ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

A REVISED UNIFORM TETAMENTARY ADDITIONS TO TRUSTS ACT

STEP (SOCIETY OF TRUST AND ESTATE PRACTITIONERS) PROPOSAL

Presented by
Timothy Matthews QC, TEP
Thomas Grozinger C.S., TEP
Peter J. M. Lown QC
Philip J. Renaud QC, TEP

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Newfoundland and Labrador
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Introduction

[1] The Conference of Commissioners on Uniformity of Legislation in Canada (now the Uniform Law Conference of Canada; herein referred to as the "ULCC") presented a draft Testamentary Additions to Trusts Act which followed very closely the text of the model American Uniform Act, but broke it down into a number of sections and subsections in an effort to facilitate the reading and understanding of the Bill. The Testamentary Additions to Trusts Act (the "Act") was adopted and recommended at Vancouver, British Columbia, August 26th to August 30th,1968. The Uniform Act was adopted only in the Yukon. In addition, Quebec does not restrict the ability to have a pour over will. This has been clearly set out in Quebec legislation since at least 1994, when article 1293 of the Civil Code of Quebec (the "CCQ") came into force. Art. 1293 CQQ reads in part that, "any person may increase the trust patrimony [i.e. net asset base of the trust] by transferring property to it by contract or by will."

Pour Over Wills

[2] A "pour-over" clause is a provision in a will whereby the testator purports to make a gift of some or all of their estate to an existing trust. In the United States, it is relatively common to transfer one's assets to a trust, sometimes called a "revocable living trust", for the purpose of managing one's assets during life. On the death of the settlor of the trust, replacement trustees are appointed, and the property is divided among the deceased's heirs pursuant to the terms of the trust or held on further trusts for the next generation. These trusts are used in the U.S. for probate avoidance as well as for U.S. tax reasons. As part of the planning, the testator will usually complete a "pour-over" will, directing that, upon death, any assets still owned personally by the testator at the date of death are then transferred to the *inter vivos* trust. As a result, the trust becomes the main "testamentary" instrument which distributes all the assets upon the testator's death.

[3] Where the *inter vivos* trust is irrevocable and not subject to being amended or altered in any particular, no problem arises at common law either in the United States, England and Wales or the common law jurisdictions in this country. However, where the trust is amendable or revocable, the courts have held that a gift in a will cannot pour over to be held by the trustees based on the amendments to the trust because the effect would be to permit the settlor (testator) to have effectively amended his or her will without complying with wills legislation. The ULCC in its 1967 study leading to the final report in 1968 explained the issue this way:

[4] In *Re Playfair,* [1951] Ch. 4 A, the testator, by his will left £20,000 to T, the trustee of an *inter vivos* trust made by him in 1888, to be "held by them on the trusts of the said settlement." The *inter vivos* trust was irrevocable. During argument, attention was directed to the point whether the legacy was an accretion to the sum settled by the *inter vivos* trust or whether the terms of the trust were incorporated in the will as to this £20,000, i.e. a referential trust. It made a difference because A's son who took under the *inter vivos* trust predeceased the testator but he had a vested interest under the trust. If the

£20,000 fell to be distributed under the will, as the law then stood in England, there would have been a lapse. The court held that the legacy was an accretion to the *inter vivos* trust and the son's estate was entitled to the legacy. In the judgment no reference was made to the doctrine of incorporation by reference. This was significant as will be seen in what follows in this report.

[5] Difficulty arises if we assume the same factual situation as in *Re Playfair,* except that the *inter vivos* trust was revocable. The courts here get into a conceptual snarl in applying the doctrine of incorporation by reference: see *In re Edwards' Will Trusts,* [1948) Ch. 440; *In re Schintz' Will Trusts, Lloyds Bank Ltd. v. Moreton,* [1951) Ch. 870. The doctrine of incorporation by reference is a probate doctrine and enables documents to be included as part of a will even though not executed in accordance with the formalities prescribed by the Wills Act. The prerequisites in applying the doctrine are: (1) that the reference in the will must show that the testator intended to incorporate the extrinsic document into the will; (2) the language of the will must be such that it refers to the extrinsic document as one already in existence at the time of the execution of the will; (3) the reference in the will must be sufficiently specific that it identifies the extrinsic document with reasonable certainty; (4) the document offered must be proven satisfactorily to be the one referred to in the will; and (5) there must be satisfactory proof that the document was actually in existence at the time of the execution of the will: see *Allen v. Maddock* (1858), 11 Moore P.C. 427.

[6] It is clear law that a document not existing in unalterable form at the date of the execution of the will cannot be incorporated into the will. The Courts have stated that a testator cannot by his will create for himself a power to dispose of his property by an instrument not executed as a will or codicil: *Johnson v. Ball* (1851), 5 DeG. & Sm. 85; *In Bonis Smart,* [1902] p. 238. One wonders what special magic lies in the formalities prescribed for the execution of wills as contrasted with those concerning *inter vivos* trusts. The fact that the settlor is parting with his property during his lifetime is a matter sufficiently serious to ensure that the proprieties are observed.

[7] The fact remains, however, that the Anglo-Canadian courts will not permit a legacy to a revocable *inter vivos* trust even though the trust remains unaltered and unrevoked up to the death of the testator.

