"POUR-OVER"FROM A WILL TO AN INTER VIVOS TRUST

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I. INTRODUCTION

FREEDOM TO DISPOSE OF PROPERTY BY WILL

The freedom to dispose of property by will has been entrenched in the English law for many centuries now, and in Canada we enjoy that same freedom. It was with the intention of preventing frauds and insuring that this freedom was not abused that the Statute of Wills of 1540, the Statute of Frauds of 1677 (providing for attestation and that Wills of personalty be in writing), and the Wills Act of 1837 were passed. Clearly, the license to devise and bequeath property requires that the law protect rightful heirs from fraudelent wills. Thus, like many freedoms, we find the freedom to dispose of property by will circumscribed and limited by the necessity of complying with legal formalaties. The policy of the law in this regard was sound at its inception and remains beneficial to this day.

Accepting, then, that the freedom to dispose of property by will is not absolute but requires compliance with certain formalities, the issues in individual cases are often reduced (and rightfully so) to the judicial determination of the requisite degree of that compliance. It is in this light that the so-called pour-over will arises in our law.

WHAT IS A POUR-OVER WILL

A pour-overwill is simply a will which, either with or without other directions and bequests, "pours-over" the testator's property to an inter-vivos or "living" trust. The trust may or may not be one created by the testator; it may or may not be revocable; it may or may not contain powers of amendment or modification in favour of the settlor.

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REASONS FOR POUR-OVERS

The reasons favouring creation of an inter-vivos trust with a pour-over will may be summarized as follows:[1]

1. Unification of administration of trust and probate corpus, in that management of the trust property will not be interrupted by the death of the settlor;
2. Minimization of administration expenses;
3. Avoidance of costly court supervision and accounting procedures required of the testamentary trustee;
4. More flexibility of administration, in that the consolidated trust and estate corpus leads to greater diversification and less risk;
5. Minimization of income, trust, estate and inheritance taxes;
6. Greater degree of certainty over trust amendments;
7. Grantor of trust is able to determine the competency and discretion of the trustee who will manage the property after the grantor's death;
8. Avoidance of any family publicity attaching to the probate of the will;
9. Avoidance of ancillary administration of estate assets located in another jurisdiction;
10. Creditors may find greater difficulty in reaching trust property than nontrust property;
11. Any heirs who contest the will may find it more difficult to upset a long established trust than a will;
12. Choice of jurisdiction in which the trust is to be administered. This choice is severely limited in the case of testamentary trusts in jurisdictions in which the courts have retained control over testamentary trusts (e.g. California).

Without debating the efficacy of any of these reasons, this paper will deal with some problems that arise in the use of pour-overs. There is little, if any, Canadian legal writing on this subject, but it is by no means a new problem to our law. On the other hand, copious material has been published on the topic in the United States and it is from that material that most of the research for this paper was done. In addition to legal writing and judicial pronouncements, the Americans have seen fit to enact statutes in

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1 *See* Kajan, *Pour-Over Trust*, 13 Clev.-Mar. L. Rev. 544, 557 (1964).

many jurisdictions[2] attempting to obviate some of the problems that have arisen.

II. VALIDITY OF POUR-OVERS

The central issue is whether a testator may by a properly executed will direct that his executors pay over to the trustees of a trust previously established (or in fact created later) all or part of his property, to be dealt with in accordance with the terms of the trust. In most cases the trust will not have been executed in accordance with the formalities required by the Wills Act. It is with such trusts that this paper will deal. Also of concern is whether the trust is revocable or irrevocable and whether it is amendable or unamendable. Basically, this matter gives rise to a discussion of the doctrine of incorporation by reference and the doctrine of facts of independent legal significance. It would seem that there are no problems if the testator repeats the terms of the trust in the will itself.

A. *POUR-OVER TO AN IRREVOCABLE AND UNAMENDABLE TRUST*

Where a trust is irrevocable and unamendable no problem arises. A disposition to such a trust is valid. This rule is true for the United States, Canada and England.[3] So long as the trust is in existence and the will refers to it as a presently existing document then it will be incorporated by reference. *In re Johnson*[4] seemed to uphold the pour-over on the grounds of a gift to a distinct and separate entity, namely, U.B.C. If the trust is not in existence at the making of the will but is created subsequently there can be no incorporation by reference. Scott maintains[5] that such wills should be upheld on the doctrine of facts of independent significance. This matter will be dealt with more fully in connection with the revocable trust.

