1959

The Desirability of Pour over Legislation

Minn. L. Rev. Editorial Board

Notes

The Desirability of Pour Over Legislation

Fourteen states have enacted legislation validating a "pour over" from a will to an amendable trust. The author of this Note analyzes the desirability of enacting such legislation in states, such as Minnesota, where the law in this area is not clear, and concludes that a "pour over" statute is desirable.

Since 1953, twelve states[1] have enacted statutes which validate a "pour over"[2] from a will to a trust and give testamentary effect to subsequent amendments to the trust.[3] For example, the Delaware statute provides:

> Whenever a testator bequeaths or devises property to the trustee of an inter-vivos trust which is evidenced by a written instrument in existence prior to the making of the will and identified in the will, and which may be subject to amendment, modification or revocation, the property so bequeathed or devised, unless the will provides otherwise, shall be governed by the provisions, effective at the testator's death, of the instrument

1. DEL. CODE ANN. tit. 12, § 111 (Supp. 1958); Fla. Laws 1959, ch. 59–57; ILL. REV. STAT. ch. 3, § 194a (1957); IND. ANN. STAT. § 6–601(j) (1953); Md. Laws 1959, ch. 612; MISS. CODE ANN. § 661.5 (Supp. 1958); MONT. REV. CODES ANN. § 91–321 (Supp. 1959); NEB. REV. STAT. § 30–1806 (Supp. 1957); N.C. GEN. STAT. § 31–47 (Supp. 1957); VA. CODE ANN. § 64–71.1 (Supp. 1958); WIS. STAT. § 231.205 (1957); WYO. COMP. STAT. ANN. § 6–310 (Supp. 1957). Connecticut and Oregon have also enacted statutes on the subject, but to a different effect. See CONN. GEN. STAT. § 45–173 (1958); ORE. REV. STAT. § 114.070 (1957); see discussion at text accompanying notes 46–51 *infra*. No statutes dealing with pour overs had been enacted before 1953.

2. A provision in a will adding property to an inter vivos trust is called a "pour over" provision. See STEPHENSON, DRAFTING WILLS AND TRUST AGREEMENTS, DISPOSITIVE PROVISIONS § 19.1 (1955) [hereinafter cited as STEPHENSON]. Pour over provisions may also be used to pour over from a will to another will, from a trust to another trust, and from a trust to a will. See Matter of Fowles, 222 N.Y. 222, 118 N.E. 611 (1918); Matter of Piffard, 111 N.Y. 410, 18 N.E. 718 (1888); STEPHENSON, *supra*.

3. For example, A creates an inter vivos trust reserving a power to amend and subsequently executes a will adding property to the trust. Then A amends the trust to change his beneficiaries. The amendment clearly controls the property held inter vivos. *E.g.*, Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934) (alternative holding). However, if the trust amendment is not executed with the formalities required for the execution of a codicil, an issue arises as to the effect the amendment should have on the testamentary disposition from the will to the trust. See Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust*, 50 MICH. L. REV. 33 (1951); 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956) [hereinafter cited as SCOTT].

creating such trust as the same may have been amended, even though any such amendment may have been made subsequent to the making of the will.[4]

Text writers seem to agree that a testator should be allowed to use the pour over device.[5] This device offers several advantages, the most important of which is that it can be used to "unify administration and disposition and thus create a complete estate plan."[6] A man can create an inter vivos trust and then substantially increase the corpus of the trust at his death, while retaining the use of most of his property during his lifetime. The property retained until death becomes a part of the inter vivos trust,[7] thus avoiding the need for, or the possibility of, two trusts, one inter vivos and one testamentary.[8] Of course, the same objective can be accomplished whether the testator pours over from his will to an inter vivos trust, or from the inter vivos trust to a trust created by the will. However, by pouring from the will to the inter vivos trust, the assets held inter vivos do not become a part of the probate estate and thus may not be subject to fees for probate administration. Furthermore, the inter vivos trust is not likely to be subject to as frequent accountings as a testamentary trust would be.[9] The possibility of keeping the inter vivos trust assets out of the probate

4. DEL. CODE ANN. tit. 12, § 111 (Supp. 1958).

5. For discussions of the problem whether a provision in a will adding property to an inter vivos trust is desirable, see Palmer, *Testamentary Dispositions to the Trustee of an Inter Vivos Trust*, 50 MICH. L. REV. 33 (1951); SCOTT § 54.3; Comment, *Testamentary Additions to the Corpus of an Inter Vivos Trust — Recent Judicial and Legislative Developments*, 57 MICH. L. REV. 81 (1958).