Re Kellogg Estate* and *Quinn Estate

[8] Two recent decisions of the British Columbia Court of Appeal, (*Re Kellogg Estate*, 2013 BCSC 2292 (CanLII); *Kellogg Estate* v. *Kellogg*, 2015 BCCA 203 (CanLII); and *The Estate of John Brian Patrick Quinn* 2018 BCSC 365 (CanLII); 2019 BCCA 91) reiterate the principle that pour over provisions in wills to an amendable trust are not valid in the common law provinces of Canada.

[9] The *Re Kellogg* decision dealt with a US pour over will to a US *inter vivos* trust. The will was challenged on the basis that a pour-over clause in a will is not valid in

British Columbia. The law of British Columbia applied to the disposition of real property situated in the province. The court held that the pour-over clause was not effective because it referred to future amendments of the trust as it was possible to amend the trust to provide different beneficiaries. The gift could not pour over to be held by the trustees based on the amendments to the trust because the effect would be to permit the settlor (testator) to have effectively amended his will without complying with wills legislation.

[10] Similarly, in the *Quinn Estate*, the questioned clause in the will provided that the residue of the deceased's Canadian estate was to "pour-over" to a revocable, amendable, inter vivos family trust which was settled by the deceased and his spouse approximately one month before the execution of the will. The court held that to allow the assets to pour over to the trust would have the effect of permitting the testator to essentially amend his will without complying with the formalities of execution for a valid will. The court also held that the rectification provisions of the BC *Wills, Estates and Succession Act* could not be used to allow a distribution to an amendable *inter vivos* trust. In this case, the will was validly executed in accordance with the Act; the court was not being asked to rectify an improperly executed will.

[11] It is now clear that testamentary additions to amendable trusts are not going to be allowed in the common law provinces of Canada without enabling legislation.

[12] Historically, these types of trusts were not commonly used in Canada. Under Canadian income tax law, when a person transfers an asset to a trust, he or she is deemed to have sold it, which could give rise to significant income tax on the accrued capital gains. However, there are now several exceptions to this rule under the *Income Tax Act*, including alter ego trusts, joint spousal trusts and common law partner trusts, which allow the settlor to roll assets into the trust on a tax deferred basis.

[13] Given the prevalence of Canada/US cross border planning both with US citizens owning property in Canada, and dual US/Canadian citizens living in Canada or the United States, practitioners often encounter US pour-over wills, or Canadian wills that include pour-over provisions for US citizens, or for the benefit of US beneficiaries. Accordingly, the use of *inter vivos* trusts for estate planning in Canada has become more common in Canada since the publication of the 1968 Act, and therefore the use of a "pour-over" clause in a will is a necessary estate planning tool that requires enabling legislation.

[14] If a testator chooses to have his or her entire estate distributed in accordance with an amendable *inter vivos* trust, he or she should be able to add property to the trust through his or her will. Testators should be able to order their affairs according to their intentions with certainty, knowing that their intentions will be carried out.

[15] Given the prevalence of alter ego, joint spousal and common law partner trusts, and due to the change in taxation of testamentary trusts, the Conference has approved the 1968 policy and recommends the Testamentary Additions to Trusts Act approved by the

ULCC in 1968, with some amendments to reflect the developments in estate law over the last 50 years, be recommended to the jurisdictions for adoption.

[16] The Act is divided into 5 sections

[17] Section 1 defines terms used in the Act.

[18] Section 2 allows a testator to make a testamentary disposition to a trust established or to be established. It may be established by the testator, by the testator and some other person or persons or by some other person or persons, if the trust is identified in the will. The terms of the trust must be identified in a written instrument executed before or currently with the execution of the will. A gift may also be made to a trust contained in the valid will of a person who has predeceased the testator.

[19] Subsections (2) and (3) of section 2 make it clear that additions to a trust may be made through designation of a trust as a beneficiary outside a will, including life insurance, RRSP's, RRIF's, TFSA's, pensions, and other instruments in which a person may designate a beneficiary. Subsection (2) was in the original Act; subsection (3) is new, as is the definition of "plan" in section 1.

[20] Subsection (4) of section 2 states that the disposition made under subsection (1) shall not be invalid because the trust is amendable or revocable or was amended after the execution of the will or after the death of the testator.

[21] Section 3 provides that property be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of that trust, and not held as a separate testamentary trust. Amendments to the trust before the death of the testator are valid, and any amendments to the trust after the death of the testator would also be valid unless the will of the testator shows a contrary intent.

[22] Section 4 provides that the revocation or termination of a trust to which a testator has disposed property before the death of the testator shall cause the disposition to lapse.

[23] Section 5 is different from the 1968 section. The 1968 Act provided that the Act was not retroactive. This is changed to allow a pour over disposition in a will made prior to the Act, but only if the testator died after the effective date of the Act.

Testamentary Additions to Trusts Act (2019)

1. In this Act:
"**disposition**" includes a bequest, a legacy, a devise and the exercise of a power of appointment;

"**plan**" means:

a. a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees, former employees, agents or former agents of an employer or their dependants or beneficiaries, whether created by or pursuant to a statute or otherwise,

b. a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term or under which money is paid for the purpose of providing, on the happening of a specified event, for the purchase of, or the payment of, an annuity for life or for a fixed or variable term, whether created before or after this section comes into force,

c. a registered retirement savings plan or registered retirement income fund as defined in the *Income Tax Act* (Canada),

d. a Tax Free Savings Account within the meaning of section 146.2 of the *Income Tax Act* (Canada), or

e. a fund, trust, scheme, contract or arrangement prescribed in the regulations.

