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Intention or Form: A Comment on the Uniform Testamentary Addition to Trusts Act in Oklahoma

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device penetrates the wall or not, "the invasion of privacy is as great in one case as in the other."²⁶ In an earlier case, Justice Brandeis stated that:

The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.²⁷

It seems apparent that the technological developments which now make it possible to invade the most sacred privacies of the individual without a "physical trespass" will require the Court to adapt Constitutional rights to 20th Century technology. Only so long as the blessings of freedom are fully protected and maintained, can the blessings of technology be enjoyed.

William S. Doenges

INTENTION OR FORM: A COMMENT ON THE UNIFORM TESTAMENTARY ADDITION TO TRUSTS ACT IN OKLAHOMA

In 1961, Oklahoma passed the Uniform Testamentary Additions to Trusts Act,¹ and is now one of the seventeen States² adopting its provisions. The Act primarily deals with what is more commonly known as the "pour-over" provision of a will: a clause contained in a testator's will directing that a certain designated portion of the testator's assets (most commonly the "rest, residue and remainder") be added to the corpus of a pre-existing trust;³ by making this reference to the extrinsic trust, the will itself need not reiterate the terms of that trust instrument.

Before the passage of a uniform act, courts employed two traditional common law doctrines in order to support a pour-over provision in a will: "incorporation by reference" and "facts of independent significance." States having no pour-over legislation still rely upon them. Incorporation by reference is the approach most commonly used. If a trust document is in existence at the time the testator executes his will, if the testator makes a sufficient, specific identification of that trust instrument in his will and indicates his intention to make that extrinsic instrument a part of his

²⁶ *Supra* note 9, at 512-13.

²⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

¹ 84 OKLA. STAT. § 301 (1961).

² Arizona; Arkansas; Connecticut; Iowa; Maine; Massachusetts; Michigan; Minnesota; New Hampshire; New Jersey; North Dakota; Oklahoma; South Carolina; Tennessee; Vermont; West Virginia.

³ Polasky, *Pour-Over Wills and the Statutory Blessing*, 98 *Trusts and Estates* 949 (1959).

will, then the terms of that trust document are deemed to have been incorporated by the testator into his will without reiteration thereof in the will itself.⁴

The other means used to substantiate a pour-over provision is the doctrine of "non-testamentary acts" or "facts of independent significance." Although the exact scope and application of this doctrine are difficult to express in a precise definition, its basic premise is that the beneficiaries intended or the property disposed of can be sufficiently ascertained from facts which have significance apart from the dispositive provisions of the will.⁵ The facts relied upon, outside the terms of the will, are deemed to satisfy the statutory requirements for execution of wills because they are not essentially testamentary in nature and exist separately as independent entities in and of themselves; such provisions, non-testamentary in nature, are less subject to undue influence, coercion or fraud for purposes of influencing disposition of property. In the application of this latter doctrine, it is the existence of the trust entity itself that is important and that is the thing that must be referred to, whereas in application of the doctrine of incorporation by reference, it is the existence of the instrument creating the trust that is important and that document must be referred to for distribution of the estate. The latter doctrine suggests a writing, the former an independent, pre-existing entity.⁶ The doctrine of facts of independent significance has been particularly criticized where the trust created by the testator has been only nominally funded by the testator during his life, or is unfunded, as in the case of a life insurance trust. One author has noted the criticism that such an entity, existing merely as a receptacle for later dispositions of property or insurance benefits, has no independent significance standing alone and therefore cannot be used in conjunction with a pour-over provision in a will.⁷ From the viewpoint of the estate planner, and in line with logic, perhaps the better view is just the opposite: that such a trust, although lacking in a substantial corpus, is a presently-existing instrumentality which will eventually pass a good part of the settlor's property and presently has a vitality and substance apart from any influence his testamentary provisions may have upon the property or its distribution.⁸ The trust indenture has been created and obligations have been fixed pursuant to its terms; even though its actual operation and testing are delayed pending the addition of substantial funds, that one contingency should not defeat its present existence.

There has been a recent proposal suggesting that neither of the traditional doctrines is a sound basis for the support of a pour-over provision, but rather the pour-over provision in a will is a perfectly proper and valid testamentary amendment to a pre-existing, amendable trust.⁹ This is indeed a tenable theory; it recognizes the basic purposes of the

⁴ *Id.* at 950.

⁵ Scott, *Pouring Over*, 97 *Trusts and Estates* 189 (1958).

⁶ Note, 13 *BAYLOR L. REV.* 301 (1961).

⁷ Trachtman, *Pour-Overs*, 97 *Trusts and Estates* 416 (1958).