6. See STEPHENSON 435.

7. However, the Nebraska statute provides that the trust will be a testamentary trust unless the trustee is a corporate trustee, qualified to do business in Nebraska. NEB. REV. STAT. § 30–1806 (Supp. 1957). Connecticut has a similar provision. See CONN. GEN. STAT. § 45–173 (1958).

8. STEPHENSON § 19.3. Scott raises the problem that a testamentary trust may be subject to the jurisdiction of the probate court while the inter vivos trust is subject to the jurisdiction of an equity court, thus making uniformity of administration extremely difficult. See SCOTT § 54.3, at 382–83.

9. See SCOTT § 54.3, at 382–83; STEPHENSON § 19.5. However, this problem may be avoided in some states by a waiver in the will. *E.g.*, MINN. STAT. § 525.504 (1957) provides in part:

> When any bequest or devise to a testamentary trustee amounts to more than $500 *and the will contains no express waiver*, the representative may not be discharged until a trustee is qualified in a court of competent jurisdiction and until proof of the qualification and a receipt by the trustee are filed. (Emphasis added.)

Having qualified, the trustee must then comply with MINN. STAT. § 501.34 (1957), which provides:

> Any trustee whose appointment has thus been confirmed shall file with the clerk of the district court an inventory containing a true and complete list of all property received by the trustee belonging to the trust estate. Thereafter such trustee shall render to such court *at least annually* a verified account containing a complete inventory of the trust assets and itemized principal and income accounts. (Emphasis added.)

estate and of reducing the number of accountings makes pouring from the will to the inter vivos trust preferable because it avoids expenses and the resulting decrease in property available to the beneficiaries.

These pour over statutes resolve three issues. First, they validate a provision in a will bequeathing property to a trustee to be held on the terms of an inter vivos trust. Second, they validate the bequest even though the trust is amendable or revocable. Third, they provide that the bequest is to be governed by the terms of the trust as existing at the time of the testator's death, even though the trust has been amended after the execution of the will and last codicil.

This Note will examine these three issues and analyze the problems involved to determine whether similar legislation is desirable in states, such as Minnesota, where these issues have never been raised, but where the pour over device is widely used.[10]

I. The Validity of a Pour Over

In the absence of a statute, a provision in a will bequeathing property to the trustee of an inter vivos trust has been upheld by the courts, under the doctrines of incorporation by reference and independent significance.[11] The doctrine of incorporation by reference permits a writing, which is in existence when the will is executed, to be considered a part of the will if the writing is identified by the will and referred to as being in existence, even though it is not actually copied into the will.[12] The incorporated writing then controls the testamentary disposition of the property even though the writing has not been executed in accordance with the formal requirements of the wills statutes.[13]

The doctrine of independent significance permits a court to refer to facts which would exist even though there had been no will, in order to determine the meaning of provisions in the will.[14] This

10. A diligent search of Minnesota law has revealed no cases dealing with either a pour over from a will to a trust or an amendment to a trust designated to receive property through a will. Interviews with Minnesota attorneys, however, indicate that pour over provisions are widely used and that amendable trusts are often involved. *E.g.*, Interviews With Trust Law Committee, Minnesota State Bar Ass'n in Minneapolis, Apr. 18, & Oct. 17, 1959.

11. *E.g.*, Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935) (incorporation by reference); *In re* York's Estate, 95 N.H. 435, 65 A.2d 282 (1949) (independent significance). Incorporation by reference and independent significance are alternative theories used to uphold the pour over. See notes 22–23 *infra* and accompanying text.

12. Atkinson, Wills § 88, at 387–90 (1953).

13. See, *e.g.*, Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); Scott § 54.1.

14. See Palmer, *op. cit. supra* note 3, at 33–34; Scott § 54.2; Stephenson § 19.7, at 440.

doctrine is based on the fact that courts must often receive extrinsic evidence in order to determine the meaning of provisions in a will. For example, if the testator bequeaths money to those servants in his employ at his death, the court must first determine who the servants are before it can order a distribution of the money.[15] Since the testator has the power to change his servants at any time, he has the power to change the beneficiaries of his will without executing a codicil. However, because the testator almost certainly employs his servants for reasons other than making them beneficiaries of his will, their identity has significance independent of the disposition of property by the will.[16] By the same rationale, the identities of the trustee and the trust agreement are facts of independent significance.[17] The trust agreement affects the property held inter vivos and consequently has significance unrelated to the disposition of property under the will.