Comment:

The definition of "disposition" is intended to update the use of the terms "devise" and "bequest" in the original Act, and to include the use of the exercise of a power of appointment. Each jurisdiction will need to determine whether they wish to retain the reference to devise and bequeath or use another term such as "gift".

The definition of "plan" is included for the purpose of subsection 2(3).

2. (1) A testator may by will make a disposition, the validity of which is determinable by the law of (name of province), to the trustee or trustees of a trust established or to be established

a. By the testator;
b. By the testator and some other person or persons; or
c. By some other person or persons,

if the trust, regardless of the existence, size or character of the corpus thereof, is

identified in the will of the testator and the terms of the trust are set forth;

d. In a written instrument, other than a will, executed before or currently with the will of the testator; or

e. In the valid last will of a person who has predeceased the testator.

Comment:

The wording removes any doubt that the receptacle trust can be one established not only by the testator or by the testator and another or others, but also by a person or persons other than the testator.

The Act requires that the trust instrument, in the case of a pour-over to an *inter vivos* trust, actually had been executed before or contemporaneously with the will. Parenthetically, it should be noted that where a trust and a pour-over will are executed at the same time as integral parts of an estate plan, testators and their counsel are relieved from the necessity of making certain that the trust has been executed before the pour-over will. The pour-over is valid under this provision as long as the signing of both instruments takes place as part of the same transaction.

The phrase 'or to be established' would seem to contemplate trusts created after the execution of the will, an apparent inconsistency with language which appears later in the Act. Actually, it has a different meaning and was deliberately included for a different reason. It recognizes any distinction which may exist between trusts established by a written instrument and trusts established when the corpus is added sometime after the trust instrument is written (such as an insurance trust) and is intended to cover both situations.

A potentially troublesome problem in the application of the doctrine of independent significance was just how large, relatively speaking, the corpus of a pour-over trust had to be before it was significant enough to support the pour-over. The Uniform Act removes any requirement of testing the independent significance of the corpus of the receptacle trust. In fact, it goes much further. It eliminates the necessity that there be a trust corpus. One might ask if the Uniform Act and any other statutes which contain similar language, 'create a new kind of institution, a trust without a corpus'. This is exactly what the Act does, but it is submitted to those who might be troubled by this result, that it is better to have resolved the problem in this way than to perpetuate the doubts and uncertainties about exactly what is required to support a pour-over.

Subsection (1)e validates pour-overs to the testamentary trusts of others, but limits them to trusts contained in the will of a second testator who has predeceased the testator whose will contains the pour-over, thereby eliminating the possibility of a pour-over to a trust contained in an ambulatory will. While it is not at all clear whether the second testator must have predeceased the testator whose will pours over at the time of the execution of the latter's will or at the time of his death, the

sense of the Act would seem to require the first result. First of all, even though a will has been properly executed by a competent testator, it could be argued that its validity does not become certain until it is admitted to probate without contest. Secondly, since it is the intent of the Act to eliminate the possibility of a pour-over to an ambulatory will, the only way this can be achieved is to validate pour-overs only to wills which can never be changed or revoked because the death of the second testator has intervened.

(2) A trust mentioned in subsection (1) includes a funded or unfunded life insurance trust, notwithstanding that the settlor has reserved any or all rights of ownership of the insurance contract.

Comment:

At common law, under the doctrine of independent significance, the retention and control of some or all of the ownership rights in the insurance contracts, leaving the trustee with the mere expectancy of receiving the insurance proceeds on the death of the insured, may have been enough to deprive the insurance trust of the significance it needed to support a pour-over. This provision in the Act wisely removes any question of the validity of a pour-over to such a trust.

(3) A trust mentioned in subsection (1) includes a funded or unfunded trust for the proceeds of a plan, notwithstanding that the settlor has reserved any or all rights of ownership of the plan.

Comment:

There has been a substantial increase in estate planning tools that allow assets to pass outside of a will. When the ULCC published its report in 1968, one of the few assets that allowed the designation of a beneficiary in an instrument outside a will was life insurance. We now have the ability to designate a beneficiary of Registered Retirement Savings Plans, Registered Retirement Income Funds, Tax Free Savings Accounts, pensions, annuities, (which are defined above as a "plan") and insurance products such as segregated funds as well as RRSP's and RRIF's that meet the definition of insurance under each jurisdiction's insurance legislation. All of this can be accomplished by the signature of the owner, without the necessity of complying with the formalities of wills legislation.

Section 2(2) of the Act was included for the reason outlined in the comment above on that subsection. The same holds true for a "plan" as defined in section 1. This subsection makes it clear that an addition to a trust may be accomplished by a designation of a trustee of a trust which is intended to hold the proceeds of a plan. Provincial insurance statutes govern the designation of beneficiaries of insurance products. Other provincial statutes govern the designation of beneficiaries of non-life insurance products (for example pensions and bank RRSP's). Each jurisdiction will need to determine which statutes require

amendment to implement the recommendations.