⁸ *Id.* at 418.

⁹ Hawley, *The Statutory Blessing and Pour-Over Problems*, 102 *Trusts and Estates* 896 (1963).

Statute of Wills, it answers some of the questions left undecided in application of the traditional doctrines, and finally, it gives great weight toward furthering the testator's expressed intentions. It has the effect, in other words, of amending the size of the corpus of that pre-existing trust described by the testator in his will. This new theory, however, has yet to be tested by judicial opinion and professional comment.

The greatest obstacle in the path of general acceptance of pour-over provisions is the difficulty imposed by the Statute of Wills.¹⁰ Courts generally agree that when the existing trust that is referred to in a will is irrevocable and not subject to amendment, that pour-over addition to the trust will have all the safeguards against fraud, coercion and undue influence that a testamentary trust would have. Such a pour-over provision would be allowed and could be supported by either of the two traditional doctrines.¹¹ This was the view expressed in *Matter of Rausch*,¹² a landmark in the field; the pour-over provision was upheld and the testator's assets were permitted to pour over into and increase the corpus of an irrevocable, unamendable trust which the testator had established during his lifetime for the benefit of his incompetent daughter. But there has not been the same unanimity among the courts when the trust referred to by the testator is revocable or is subject to amendment, even though that right has not in fact been exercised. In such a case, both traditional doctrines would be applicable in support of the pour-over provision.¹³ Nevertheless, some courts still refuse to uphold the pour-over; it is the mere power to change (even though not exercised) that renders the provision defective, not the change itself.¹⁴ On the other hand, some courts allow the provision to take effect; nothing has occurred that changes the extrinsic trust, so it is treated the same as if no change could have been made, that is, in the same manner as an irrevocable, unamendable trust; the intentions of the testator are given their full effect.¹⁵

The situation which causes the greatest difficulty, however, is when an extrinsic trust has been amended by a testator (or another) since his will was last executed or republished. The basic problem here is that the trust instrument has been amended subsequent to the date of the properly executed will by another instrument that has not been executed in accordance with the Statute of Wills. In this situation, courts have generally taken one of three actions: the pour-over provision has been invalidated altogether; the amendment to the trust has been ignored and disposition of the testator's assets made in accordance with the terms of the trust and will as they existed before the improper amendment of the trust;¹⁶ or, full effect has been given to the amendments and the assets distributed to the trust for administration and distribution according to

¹⁰ 84 OKLA. STAT. §§ 55, 56 (1961).

¹¹ Scott, *supra* note 5, at 189.

¹² 179 N.E. 755, 258 N.Y. 327 (1932).

¹³ Scott, *supra* note 5, at 190.

¹⁴ *Atwood v. Rhode Island Hospital Trust*, 275 Fed. 513 (1st. Cir. 1921).

¹⁵ *Montgomery v. Blankenship*, 217 Ark. 357, 230 S.W.2d 51 (1950).

¹⁶ *Old Colony Trust Co. v. Cleveland*, 297 Mass. 380, 196 N.E. 920 (1935).

its basic terms and amendments, whenever made.¹⁷ Regardless of which alternative a court might choose, it could not do so upon the theory of incorporation by reference; the trust, as subsequently amended, would not have been in its final form when incorporated by the testator into his will. However, the doctrine of independent significance could be properly adopted; the living trust, even though it had been amended, would be significant independent from the will and would be in existence at the testator's death.¹⁸ The testator's intentions could be determined from it, both as to beneficiaries and property disposition.

It is the last of the three alternatives chosen by courts that has been most severely criticized. When a court chooses to give effect to the will and all subsequent amendments to the trust referred to therein, some critics hold this to be a complete circumvention of the Statute of Wills.¹⁹ On the other hand, eminent authorities suggest that the Statute of Wills should not be so strictly construed or applied as to preclude carrying out the intentions of the testator.²⁰ The testator intended administration in accordance with the trust as amended, since it must be assumed he knew its terms and amendments at his demise; those terms should govern all assets of that trust, including those assets that would be added to it by the will. Thus, it would seem that there is great emphasis given to a testator's intentions, the Statute of Wills notwithstanding.