A testator may desire to use incorporation by reference, first, because it allows him to include in his will a detailed trust agreement without recopying it, and thus prevents any typographical errors that might occur in the process of reproduction. Therefore, the testator is assured that the terms of the trust, as set forth in the original agreement and as set forth in his will, are identical.[18] If the trust agreement were erroneously reproduced, a question could arise whether the testator intended to amend the trust agreement by his will or to create a new trust agreement. If the latter were held, the testator could then have two nearly identical trusts, one inter vivos and one testamentary, being administered separately. Separate administration would increase administrative expenses, which would reduce the amount of money available to the beneficiaries.[19]

Second, the fact the trust agreement is not set forth in the will enables the testator to keep the identity of his beneficiaries, and the amount of their gifts, from becoming a matter of public record. The will, as recorded, would contain only a reference identifying the trust and the trustee, rather than the terms of the trust itself. Since the inter vivos trust agreement need not be recorded, people who consult the public record to discover the identity of beneficiaries in order to take financial advantage of them cannot ascertain either their identity or the amount they have received; nor is the trustee likely to reveal any of the terms of the trust.[20]

15. See Metcalf v. Sweeney, 17 R.I. 213, 21 Atl. 364 (1891).
16. Palmer, *op. cit. supra* note 3, at 35.
17. See SCOTT § 54.3, at 376–77.
18. See STEPHENSON § 19.2.
19. *Id.* at § 19.3.
20. See *id.* at § 19.4.

A testator may desire to have the courts uphold the pour over on the theory of independent significance because that theory, as does incorporation by reference, obviates recopying the trust in the will and enables the testator to keep the identity of his beneficiaries from becoming a matter of public record.[21] In addition, independent significance provides a theory a court can use to validate a pour over provision if the requirements of incorporation by reference have not been fulfilled,[22] or if incorporation by reference has previously been rejected by the court.[23]

Although the doctrines of incorporation by reference and independent significance are sufficient, if adopted, to provide a means to validate pour overs to unamendable trusts,[24] legislation is desirable to settle the issue in states where it has not been adjudicated. In Minnesota, for example, with no court opinion directly in point,[25] an attorney cannot include a pour over provision without a risk that it will be held invalid. A cautious attorney might include in the will clauses reciting the entire trust agreement, with a provision that these clauses are to take effect in the event the pour over fails. Thus, in order to protect the testator from failure of his estate plan, the advantages which could be gained from the use of incorporation by reference and independent significance are lost.[26]

II. The Effect of Amendability of the Trust

The second provision of these statutes, that is, to validate a pour over even though the trust is amendable or revocable, seems logically unnecessary. Since the result of the legislation is to give testamentary effect to the trust amendments made after the execution of the will, there is no need to say the disposition is valid even though the trust is amendable. If a trust amendment made

21. See Palmer, *op. cit. supra* note 3, at 34, 55.

22. Palmer, *op. cit. supra* note 3, at 55. The requirements for incorporation by reference are set out in text accompanying note 12 *supra.*

23. *E.g.*, the New Jersey court adopted the opinion of the lower court, which had said:

> But regardless of what the rule is in New Jersey with respect to the doctrine of incorporation by reference, and about which there seems to be some contrariety of view, I am of the opinion that this bequest is valid. By it the testator merely added additional property to a trust fund established by him years before the execution of his will under a valid, active trust and to which he had, from time to time during his lifetime, added securities. The trust to which this bequest is added is not theoretical, nebulous, intangible or incapable of identification, but exists in fact . . . .

Swetland v. Swetland, 102 N.J. Eq. 294, 140 Atl. 279 (Ct. Err. & App. 1927) (per curiam).

24. For a discussion of the applicability of incorporation by reference and independent significance to amendable trusts, see text accompanying notes 30–51 *infra.*

25. See note 10 *supra.*

26. See text accompanying notes 18–23 *supra.*

after the execution of the will is to affect the disposition of property by the will, then obviously that disposition cannot be invalidated on the ground that the trust is amendable. Similarly, even if the legislature requires a codicil after the trust amendment has been executed, before the amendment can control the disposition of property by the will,[27] the fact is implicit that the amendability of the trust will not invalidate the pour over.