(4) A disposition made under subsection (1) shall not be invalid because the trust

a. Is amendable or revocable or both; or

b. Was amended after the execution of the will or after the death of the testator.

Comment:

A pour-over to a revocable, amendable trust is not invalid because the testator amends it during his or her lifetime or another person does so either before or after the testator's death.

3. (1) Where, in accordance with the provisions of section 2, a testator makes a disposition of property to a trustee or trustees, unless the will of the testator otherwise provides, the property so disposed

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 that trust.

Comment:

In brief, there is an actual pour-over and a single, non-testamentary trust results.

The phrase “unless the will of the testator otherwise provides” is included to reserve to the testator the power to provide by his or her will for results other than those contemplated by the provisions which follow it. Without this language, there might have been some doubt as to whether or not the testator was precluded from making other provisions in his or her will.

(2) A trust to which property is disposed by a testator includes

a. Any amendments made thereto before the death of the testator, notwithstanding that the amendments were made before or after the execution of the will of the testator; and

b. Unless the Court, in interpreting the will of the testator, finds that the testator had a contrary intention, any amendments to the trust after the death of the testator.

Comment:

This language is consistent with the intent of the Act to codify an exception to Wills legislation by validating pour-overs to trusts amended after the execution of the pour-over will, including amendments after the death of the testator.

The testator is presumed to be content with the pour-over trust as it stood at the

time of his or her death. However, in also giving initial efficacy to amendments after the death of the testator, this is a change from the 1968 Act which required that the testator include a provision in the pour-over clause allowing for amendments after the death of the testator. A lay person or inexperienced draftsperson may have inadvertently omitted such words, which might well have created more confusion than now exists in the law. It would certainly have created administrative problems in cases where the will was silent, and the trust was amended after the death of the testator. Subsection 3(2)(b) now provides for initial efficacy of amendments after death, unless the will of the testator shows a contrary intent.

This provision adopts the minority view of the 1968 Commissioners that the burden should be on the testator to provide specifically for a limitation on the pour-over if that was his or her intention.

4. The revocation or termination of a trust to which a testator has devised or bequeathed property before the death of the testator shall cause the disposition to lapse.

Comment:

If nothing more, this provision should operate as a caveat to a testator and his or her legal counsel to make proper provisions in the will for alternative disposition of the pour-over property unless the testator is content to have the property pass either by intestacy if the residuary clause of the will contains the pour-over or by the residuary clause if it does not.

5. This Act has no effect upon any disposition made in a will of a person who died prior to the effective date of this Act.

Comment:

Section 5 of the 1968 Act stated that "This Act has no effect upon any devise or bequest made by a will executed prior to the effective date of this Act." The Act was drafted at the time that many of the states in the United States were adopting similar legislation to allow pour-over wills. Practitioners are now encountering US pour-over wills, or Canadian wills that include pour-over provisions for US citizens, or for the benefit of US beneficiaries (such as in the *Quinn* and *Kellogg* cases). Therefore section 5 was amended to recognize such pour-over provisions that were signed prior to the effective date of the Act, but only for the wills of persons who die after the effective date of the Act.

APPENDIX A

1967 Proceedings of the Forty-Ninth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada

(Page 26)

Testamentary Additions to Trusts

Mr. Leal presented the report. of the Ontario Commissioners relating to testamentary additions to trusts (Appendix U, page 207) (See 1966 Proceedings, page 25.) After discussion, the following resolution was adopted:

RESOLVED that the matter of testamentary additions to trusts be referred to the Saskatchewan Commissioners for preparation of a draft Bill, the Commissioners to report at the next meeting of the Conference.

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APPENDIX U

(See page 26)

TESTAMENTARY ADDITIONS TO TRUSTS

The question of testamentary additions to trusts was raised at the 1966 annual meeting of the Conference. After discussion, it was agreed that this subject should be put on the agenda and the Ontario Commissioners were requested to study the subject and to report at the next meeting of the Conference.

It will be admitted at the outset that the problem does not arise frequently in Anglo-Canadian jurisprudence, if one is to judge by the reported cases. This may be attributed to the fact that one sees only the tip of the iceberg, or, again, it may reflect the fact that *inter vivos* trusts are not used as an estate planning device as frequently in this country and in England as they are in the United States. The problem plagued the American courts and estate planners for two decades and

loomed so large that between 1953 and 1961 no less than twenty-two states had passed legislation to remedy the deficiencies of the common law. On August 25, 1960, the National Conference on Uniform State Laws approved the Uniform Testamentary Additions to Trusts Act which was approved in the same year by the American Bar Association. A copy of the Uniform Act is appended hereto as Appendix A. In the period between 1961, the first legislative year in which the Uniform Act was available, and 1964 eighteen states, or approximately one-third, have enacted it. Connecticut, which initiated its own legislation in 1953, subsequently repealed it and adopted the Uniform Act.

The factual situation giving rise to the problem is simply stated. A creates an *inter vivo* trust in proper form in favour of B, the beneficiary. A then dies having executed a will in proper form in which he leaves a legacy of $10,000 to T, the trustee of the *inter vivos* trust, such legacy to form part of the r*es* of the *inter vivos* trust and to be administered and distributed in accordance with the terms of the trust. Where the *inter vivos* trust is irrevocable and not subject to being amended or altered in any particular, no problem arises at common law either in the United States, the United Kingdom or the common law jurisdictions in this country.