But unless the Uniform Act is different from the law, as briefly outlined above, how can the Act change that law? Before the passage of the Uniform Act, Oklahoma had no pour-over legislation, nor had the Oklahoma Supreme Court ever been called upon to decide a pour-over question. Reading the Act will at once reveal that many of the difficulties that have hertofore plagued both courts and practitioners under the common law approaches, are specifically eliminated. The pour-over provision of a testator's will may distribute funds to any designated pre-existing inter vivos trust whether established by the testator or by another; the corpus of that trust need be of no specific amount so that even bequests to a previously unfunded trust, such as a life insurance trust, will not be set aside for want of independent significance (lack of a corpus); and finally, the property poured over to the trust shall be administered and disposed of in accordance with the original trust and all amendments thereto, regardless of when they have been made. This last provision has the particular advantage of securing a unified administration as an inter vivos trust, thereby preventing the expense of annual accounting, as with a testamentary trust, and separating the trust assets from probate expenses.

Perhaps the greatest significance of the Act, however, lies in the fact that it codifies what has long been an uncertain rule in Oklahoma regarding the extent to which effect will be given a testator's expressed

¹⁷ *Strouse v. First National Bank*, 312 Ky. 405, 245 S.W.2d 914 (1951); *Matter of Ivie*, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958).

¹⁸ *Scott*, *supra* note 5, at 190.

¹⁹ *Hawley*, *supra* note 9, at 897.

²⁰ *Polasky*, *supra* note 3, at 954; 1 SCOTT ON TRUSTS § 54.3 (2nd. ed. 1956); *Palmer, Testamentary Disposition to the Trustee of an Inter Vivos Trust*, 50 Mich. L. Rev. 33 (1951).

intentions. Since the decision of *Johnson v. Johnson*,²¹ Oklahoma has given great weight to a testator's intentions as he expresses them in his will and in such other documents as he relates to therein; this effect has resulted even though there has been no strict compliance with the Statute of Wills.²² Pursuant to the rule of *Johnson v. Johnson*, some practitioners have felt that almost any document could be incorporated into a will regardless of its form or manner of execution, so long as the testator expresses his intention to use that extrinsic document as a part of his will. With the passage of the Uniform Act, in the area of pour-over provisions, practitioners can now proceed with more confidence that their work will not be upset because there has not been strict adherence to form or procedure; in this regard the Act lessens the rigors and confusion that often result when traditional common law approaches are pursued.

The trend away from the restrictions of form and procedures is as it should be. With the increased complexity of today's retirement and investment plans and insurance and annuity policies, persons with no legal training encounter many legal pitfalls without having to surmount the additional obstacle imposed by form. Many of the safeguards the Statute of Wills is designed to implement are otherwise met by contract when such complex plans are initially executed; to require strict adherence to form as well would seem to unduly frustrate intentions that are already adequately safeguarded. Indeed, there would seem to be little justification or consistency to make this stringent requirement upon pour-over provisions and trusts when equally dispositive devices such as the Totten (or savings bank) trust, the holographic will and the gift causa mortis, to which the Statute of Wills does not apply,²³ escape the requirement.

There is another factor that can be considered as furthering the purposes of the Statute of Wills. Today, in the creation and administration of trusts, either inter vivos or testamentary, the corporate entity, such as the trust department of a bank, is being utilized as trustee more than ever before. Such a two party relationship has many advantages. There is a separation of the duties between an interested settlor and a disinterested trustee; opportunities for the exercise of fraud, coercion and duress, affecting property disposition, are thereby minimized.²⁴ The corporate trustee has at its disposal trained professionals and expert information to use in counselling the settlor and increasing the efficiency and security of trust administration. And such a two party relationship can increase the understanding of the testator concerning problems of the trust and its amendments. The result is a greater opportunity for corrections of both form and substance and for coordination of the execution of a will and amendments to a pre-existing trust. These factors will all combine to insure a true and correct expression of the testator's intentions.

Many other phases of the Uniform Act have not been dealt with

²¹ 279 P.2d 928 (Okla. 1954).

²² This was the dissenting argument of Justice Halley. "Why make a mockery of our statutes? Property may only descend when the will is executed in conformity with the statutes." *Johnson v. Johnson*, *supra* note 21, at 934.

²³ *Hawley*, *supra* note 9, at 898.

²⁴ *Ibid.*

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here, but when one must balance the purposes of the Statute of Wills against the effect to be given a testator's intentions, it becomes clear that the Uniform Act will eliminate many problems that prevented widespread use and acceptance of pour-over provisions in the past. It should be noted, however, that in Oklahoma, the Uniform Act does not encompass all pour-over provisions for it is not retrospective;²⁵ for those provisions executed before the effective date of the Act, courts will have to pursue traditional common law approaches to those pour-over problems. Nevertheless, it is evident that the Uniform Testamentary Additions to Trusts Act gives practitioners a more firm basis on which to employ a pour-over provision should that device be in the best interest of the client.

John Barlow Nelson

²⁵ 84 OKLA. STAT. § 302.