However, the draftsmen of the various pour over statutes apparently believed there was a need for such a provision to preclude any confusion that might be caused by the holding in *Atwood v. Rhode Island Hosp. Trust Co.*[28] In *Atwood*, the court held that a pour over provision was invalid because it added property to a trust in which the settlor had reserved the power to amend. The court there said:

> we are clear that the plan disclosed in the will and the inter vivos trust together is obnoxious to the statute of wills, falling plainly within the condemnation of the 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." [29]

Since it would be ridiculous for a court in a jurisdiction having one of these pour over statutes to follow *Atwood*, inclusion of the second provision is mere surplusage. However, since the reason for its inclusion is known, such a provision probably does no harm.

III. The Effect of Amending the Trust After the Execution of the Will

The third, and by far the most important, objective of the statute is to give testamentary effect to the amendments to the trust made after the execution of the will. This objective is particularly important because it creates a new exception to the statute of wills. This provision enables any testator to change the testamentary disposition of his property without executing a codicil to his will. He accomplishes this change by first executing an amendable inter vivos trust for a small portion of his property, and then executing his will, which adds all the remainder of his property to the inter vivos trust at his death. Then, as he changes his mind from time to time about the manner in which he wishes to have his property disposed of at his death, the testator may exercise his reserved power to amend the trust—thus changing his will. The pour over statutes uniformly require that the trust amendment be in writing; however, it is not necessary that the trust amendments be attested.[30]

27. Two states do require a codicil. See Conn. Gen. Stat. § 45–173 (1958) and Ore. Rev. Stat. § 114.070 (1957) and text accompanying notes 46–51 *infra*.

28. 275 Fed. 513 (1st Cir. 1921).

29. *Id.* at 521.

30. See statutes cited note 1 *supra*.

Therefore, the testator has the power to change the testamentary disposition of his property at any time, without complying with the attestation requirements of the statute of wills.

Prior to the enactment of the pour over statutes, no court had ever upheld an attempt to pour over to a trust as amended subsequent to the will or last codicil.[31] Because the amendment was not in existence when the will was executed, the courts rejected the idea that a trust amendment made after the execution of the last codicil to the will could be incorporated by reference. For example, in *President & Directors of Manhatten Co. v. Janowitz*,[32] where the testator had amended the trust twice after the execution of the will, the amendments were not given testamentary effect. The court distinguished *Matter of Rausch*,[33] which had allowed a trust to be incorporated by reference, because among other things, "[in *Rausch*] the trust agreement was in existence at the time the will was executed . . . [while here] the fourth supplemental indenture did not come into existence until approximately two months after the will was executed."[34]

Some text writers assert that the trust amendment made after the execution of the will should control the property added to the trust by the will because the amendment has independent significance.[35] They draw an analogy to the case where a bequest is to servants "in my employ at my death," and conclude that, since the identity of the servants is a fact of independent significance, an amendment to the trust also has independent significance.[36] Their rationale is that when the testator amends his trust, he is changing the disposition of the res of the inter vivos trust as well as the

31. The testamentary disposition in Matter of Ivie, 4 N.Y.2d 178, 149 N.E.2d 725 (1958), was upheld although the trust had been amended three times after the execution of the will without a subsequent codicil. However, the total effect of the amendments was to leave the trust in substantially its original form. The first amendment added a new trustee; the second amendment eliminated the trustee added by the first amendment; and the third amendment made the trust unamendable. *Id.* at 181, 149 N.E.2d at 726. The court said:

> To be sure, where the trust remains unimpaired and substantially the same as it was at the time of the execution of the will, and certainly where the amendments are concerned solely with the administrative provisions of the trust deed, it cannot be said to come within the purview of the rule against incorporation by reference.

Id. at 181–82, 149 N.E.2d at 728.

32. 260 App. Div. 174, 21 N.Y.S.2d 232 (1940).

33. 258 N.Y. 327, 179 N.E. 755 (1932).

34. 260 App. Div. 174, 179, 21 N.Y.S.2d 232, 237 (1940).

35. See, *e.g.*, SCOTT § 54.3, at 377; STEPHENSON § 19.7, at 441. The court in *Janowitz* rejected independent significance because "the reservation of the power to amend the trust indenture and its repeated exercise eliminated all independent significance that might be attached to the trust indenture." 260 App. Div. 174, 179, 21 N.Y.S.2d 232, 237 (1940).