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In *Re Playfair,* [1951] Ch. 4 A, the testator, by his will left £20,000 to T, the trustee of an *inter vivos* trust made by him in 1888, to be "held by them on the trusts of the said settlement." The *inter vivos* trust was irrevocable. During argument, attention was directed to the point whether the legacy was an accretion to the sum settled by the *inter vivos* trust or whether the terms of the trust were incorporated in the will as to this £20,000, i.e. a referential trust. It made a difference because A's son who took under the *inter vivos* trust predeceased the testator but he had a vested interest under the trust. If the £20,000 fell to be distributed under the will, as the law then stood in England, there would have been a lapse. The court held that the legacy was an accretion to the *inter vivos* trust and the son's estate was entitled to the legacy. In the judgment no reference was made to the doctrine of incorporation by reference. This was significant as will be seen in what follows in this report.

Difficulty arises if we assume the same factual situation as in *Re Playfair,* except that the *inter vivos* trust was revocable. The courts here get into a conceptual snarl in applying the doctrine of incorporation by reference: see *In re Edwards' Will Trusts,* [1948) Ch. 440; *In re Schintz' Will Trusts, Lloyds Bank Ltd. v. Moreton,* [1951) Ch. 870. The doctrine of incorporation by reference is a probate doctrine and enables documents to be included as part of a will even though not executed in accordance with the formalities prescribed by the Wills Act. The prerequisites in applying the doctrine are: (1) that the reference in the will must show that the testator intended to incorporate the extrinsic document into the will; (2)

the language of the will must be such that it refers to the extrinsic document as one already in existence at the time of the execution of the will; (3) the reference in the will must be sufficiently specific that it identifies the extrinsic document with reasonable certainty; (4) the document offered must be proven satisfactorily to be the one. referred to in the will; and (5) there must be satisfactory proof that the document was actually in existence at the time of the execution of the will: see *Allen v. Maddock* (1858), 11 Moore P.C. 427.

It is clear law that a document not existing in unalterable form at the date of the execution of the will cannot be incorporated into the will. The Courts have stated that a testator cannot by his will create for himself a power to dispose of his property by an instrument not executed as a will or codicil:

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Johnson v. Ball (1851), 5 DeG. & Sm. 85; *In Bonis Smart,* [1902] 238. One wonders what special magic lies in the formalities prescribed for the execution of wills as contrasted with those concerning *inter vivos* trusts. The fact that the settlor is parting with his property during his lifetime is a matter sufficiently serious to ensure that the proprieties are observed.

The fact remains, however, that the Anglo-Canadian courts will not permit a legacy to a revocable *inter vivos* trust even though the trust remains unaltered and unrevoked up to the death of the testator. Some of the American courts, with faltering steps, have upheld the validity of "pour-over" from a will to a revocable *inter vivos* trust even though the trust has been altered in the period between the date of execution of the will and the death of the testator. This has been accomplished by resorting to the doctrine of "facts of independent significance" or what may amount to the same thing, of "the trust being a legal entity."

The doctrine of "facts of independent significance" is not new in our law. There are a number of instances where the court will resort to extrinsic evidence to establish the identity of a beneficiary or the subject matter of a legacy or a devise For example, if A leaves a legacy of $1,000 to the person employed as his chauffeur at the date of his death, the court will admit evidence to establish the identity of the legatee. It may not be the same person employed by the testator in that capacity at the date of the execution of the will. The testator is not engaged in the process of discharging one chauffeur and hiring another for the purpose of altering his testamentary disposition. Similarly, the testator who leaves the balance in a designated bank account to a named beneficiary, may deposit and withdraw from that account during his lifetime, thus altering the bequest, without any design on

changing his will, though this is clearly the result of his conduct. These are facts of independent significance.

The American courts have applied this doctrine to uphold the validity of bequests and devises to revocable *inter vivos* trusts even in those cases where the trust has been amended in the period between the date of the execution of the will and the date of the death of the testator. The existence of the trust as a full- blown legal institution and not an empty shell is a fact of independent significance. It has been posited that if the only purpose served by the extrinsic document is to dispose of property under

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the will, then it has no significance independent of the will and the attempted disposition is invalid because of the failure of the testator to comply with the formalities prescribed by the Wills Act, so far as the extrinsic document is concerned.

In the factual situation posed, it is demonstrably false in any event for the court to say that the testator is seeking to incorporate the terms of the revocable *inter vivos* trust into his will. He may, of course, in a totally different factual situation intend to do just that, but in that event, one ends up with a testamentary trustee(s) administering and distributing a testamentary trust, which in a strikingly different result.

The American courts occasionally have validated a bequest to a revocable *inter vivos* trust on the ground that the trust is a legal entity and therefore capable of receiving a bequest from the will of the testator in the same way as an individual orally other legal entity. The application of this doctrine accomplishes the same result and is conceptually very close to that which validates the legacy on the ground that existence of the trust is a fact of independent significance.