B. *POUR-OVER TO A REVOCABLE OR AMENDABLE TRUST*

Real difficulties arise where the pour-over is to a revocable or amendable trust. The difficulties are compounded if the trust is in fact amended before the testator's death. Thus the inquiry

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2 Either the Uniform Testamentary Additions to Trusts Act, promulgated in 1960, or amendments to existing statutes which substantially embody its provisions have been adopted in all 50 states.

3 *In Matter of Rausch*, 258 N.Y. 327, 179 N.E. 755 (1932); *In re Johnson* (1961), 30 D.L.R. (2d) 474; *In re Playfair*, [1951] Ch. 4

4 (1961), 30 D.L.R. (2d) 474.

5 1 Scott, *The Law of Trusts* 391 (3rd ed. 1967).

into this problem must commence with the question: Can there be a legal pour-over to an amendable living trust? Only if this question is answered affirmatively need inquiry go further to see if a subsequent amendment affects what would otherwise be a valid disposition.

For Canadians, the words of H. Allan Leal, Q.C., former Dean of Osgoode Hall, and sometime Chairman of the Ontario Law Reform Commission, are noteworthy on this question. Referring to the question of pour-overs to a revocable or amendable trust he said ". . . under present decisions it probably cannot be done with safety and should not be attempted."[6] He based his conclusion on the English decision of *In The Goods of Smart.*[7] In this case the pour-over was held invalid on the grounds that the trust document was "future" and thus not a "presently existing document" as required by the doctrine of incorporation by reference. To the like effect is *University College of North Wales* v. *Taylor,*[8] where a testator left property to the University subject to such rules "as are contained in any memorandum amongst my papers written or signed by me relating thereto". Even though evidence was adduced to show that a memorandum was in existence in 1905 when the will was made, the Court held there could be no incorporation because the testator clearly *intended* to include any rules made by him up to the moment of death.

In *In Re Hardy,*[9] the Nova Scotia Supreme Court held that a testator could not make a gift by his will to trustees of a valid and subsisting trust and give instructions as to its disposition at a later date, either by parol or in writing. The judgment cites the English decision of *In Re Jones*[10] as an authority for this proposition. It was pointed out in the *Hardy* case that there was no presently existing document to be incorporated at the date of the will. Indeed, the basic issue centred around the disposition made in the will to the executors, who were given a power to appoint such property. According to the evidence of the solicitor who drew the will the power was to be exercised only in accordance with and upon the instructions of the testator.

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6 Leal, *The Revocable Trust and Pour Over Wills*, 1 Real Prop. Prob. &Tr. J. 286 (1966).

7 [1902] p. 238.

8 [1908] p. 140.

9 [1952] 2 D.L.R. 768.

10 [1942] Ch. 328.

There may be some doubt as to the accuracy of Dean Leal's conclusion in view of some English and American decisions. There can, however, be no question about the accuracy of his exhortation for proceeding with caution in this area.

1. *English Decisions*

There is a trilogy of English cases that bear on this matter. The first is *In Re Jones.*[11] In this case the testator made a bequest to trustees on the trusts contained in the document "executed by me bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute". A deed poll appointing the trusts was executed the same day as the will, though it is not clear whether before or after the will. The Court held the bequest ineffective even though the trust instrument had not been changed after execution of the will. The decision was based primarily on the rule that evidence of documents which might have come into existence after the will was executed could not be admitted, *i.e.*, the Court could look only to the will itself. Thus, the Court was left with the original documents, which contemplated the possibility of future documents. This uncertainty left the bequest invalid. The decision, said the Court, was one of principle and was arrived at even though counsel for the trustees pointed out that the trust had *not* in fact been altered.