36. See SCOTT § 54.3, at 377; STEPHENSON § 19.7, at 441. See notes 14–17 *supra* and accompanying text.

property added to the trust by the will. Since the property added inter vivos is affected, the amendment has significance unrelated to the testamentary disposition. The text discussions generally assume that the creation of the inter vivos trust was designed for some purpose other than escaping the attestation requirement for changing a will.[37] In fact, the writers argue that if the sole purpose of the trust is to enable the testator to change his will without attestation, the trust has no independent significance because it has no substantial significance unrelated to the testamentary disposition.[38] Unlike the case of a man changing his servants, the trust amendment is quite likely to be designed *primarily* to change the testamentary disposition.

The pour over statutes go beyond independent significance when they allow the trust amendment to control the testamentary disposition without reference to whether the inter vivos trust has some other function. However, a legislature considering enactment of a pour over statute need not find theoretical justification for its action in such doctrines as independent significance and incorporation by reference. Yet, there should be some grounds for justifying enactments which so summarily dispose of the attestation requirement for changing a will.[39]

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37. See Palmer, *op. cit. supra* note 3, at 56–58; SCOTT § 54.3.

38. See Palmer, *op. cit. supra* note 3, at 56–58; SCOTT § 54.3, at 379–81.

39. Professor Scott, the leading exponent of the idea that the trust amendment should control the property added by the will, can muster no better reason in support of his view than that a similar result occurs in other situations. The whole support for his position seems to be:

> It is true that the testator is thereby enabled to change the testamentary disposition without executing codicils to his will. This is, however, what he does where he bequeaths the contents of a room or of a safe-deposit box, since he can modify the contents from time to time by removing or adding articles. The same thing is true where he bequeaths property to persons in his employ at the time of his death, since he can change the beneficiaries by hiring and firing.

SCOTT § 54.3, at 376–77. The court in Atwood v. Rhode Island Hosp. Trust Co. disagreed with Scott:

> It seems equally clear to us that this case [a bequest to an amendable trust] does not fall within the rule which permits a testator to determine to some degree the objects of his testamentary bounty by his own subsequent conduct, as, for instance, in cases of gifts to servants in the employ of the testator at his decease, or to surviving partners, or to the persons or institutions caring for the testator in his last sickness. It is, of course, true that the volition of the testator as to who shall be his servants or partners, or final attendants, is a factor in selecting the objects of his testamentary bounty. But it is not the only factor. The volition and acts of such legatees are also factors in determining whether the designated relationship shall or shall not exist at the time of the testator's death. There is a practical as well as legal difference between such relationship . . . and a relationship which arises solely out of the bounty-giving volition of the testator.

275 Fed. 513, 523 (1st Cir. 1921).

Even if the effect of a gift to servants at the testator's death or of adding articles

The reason for requiring witnesses to a will is to prevent fraudulent claims to the testator's property after his death.[40] The requirement was first enacted in 1676[41] to cope with the problem raised in *Cole v. Mordaunt*[42] where the decedent's widow paid nine witnesses to perjure themselves by testifying that the decedent had orally revoked his written testament and had bequeathed all his property to his widow. Since the policy underlying the requirement is protection against fraud, before pour over trust amendments should be exempted from the attestation requirement, it would seem necessary to show either that there is sufficient protection against fraud in the execution of a written trust amendment or that a witnessing requirement would not provide effective protection against fraud.

The requirement of a written amendment may provide sufficient protection against fraud in the *inter vivos* disposition of property. However, a writing alone does not seem to provide adequate assurance that an amendment affecting a *testamentary* disposition was executed free from coercion and fraud. More protection is needed in the testamentary disposition of property because when the validity of the amendment is most likely to be questioned, after the testator's death, he will not be available to testify about the surrounding circumstances.

The protection against fraud provided by a witnessing requirement probably cannot be quantitatively measured, but that the protection is necessary can be inferred from the fact that every state has an attestation requirement for codicils.[43] On the other

to a safe deposit box were the same, it does not follow from the fact the attestation requirement has been dispensed with in these situations that it should be dispensed with for these trust amendments.

40. CASNER & LEACH, CASES AND TEXT ON PROPERTY 105–06 (1950). The attestation requirement also establishes the identity of those persons who are best qualified to identify the will and the testator's signature, and can testify about the testator's apparent mental capacity at the time of execution.