Even the most flexible and venturesome approach adopted by some of the courts in moulding common law principles to evolving situations left some problems unresolved and frustrated the legitimate aspirations of the estate planners. For example, there remained the problem of a legacy to the revocable *inter vivos* trust which was revoked by the testator before bis death but subsequent to the making of

the will. A similar difficulty arose when the testator left a legacy to a revocable *inter vivas* trust created by another and the settlor revoked the trust prior to the death of the testator. Would the legacy still be effective if the settler, to whose trust a legacy had been bequeathed, revoked the trust after the death of the testator? These and other unresolved problems are discussed in a helpful monograph by Osgood, "The Law of Pour Overs and the Uniform Testamentary Addition to Trusts Acts" (1964 unpublished).

Osgood's monograph contains an extensive bibliography and the text of a number of the American "pour-over" statutes which predated the Uniform Act. It also contains a phrase by phrase commentary on the provisions of section 1 of the latter Act which is reproduced here to facilitate analysis.

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"Section 1

'A devise or bequest,

One Commissioner suggested that the Act be broadened to include specifically the exercise of a power of appointment as some states have done. This suggestion was rejected on the ground that the above language include the exercise of a power of appointment by will and that any attempt to include other powers of appointment would create additional problems the Act was not intended to solve.

'the validity of which is determinable by the law of this state,

This phrase was included at the suggestion of Professor Bogert to avoid any question in the conflicts of law area as to whether or not a particular state was attempting to reach out into the laws of other states. The phrase as originally suggested used the word 'determined' which the Committee replaced with 'determinable' so that it was clear that the Act applies not only to accomplished but also to prospective testamentary dispositions as well.

'may be made by a will to the trustee or trustees of a trust established or to be established

The phrase 'or to be established' would seem to contemplate trusts created after the execution of the will, an apparent inconsistency with language which appears later in the Act. Actually, it has a different meaning and was deliberately included for a different reason. It recognizes any distinction which may exist between trusts established by a written instrument and trusts established when the corpus is added sometime after the trust instrument is written, and is intended to cover both situations.

'by the testator or by the testator and some other person or persons or by some other person or persons

The original draft of the Act contained the phrase 'by the testator' and/or some other person or persons', which the Committee expanded to its final form, first of all to eliminate the objectionable use of the couplet 'and/or', and secondly, to remove any doubt that the receptacle trust can be one established not only by the testator or by the testator and another or others, but also by a person or persons other than the testator.

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'(including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts)

At common law, under the doctrine of independent significance, the retention and control of some or all of the ownership rights in the insurance contracts, leaving the trustee with the mere expectancy of receiving the insurance proceeds on the death of the insured, may have been enough to deprive the insurance trust of the significance it needed to support a pour-over. This provision in the Act wisely removes any question of the validity of a pour-over to such a trust.

'if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than will) executed before or concurrently with the execution of the testator's will.

Thus the Act requires that the trust instrument, in the case of a pour-over to an *inter vivos* trust, actually had been executed before or contemporaneously with the will. Parenthetically, it should be noted that where a trust and a pour-over will are executed at the same time as integral parts of an estate plan, testators and their counsel are relieved from the necessity of making certain that the trust has been executed before the pour- over will. The pour-over is valid under this provision as long as the signing of both instruments takes place as part of the same transaction.

'or in the valid last will of a person who has predeceased the testator

This provision validates pour-overs to the testamentary trusts of others, but limits them to trusts contained in the will of a second testator who has predeceased the testator whose will contains the pour-over, thereby eliminating the possibility of a pour-over to a trust contained in an ambulatory will. While it is not at all clear whether the second testator must have pre-deceased the testator whose will pours over at the time of the execution of the latter's will or at the time of his death, the sense of the Act would seem to require the first result. First of all, even though a will has been properly executed by a competent testator, it could be argued that its validity does not become certain until it is admitted to probate without contest. Secondly,

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since it would appear to be the intent of the Act to eliminate the possibility of a pour-over to an ambulatory will, the only way this can be achieved is to validate pour-overs only to wills which can never be changed or revoked because the death of the testator has intervened. Unfortunately, the proceedings of the Commissioners shed no light on this question and it may someday come before a court for its interpretation and adjudication.

'(regardless of the existence, size or character of the corpus of the trust.)

A potentially troublesome problem in the application of the doctrine of independent significance was just how large, relatively speaking, the corpus of a pour-over trust

had to be before it was significant enough to support the pour-over. The Uniform Act removes any requirement of testing the independent significance of the corpus of the receptacle trust. In fact, it goes much further. It eliminates the necessity that there be a trust corpus. Professor Hawley has been quite critical of this provision. In his words,

> '... a trust without a corpus is nothing at all... - [By) definition a trust is a method of holding property, so that a trust with no assets does not exist. It has no legal significance, much less any independent significance.'

He goes on to ask if the Uniform Act and any other statutes which contain similar language, 'create a new kind of institution, a trust without a corpus' This appears to be exactly what the Act does, but it is submitted to those who might be troubled by this result, that it is better to have resolved the problem in this way than to perpetuate the doubts and uncertainties about exactly what is required to support a pour-over.