One writer has termed the rationale of this decision "refined nonsense".[12] One is tempted to agree with his conclusion. Yet the decision does not by any means rule out the pour-over will. Indeed, the Court suggested that if the will had been worded a little differently the result might have been avoided, for although the validity of any later amendments was rejected, the concept of incorporation was accepted. Simonds J. said:

> I must add, for the sake of clarity, that a somewhat different form of words in the gift may lead to a different conclusion. If, for instance, the testator directs his trustees to hold a sum of money on the trusts of an existing indentifiable document, unless he substitutes some other document therefor, it may be that evidence is admissible to show whether or not he has purported to substitute a new document, and that the original gift will stand or fall accordingly; though in no event could the trusts of the new document have testamentary validity. In such a case, the substitution of the new document might perhaps be treated like any other event or condition mentioned by the testator; as, for example, "unless I shall before my death have gone to Rome". That is clearly distinguishable from the present case.[13]

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11 *Ibid.*

12 Palmer, *Testamentary Disposition to the Trustee of an Inter-Vivos Trust*, 50 Mich. L. Rev. 33 (1951).

13 [1942] Ch. 328, 331.

The next decision is *In Re Edwards Will Trust, Dalgleish* v. *Leighton.*[14] Here, the Court of Appeal very clearly accepted incorporation by reference of an amendable inter-vivos trust. It is instructive to analyze this case with some care. The facts may be summarized as follows: On October 16, 1936, the testator executed an inter-vivos trust settling 100 pounds. Clause 2 of the trust instrument directed that the trust fund and income be paid as the settlor might by subsequent memorandum direct and, in default, then to such persons as the managing trustee in his discretion might direct. Clause 3 of the trust stated that "subject to the provisions of the preceding clause" the trust fund and one-half of the income therefrom were to be held for the benefit of the wife during her life and then to children at age twenty-one. On the same day, the testator executed a will and gave all residuary property to trustees of settlement "subject to the powers and provisions therein declared and contained so far as such trusts, powers and provisions are subsisting and capable of taking effect". On December 21, 1937, the testator executed a memorandum directing the trustees of the settlement to raise out of the proceeds and subject to the trusts many thousands of pounds. At this point there was yet only 100 pounds in the trust. On the death of the testator, subsequent to those events, the validity of the will was questioned.

In the Court below[15] Jenkins J. had held that the will was not valid since both clauses 2 and 3 of the trust could not be validly incorporated in the will.

The Court of Appeal (Lord Greene M.R., Somervell and Cohen L.JJ.) held the will valid.[16] Lord Greene M.R. found:

1. The testator had made his testamentary wishes clear.
2. The entire trust could be incorporated in the will by reference since there was no problem of identification.
3. Since the document was in existence at the date of the will there would be no problem in leading evidence to identify it.
4. Once the entire trust was read as part of the will then it became necessary to see if each clause was valid.
5. Clause 2 was not valid but this did not affect the validity of clause 3 of the trust, which had been incorporated.

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14 [1948] 1 All E.R. 821.

15 [1947] 2 All E.R. 521.

16 [1948] 1 All E.R. 821.

In his judgment Lord Greene said:

> The result of his having in that identifiable document included something which the law does not allow to have effect is a matter to be considered after probate when the question of the validity of his testamentary dispositions arises. The result, therefore, is that we have here, so to speak, a composite will consisting of a combination of the provisions of the actual will itself plus those of the settlement.
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> . . . I read the words "subject to the provisions of the preceding clause" at the beginning of cl. 3 in what appears to me to be the natural meaning, *viz.* in so far as under the provisions of the preceding clause the residuary estate shall not have been effectively dealt with in fact, but also effectively dealt with in law, and, in so far as an attempt under cl. 2 to deal with the property fails, not from any lack of intention on the part of the testator or any insufficiency of language, but because some rule of law makes it incapable of achievement, then I think the words "subject to the provisions of the preceding clause" are apt to meet such a case. If there has been no effective disposition of the residue under cl. 2, which as a matter of law there could not be, cl. 3 has its natural effect.
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> . . . It seems to me that the directions for incorporation are directions to read into the will the entirety of a document which the testator, no doubt, thought would be effective, but if, on writing them into the will, it turns out that part of them is invalid from some rule of law, as in the present case, I cannot read the testator's directions as meaning that, therefore, the whole process of incorporation must be abandoned.[17]

It is interesting to note that two different writers have arrived at two diametrically opposed conclusions on the effect of *In Re Edwards Will Trust.* Professor Palmer cites it as authority for allowing pour-overs to an amendable trust.[18] Professor Lauritzen cites it as authority for the opposite conclusion.[19] Before drawing any conclusion, one should first look at *In Re Schintz's Will Trust*,[20] which is the third case in the trilogy of English decisions and was decided subsequent to the articles of Professors Palmer and Lauritzen.

