of the inter vivos trust, not a separate testamentary trust. If the trust is terminated prior to the testator's death, the pour-over bequest lapses. R.I. GEN. LAWS § 33-6-33 (1969).

Wisconsin provides that an inter vivos trust is valid even if the settlor retains the power to revoke or modify the trust, to control administration of the trust, or to add property to the trust at any time. The trust is valid even if the principal consists only of nominal assets or the designation of the trustee as a beneficiary of a will. The inter vivos trust is eligible to receive property from any source. WIS. STAT. ANN. § 701.07 (West 1981). The order of execution of an inter vivos trust and a will purporting to transfer property to the trust is disregarded in determining the validity of the transfer. *Id.* § 701.08. The poured-over assets may be treated as part of the inter vivos trust, not as a separate testamentary trust. The terms of the trust, even if amendable after execution of the will, govern the property transferred to it without the need to re-execute the will. If the power to amend the trust requires the consent of someone other than the testator, the poured-over assets will be administered on the terms of the trust as they existed at the time of the will's execution unless the testator provides otherwise. If the power to amend is exercised, the testator must provide expressly in his will that the property is to be administered according to the terms of the trust as modified. If the testator was a party to the revocation of a trust prior to his death, a pour-over to the trust will lapse. If he was not a party, the pour-over provision creates a separate testamentary trust. *Id.* § 701.08.

161. *See* H.R. 1733, 81st Gen. Assem., 2d Reg. Sess. (1982).

162. *Id.*

163. St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 778-79 (Mo. 1962).

164. *See* note 6 *supra*.

165. Both acts would allow a pour-over into an inter vivos trust created after execution of the will, e.g., when the settlor creates a shell before the execution of the will but delays adding property to it until later. The Uniform Act requires that the

VII. CONCLUSION

Missouri courts have evidenced a desire to fulfill the intent of the testator in giving effect to pour-overs.[166] They manipulate two theories—independent significance and incorporation by reference—to further that policy. The doctrine of independent significance can be applied where it appears that the testator desired a single trust. Where the trust is deemed independently significant, the property poured over into the trust may be administered under the terms of the inter vivos trust and not under the terms of the will.[167] Where the testator apparently intended a separate testamentary trust, the court can use the doctrine of incorporation by reference, under which "the trust instrument is probated and should become an integral part of the will."[168] The separate existence of the inter vivos trust is irrelevant. In using incorporation by reference, there is really no "pour-over" into anything; the trust terms are merely part of the will. While Missouri courts can reach desirable results using these theories, they experience some of the same problems encountered by other jurisdictions left to case law.[169]

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writing be made prior to or concurrently with the will. UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1960). In the Missouri version, the testator may defer making the written instrument until after execution of the will. If he fails to execute the instrument, the bequest lapses. H.R. 1733, 81st Gen. Assem., 2d Reg. Sess. (1982). Professor Scott believed this to be a desirable change. 1 A. SCOTT, *supra* note 26, § 54.3, at 404-05. The Uniform Act validates transfers to trusts not in existence when the testator executed his will if the trust was created by the will of another person who predeceased the testator. UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1960).

166. Where the testator wants a testamentary trust, Missouri courts will declare one if the requirements of incorporation by reference are met. Where the testator wants a single trust, the courts will not use incorporation by reference. *See* St. Louis Union Trust Co. v. Blue, 353 S.W.2d 770, 777-78 (Mo. 1962) ("intent to incorporate must clearly appear" before incorporation can be used).

167. *See, e.g.*, Canal Nat'l Bank v. Chapman, 157 Me. 309, 315-16, 171 A.2d 919, 922 (1961).

168. Annot., 12 A.L.R.3d 56, 64 (1967).

169. In Missouri, the traditional rule of incorporation by reference would require the creation of two separate trusts in pour-over situations. The general rule that there can be no incorporation of an instrument not in existence when the will was created need not be changed, since Missouri courts appear ready to use the doctrine of independent significance where one trust apparently is intended. Where the testator intended two trusts and no amendment to the inter vivos trust was made after execution of the will, two separate trusts could be created under the doctrine of incorporation by reference. But where two trusts are intended, and the inter vivos trust has been amended after execution of the will, Missouri courts presumably would use the doctrine of incorporation by reference. Given the Missouri statute of wills and the case law in other jurisdictions, the bequest probably would be invalidated or, perhaps, validated on the terms of the original trust. This may not be what the testator wished. *See generally* St. Louis Union Trust Co. v. Blue, 353

The proposed version of the Uniform Act before the Missouri legislature provides a simple and certain method for determining the validity of pour-over trusts. The Uniform Act would dispense with the necessity of executing a new codicil to a will with every amendment of the inter vivos trust into which the will is to pour assets. Adoption of the Uniform Act would also solve the present inconsistency between the common law doctrines by precluding creation of a testamentary trust unless the testator specifically set out his desire for a separate trust in the will. The reduced volume of cases in those jurisdictions that have adopted the Uniform Act suggests that it has effectively clarified the law governing pour-over provisions. While Missouri practitioners have been careful to avoid problems with this device, they should not be forced into court to resolve the many unsettled issues that remain. The Missouri legislature should adopt a form of the Uniform Testamentary Additions to Trusts Act.

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S.W.2d 770 (Mo. 1962) (using independent significance); Prudential Ins. Co. v. Gatewood, 317 S.W.2d 382 (Mo. 1958) (using incorporation by reference); Tootle-Lacy Nat'l Bank v. Rollier, 341 Mo. 1029, 111 S.W.2d 12 (1937) (using incorporation by reference); Ray v. Walker, 293 Mo. 447, 240 S.W. 187 (1922) (using incorporation by reference).