'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

This is a significant provision. It codifies a position which many courts and even a few legislatures have been unwilling to take. However, this provision does not stand for all that. it would appear to, as it is qualified by or at least must be read together with provisions of the Act that follow. All that this provision says is that a pour-over to a revocable, amendable trust is not invalid because the testator amends it during his lifetime or

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another does so either before or after the testator's death. 1t does not determine the effect of the amendment on the pour- over.

'Unless the testator's will provides otherwise,

By the inclusion of this clause, the Act reserves to the testator the power to provide by his will for results other than those contemplated by the provisions which follow it. Without this language, there might have been some doubt as to whether or not the testator was precluded from making other provisions in in his will.

'the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given

In brief, there is an actual pour-over and a single, non-testamentary trust results.

'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),

This language is consistent with the intent of the Act to codify an exception to the Statute of Wills by validating pour-overs to trusts amended after the execution of the pour-over will.

'and, if the testator's will so provides, including any amendments to the trust made after the death of the testator

This provision proved to be by far the most troublesome and controversial in the course of the Conference proceedings.

Several commissioners argued forcefully that the pour-over should be complete, not partial, that the burden should be on the testator to provide specifically for a limitation on the pour-over if that was his intention, that this provision might well create more confusion than now exists in the law, and that it would certainly create administrative problems in cases where the will was silent and the trust was amended after the death of the testator. For instance, asked one of the Commissioners, what

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happens to the pour-over property when, after the testator's death, another who has the power to amend the trust exercises it for the purpose of replacing the incumbent trustee with another? In spite of the persuasive arguments advanced by the Commissioners who opposed the inclusion of this provision, their motion which would have had the effect of deleting it was defeated by a vote of 33 to 20. The position of the majority is sound. Despite the difficult administrative problems which might arise if there were an amendment subsequent to the testator's death, the language of the Act as finally adopted affords him better protection against his or his counsel's failure to give proper consideration to the possibility of subsequent amendments. The testator is presumed to be content with the pour-over trust as it stood at the time of his death, whereas amendments made after his death might have been very unsatisfactory and displeasing to him. Yet, the Act does not close the door. It gives him the opportunity to bestow upon another the power to make amendments after his death which may affect the use and disposition of his property. If this is what he wishes, he need only to provide for it in his will.

'A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse'

If nothing more, this provision should operate as a caveat to a testator and his attorney to make proper provisions in the farmer's will for alternative disposition of the pour-over property unless they are content to have the property pass either by intestacy if the residuary clause of the will contains the pour-over or by the residuary clause if it does not.

The Commissioners had considerable difficulty in arriving at the language in section 2 of the Act, but finally adopted the following:

'This Act shall have no effect upon any devise or bequest made prior to a will executed prior to the effective date of this Act'

Not only did the Commissioners not want the Act to have any retroactive effect, but they also did not want to infer [sic] in this section that it was declaratory of the

existing law in a juris- diction where it was not the law prior to its enactment or that it changed the law in a jurisdiction where it a1ready was the law.

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Actually, their difficulty in drafting section 2 stemmed from the fact that in many jurisdictions, no one knew what the law was, so that the Commissioners could not tell what effect any declaration might have. By a vote of 28 to 25, they decided to say nothing more than what appears in the section as finally adopted.

Sections 3, 4, 5, and 6 of the Act, the standard formal sections, were adopted by the Committee without comment or question.

It is recommended that the Conference direct the preparation of a draft modelled on the American Uniform Act for discussion at the next annual meeting. It will be appreciated that this legislation need not form the subject of a separate statute but might be added as a section(s) to the Uniform Wills Act or form part of the Trustee Act or its equivalent in the various provinces.

H. ALLAN LEAL,

of the Ontario Commissioners.

APPENDIX B

1968 Proceedings of the Fiftieth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada

(Page 30)

Testamentary Additions to Trusts

Mr. Balkaran presented the report of the Saskatchewan Commissioners on Testamentary Additions to Trusts (Appendix Q, page. 165) After discussion, the following resolution was adopted:

RESOLVED that the matter of Testamentary Additions to Trusts be ref erred back to the Saskatchewan Commissioners with a request that they prepare a draft Testamentary Additions to Trusts Act in accordance with the decisions arrived at this meeting, that the draft be sent to each of the Local Secretaries for distribution by them to the Commissioners in their respective jurisdictions, and that, if the draft is .not disapproved by two or more jurisdictions .by notice to the Secretary of the Conference on or before the 30th day of November, 1968, it be recommended for enactment in that form.

Note: - Copies of the draft Act were distributed in accordance with the above resolution. Disapprovals by two or more jurisdictions were not received by the Secretary by November 30, 1968, the draft Act as adopted and recommended is set out *in* Appendix R, page 167

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APPENDIX Q

(See page 30)

TESTAMENTARY ADDITIONS TO TRUSTS

REPORT OF THE SASKATCHEWAN COMMISSIONERS

At the 1967 annual meeting of the Conference held at St. John's, Newfoundland, Mr. Allan Leal presented the Report of the Ontario Commissioners on the subject of testamentary additions *to* trusts. (See 1967 Proceedings at p. 207 et seq.). After discussion a resolution was passed referring the matter to the Saskatchewan Commissioners for preparation of a draft Bill for consideration at the 1968 meeting of the Conference. (See:1967 Proceedings at p. 26). A copy of the draft Bill is appended hereto as Appendix A

In the draft Bill the Saskatchewan Commissioners have followed very closely the text of the model American Uniform Act. However, section 1of that Act has been broken down into a number of sections and subsections in an effort to facilitate the reading and understanding of the Bill.