The *Schintz* decision attempts a rationalization of the decisions in *In Re Jones* and in *In Re Edwards Will Trust.* In the *Schintz* case a settlor reserved to himself in the deed of settlement power "at any time 'by deed' revocable and irrevocable" to declare further trusts for the benefit of named persons and for that purpose to revoke the provisions of the settlement. Subsequently he made a will and directed that shares of his residuary estate should be held by the trustees of the settlement on the trusts therein declared and the

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17 *Id.*, 824-25.

18 Palmer, *supra* note 12, at 42.

19 Lauritzen, *Can a Revocable Trust be Incorporated by Reference?*, 45 Ill. L. Rev. 583 (1950).

20 [1951] Ch. 870.

deed or deeds which might "hereafter be executed under the power of revocation and declaration of new trusts thereby reserved or as near thereto as circumstances will admit".

The court held that the gifts of the residue were valid and they incorporated the whole of the trusts of the settlement. This incorporation included the reserved power of the settlor of the trust to declare new trusts by subsequent deeds, but, since such power offended against the Wills Act of 1837, it was ineffective. This did not, however, affect the validity of the other incorporated trusts. The Court analyzed the decision in *In Re Jones* and pointed out that the powers that had been reserved in that case were much broader than the ones reserved in the case before it. Indeed, the Court seemed to place great emphasis upon the power which had been contained in the *Jones* case of substitution for the original trusts. Although this is a valid point insofar as the breadth of the reservation is concerned, nonetheless clause 10 of the deed of settlement in the *Schintz* case did not allow for completely new trusts to be created; indeed, the words of clause 10 were to the effect that the settlor could change the trusts and for that purpose "wholly or partially to revoke and make void the trusts, powers and provisions herein declared".

Logically, it is difficult to see why the difference in wording of the amending power should be very significant in the legal result. If there is a power to alter or amend, whether it be by way of complete substitution of new trusts or simply by way of limited substitution of new trusts or simply by way of limited substitution, then the Court will still be incorporating, in effect, a future deed of the settlor, and this is the contaminating element. The breadth of the power of reservation has absolutely nothing to do with the point under consideration at that stage.

Clause 17 of the *Schintz* will stated, among other things, that the share should be held "under or by virtue of the said settlement and the deed or deeds (if any) which may hereafter be executed by me under the power of reservation or revocation and declaration of new trusts and thereby reserved to me or as near thereto as circumstances will admit". The Court looked at this provision and said that if it were to treat it as "operative" then clearly the decision of Simonds J. in *In Re Jones* would be applicable and the whole clause would have to be treated as invalid. In his judgment in the *Schintz* case, Wynn-Parry J. came to the conclusion that he did not have to treat this clause as "operative" and stated that it was no more than descriptive of the terms of the settlement. He accepted the argument of Mr. Cross, counsel for several of the defendants, that if similar words had been inserted in the will in the *Edwards* case then the Court of Appeal would

not have come to any different conclusion.

Should any distinction be made based on the extent of the amending power? If this power merely goes to the administrative provisions of the trust then there is strong argument for saying it ought not to affect the issue. If, on the other hand, it goes to the dispositive provisions a stronger case can be made for taking it into account. But even then, as we have seen from the *Schintz* case, a court might attempt to subdivide amending powers into those that are broad and those that are limited. This of course can have no other result than to create havoc and uncertainty in the law.