41. See Statute of Frauds, 1676, 29 Car. 2, c. 2, §§ 5–6. The only formal requirement of the original Statute of Wills was that the will be in writing. See Statute of Wills, 1540, 32 Hen. 8, c. 1 (repealed).

42. Discussed in Matthews v. Werner, 4 Ves. Jun. 186, 196 n.(a), 31 Eng. Rep. 96, 107 (Ch. 1798). See REPPY & THOMPKINS, HISTORY OF WILLS 9 (1928).

43. *E.g.*, MINN. STAT. § 525.18 (1957), provides:

> Every person of sound mind, not a minor, may dispose of his estate, or any part thereof, or any right or interest therein, by his last will in writing, signed by him or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses.

Some states allow unattested holographic wills to be probated. *E.g.*, MISS. CODE ANN. § 657 (1956) provides:

> Every person aged twenty-one years, . . . being of sound and disposing mind, shall have power, by last will and testament, or codicil in writing, to devise all the estate, right, title, and interest in possession, reversion, or remainder, . . . provided, such last will and testament, or codicil, be signed by the testator or

hand, the same fact may only be an indication that the attestation requirement has become a fixed part of the law, retained without reason. Whatever the reason for retaining the requirement, it is clear that the protection against fraud which witnesses afford is by no means complete. Certainly, if nine people could perjure themselves, as in *Cole*, two or three people could attest a counterfeit codicil and testify that the decedent had executed it. However, since the counterfeiting would require forgery as well as perjury, an attestation requirement increases the difficulty attendant to committing the fraud, and therefore, increases the protection against fraud.

A legislature facing the issue of whether to enact a pour over statute, which gives testamentary effect to a trust amendment made after the execution of the last codicil to the will, must weigh the protection from fraud against the advantages to the testator of being able to amend the trust without executing a codicil. These advantages do not seem to outweigh the need for protection against fraud. One advantage is that the testator is able to avoid the inconvenience of executing a codicil. However, in practice, trust amendments are often witnessed even though the trust is not the object of a pour over provision in the will.[44] Another "advantage" is that the testator is protected from the forgetfulness of his attorney, who may neglect to execute a codicil after the trust amendment has been made.[45] Certainly this last advantage is not a good reason for enacting a statute which effectively eliminates the attestation requirement for testamentary dispositions. Taken together, the gain to the testator does not seem to outweigh the increased protection against fraud afforded by a witnessing requirement.

The legislatures of Connecticut and Oregon have enacted statutes[46] which require the execution of a codicil after the trust is

testatrix, or by some other person in his or her presence, and by his or her express direction; and, moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two or more credible witnesses in the presence of the testator or testatrix.

44. Interviews With Trust Law Committee, Minnesota State Bar Ass'n in Minneapolis, Apr. 18, & Oct. 17, 1959.

45. The argument has been made that a testator, using a pour over provision, may have amendments executed by attorneys other than the one who executed the will, and may forget to tell the new attorney that the trust is the object of a pour over provision in his will. The problem can be avoided by including in the trust agreement a statement that the trust is to receive property from the settlor's will. This statement would alert the attorney that a codicil to the will should be executed when the trust is amended.

46. CONN. GEN. STAT. § 45–173 (1958); ORE. REV. STAT. § 114.070 (1957). *E.g.*, the Oregon statute provides:

A devise or bequest in a will duly executed pursuant to the provisions of . . . [ORS chapter 114] may be in form or substance to the trustee of a trust in existence at the date of the testator's death and established by written instrument executed prior to the execution of such will. Such devise or bequest shall

amended as a prerequisite to permitting the amendment to control the property added to the trust by the will. These statutes seem to reflect a determination on the part of the legislatures that the need for protection against fraud afforded by a witnessing requirement outweighs the slight inconvenience to the testator occasioned by the execution of a codicil.

If the trust amendment is invalid because a codicil was not executed, a problem arises whether the testamentary disposition to the trust should be governed by the terms of the trust as they existed when the last codicil was executed, or whether the whole disposition to the trust should fail.[47] The Connecticut and Oregon statutes provide that failure to execute a codicil invalidates the entire testamentary disposition to the trust.[48] Professor Scott formerly took a similar position—if the amendment does not control the property added by the will, the testamentary disposition to the trust should fail—basing his conclusion on the supposed frustration of the testator's intention.[49] Professor Scott has apparently changed his position, for he now says:

> If it is held that . . . [the property cannot pass in accordance with the terms of the inter vivos trust as amended] should it pass in accordance with the terms of the unamended trust instrument? It is believed that ordinarily it should. Presumably the testator would have preferred to have it so pass rather than to have the testamentary disposition fail altogether. This is the theory which underlies the doctrine of dependent relative revocation.[50]

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not be invalid because the trust is amendable by the settlor . . . provided that the will or last codicil thereto was executed subsequent to the time of execution of the trust instrument and all amendments thereto.