All of which is respectfully submitted.

ANDREW C. BALK.ARAN

for the Saskatchewan Commissioners

Appendix A

TESTAMENTARY ADDITIONS TO TRUSTS ACT

Short title

1. This Act may be cited as the Testamentary Additions to Trusts Act.

Testamentary additions to trusts

2. (1) A testator may by will make a devise or bequeath, the validity of which is determinable by the law of (name of province), to the trustee or trustees of a trust established or to be established

(a) by the testator;

(b) by the testator and some other person or persons; or

(c) by some other person or persons,

if the trust, regardless of the existence, size or character of the corpus thereof, is identified in the will of the testator and the terms of the trust are set forth;

(d) in a written instrument, other than a will, executed before or concurrently with the will of the testator; or

(e) in the valid last will of a person who has predeceased the testator.

Trust Includes life insurance trust

(2) A trust mentioned in subsection (1) includes a funded or unfunded life insurance trust, notwithstanding that the trustor has reserved any or all rights of ownership of the insurance contract.

Amendable trust not to invalidate devise or bequest

(3) A devise or bequest made under subsection (1) shall not be invalid because the trust

(a) is amendable or revocable or both; or

(b) was amended after the execution of the will, or after the death of the testator.

Property devised to trust becomes part of and administered in accordance with terms the trust

3. (1) Where, in accordance with the provisions of section 2, a testator devises or bequeaths property to a trustee or trustees, unless the will of the testator otherwise provides, 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.

(2) A trust to ·which property. is devised or bequeathed by a testator includes

Trust Includes amendments thereto

(a) any amendments made thereto before the death of the testator, notwithstanding that the amendments were made before or after the execution of the will of the testator; and

(b) where the will of the testator so provides, any amendments to the trust after the death of the testator.

Laps or devise or bequest

4. The revocation or termination of a trust to which a testator has devised or bequeathed property before the death of the testator shall cause the devise or bequest to lapse.

Effect on prior wills

5. This Act has no effect upon any devise. or bequest made by a will executed prior to the effective date of this Act.

Uniformity of interpretation

6. This Act shall be so construed as to effectuate its general purpose to make uniform the law of those provinces which enact it.

Appendix D

Draft Uniform Testamentary Additions to Trusts Act

1. This Act may be cited as the *Uniform Testamentary Additions to Trusts Act*.

2. (1) A testator may by will make a devise or bequest, the validity of which is determinable by the law of [name of the enacting jurisdiction], to the trustee or trustees of a trust established or to be established

a. by the testator;

b. by the testator and some other person or persons; or

c. by some other person or persons, if the trust, regardless of the existence, size or character of the corpus thereof, is identified in the will of the testator and the terms of the trust are set forth;

d. in a written instrument, other than a will, executed before or currently with the will of the testator; or

e. in the valid last will of a person who has predeceased the testator.

(2) A trust mentioned in subsection (1) includes a funded or unfunded life insurance trust, notwithstanding that the trustor has reserved any or all rights of ownership of the insurance contract.

(3) In this Act "plan" means:

a. a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees, former employees, agents or former agents of an employer or their dependants or beneficiaries, whether created by or pursuant to a statute or otherwise,

b. a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term or under which money is paid for the purpose of providing, on the happening of a specified event, for the purchase of, or the payment of, an annuity for life or for a fixed or variable term, whether created before or after this section comes into force,

c. a registered retirement savings plan or registered retirement income fund as defined in the *Income Tax Act* (Canada),

d. a Tax-Free Savings Account within the meaning of section 146.2 of the *Income Tax Act* (Canada), or

e. a fund, trust, scheme, contract or arrangement prescribed in the regulations.

(4) A trust mentioned in subsection (1) includes a funded or unfunded trust for the proceeds of a plan, notwithstanding that the trustor has reserved any or all rights of ownership of the plan.

(5) Subsection (4) does not apply to a contract or to a designation of a beneficiary to which the Insurance *Act* applies.

(6) A devise or bequest made under subsection (1) shall not be invalid because the trust

a. is amendable or revocable or both; or

b. was amended after the execution of the will or after the death of the testator.

3. (1) Where, in accordance with the provisions of section 2, a testator devises or bequeaths property to a trustee or trustees, unless the will of the testator otherwise provides, 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 that trust.

(2) A trust to which property is devised or bequeathed by a testator includes

a. any amendments made thereto before the death of the testator, notwithstanding that the amendments were made before or after the execution of the will of the testator; and

b. where the will of the testator so provides, any amendments to the trust after the death of the testator.

4. The revocation or termination of a trust to which a testator has devised or bequeathed property before the death of the testator shall cause the devise or bequest to lapse.

5. This Act has no effect upon any devise or bequest made in a will of a person who died prior to the effective date of this Act.

6. This Act shall be so construed as to effectuate its general purpose to make uniform the law of those jurisdictions which enact it.

7. The Testamentary Additions to Trusts Act, 1968 is withdrawn.

8. This Act comes into force on [assent, proclamation, specific or future date or according to the practice of the jurisdiction].