47. See President & Directors of Manhatten Co. v. Janowitz, 260 App. Div. 174, 179, 21 N.Y.S.2d 232, 236 (1940); SCOTT § 54.3, at 377.

48. See CONN. GEN. STAT. § 45–173 (1958); ORE. REV. STAT. § 114.070 (1957).

49. See 1 SCOTT, TRUSTS § 54.3, at 299 (1st ed. 1939). Scott there said:

> where a settlor creates a trust *inter vivos* subject to modification, and by a will subsequently executed disposes of property in accordance with the terms of the *inter vivos* trust as modified from time to time, and thereafter modifies the *inter vivos* trust, the testamentary disposition is valid in accordance with the modified terms. If the only theory on which the testamentary trust is upheld is that of incorporation by reference, it would seem that the testamentary disposition should fail altogether, since the doctrine permits the incorporation only of an instrument existing at the time of the execution of the will, and it would defeat the purpose of the testator to have the property pass in accordance with the original terms of the *inter vivos* instrument.

Ibid.

Since the purpose of the testator is to have the amendment control the testamentary disposition, either invalidating the bequest to the trust, as Scott suggests, or allowing the testamentary disposition to be governed by the terms of the original trust would "defeat the purpose of the testator."

50. SCOTT § 54.3, at 377. Palmer agrees with Scott's analogy to dependent relative revocation:

> In an analogous situation involving the application of dependent relative revocation, courts regularly assume that the testator would have preferred the will he ostensibly revoked to no will at all. For example, when he cancels one will

Perhaps the reason for Scott's dilemma is the futility of attempting to ascertain what most testators would have preferred had they known the amendment would not control the testamentary disposition. Consequently, the legislatures can do little more than arbitrarily choose one solution or the other, to take effect in the event the testator does not express a contrary intention in his will.[51]

CONCLUSION

Legislation is desirable to clarify the law in states, such as Minnesota, where the issues involved in the use of a pour over from a will to a trust have never been decided.[52] The legislation should provide first, that such a pour over is valid; second, that amendments to the trust made after the will is executed do not control the testamentary disposition unless either the amendment is witnessed by two persons or a codicil to the will is executed; third, that in the event an amendment to the trust is made, but the amendment is not witnessed or a codicil is not subsequently executed, and the testator expresses no other intention which may be given effect, the testamentary disposition shall pass by the terms of the trust as they existed at the time the last codicil to the will was executed.

Such legislation is preferable because the pour over device provides testators with a convenient method of disposing of their property through an integrated and unified estate plan which controls both inter vivos and testamentary dispositions.

This legislation would provide better protection against fraud than would a statute allowing the trust amendment to control the testamentary disposition even though there was no compliance with the attestation requirement of the statute of wills. The slight inconvenience to the testator in having to execute a codicil or hav-

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in connection with the preparation of a later will which is not validly executed, it is held that there was no revocation. The revocation of the first will was intended, the courts say, to be conditioned on the effectiveness of the second. The underlying assumption is that he would have preferred the first will to intestacy.

Palmer, *op. cit. supra* note 3, at 62. Palmer also explored the possibility of allowing the court to refer to the trust amendment to see which result the testator might have preferred. He concluded that such reference could not be made because:

the legal basis for such use of the writing despite the statute of wills would be its independent significance. If a court refuses to find this sufficient for giving dispositive effect to the writing it is likely that it would also refuse to consider the writing for the other purpose.

Id. at 64.

51. This is one of those numerous situations in which the testator did not anticipate the possible invalidity of any of his attempted dispositions; or if he did, no provision was made in the instruments to cover the possibility. In such circumstances the law must do the best it can.

Palmer, *op. cit. supra* note 3, at 62.

52. See note 10 *supra.*

ing the amendment witnessed seems insignificant when compared with the increased protection against fraud afforded by the authentication.

A provision that the testamentary disposition should pass by the terms of the original trust, if the trust is amended without subsequent execution of a codicil, is preferable because it would produce a result consistent with the ordinary result of failure to execute a valid codicil.