It is interesting to note that the *Schintz* case contains elements of both the *Jones* case and the *Edwards* case. That is to say, there was a power of revocation or a reservation of the power to alter or amend in the trust, but in the *Edwards* case it was not set out in the will. In the *Jones* case there was a reference to subsequent amendments that might be made in the will itself. The same was true of the *Schintz* case, even though the court refers to it as a descriptive clause, rather than an operative one. Some attempts have been made to rationalize these decisions on this point, but, as R.E. Megarry points out in his effort to reconcile these cases:

> On a superficial view, the distinction between the two older cases depends on whether or not the will expressly refers to a subsequent deed; but *Re Schintz's Will Trusts* has shown that this would have put the emphasis on the wrong point. What matters, it seems, is whether the testator is attempting to give effect to an assortment of present and future deeds, or merely to an existing deed. In the former case, the whole attempt at incorporation fails; in the latter case, it matters not that the deed contains powers of revocation and appointment, nor whether the will refers to these powers, for the court will incorporate the deed but strike out the powers. The problem is difficult and the line thin, but, with respect, the distinction that has now been made seems convincing.[21]

2. *United States Decisions*

In *Swetland* v. *Swetland*[22] the Court of Errors and Appeals of New Jersey held that it was not material that the inter-vivos trust was revocable by the settlor. The Court held that the trust agreement, not being testamentary, could be referred to in order to ascertain the terms of the testamentary trust. The Court said:

> 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 theor-

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21 (1951), 67 L.Q. Rev. 444.

22 102 N.J. Eq. 294, 140 Atl. 279 (1928).

> etical, nebulous, intangible, or incapable of identification, but exists in fact, and the trustee legatee is as distinct and definite an entity as would have been an individual or corporation legatee.[23]

The American courts have generally been willing to uphold pour-overs to an amendable trust. Thus, in both England and the United States we may conclude that pour-overs to amendable trusts will be upheld. The next problem, then, is to decide what will be the effect of a subsequent amendment to the trust which is executed without complying with the formalities of the Wills Act.

3. *Subsequent Amendments*

Logically, the amendment problem could be solved in two ways: (1) treat the will as though it were re-executed on the day of the amendment to the trust, so that there is a re-incorporation; (2) treat the amendment as a future act by the testator of independent significance. The second of these solutions is more closely akin to orthodox legal analysis, while the first is probably more closely akin to what the testator thought he was doing or desired to do. Yet the first involves the creation of a fiction; *i.e.*, re-execution and re-incorporation.

Professor Scott maintains[24] that the amendment problem can be broken down into three questions, namely:

(1) Is the testamentary disposition also modified?

(2) Does the testamentary disposition follow the original terms of the inter-vivos trust?

(3) Does it fail altogether?

In discussing this problem, reference will be made only to United States decisions, since there do not appear to be any English or Canadian cases on point. The U.S. decisions are not uniform on this point, but the American courts have narrowed the problem to whether or not the doctrine of facts of independent legal significance (or non-testamentary acts) should be applied to uphold the disposition. That is to say, should the revocable trust and even the amendments be treated as facts of independent significance on which the court may receive extrinsic evidence to give validity to the dispositions of a will. The United States decisions are relevant for Canadian purposes since the American laws of wills have, in the main, been derived directly from English law, and judicial doctrines such as incorporation by reference and independent legal significance have been adopted by American courts.

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23 *Id.*, at 279-80 of 140 Atl.

24 1 Scott, *supra* note 5, at 396.

DOCTRINES OF FACTS OF INDEPENDENT SIGNIFICANCE

Before dealing with the United States decisions it may be useful to review briefly the doctrine of facts of independent legal significance. A landmark in this regard is the decision in *Stubbs* v. *Stubbs*,[25] where property was left by will "unto and amongst my partners who shall be in co-partnership with me at the time of my decease or to whom I may have disposed of my said business..." The testatrix disposed of her business during her lifetime and the bequest was upheld to give the property to those who obtained the business. Clearly this was a non-testamentary act, to which the court said it could look with a view to interpreting the will. In other words, the language of the will was related to the facts that had an independent significance. There are also cases dealing with dispositions of the "contents of my desk"[26] and to "servants in my employ at my death".[27] These dispositions have been universally upheld.

The theory of independent significance is based upon the principles of interpretation of wills, a theory quite different from that of incorporation by reference. In *Sanford* v. *Raikes*,[28] Sir William Grant made it clear that the two notions were quite different. Sir William said:

> I had always understood that, where the subject of the devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact, and, through that medium, to ascertain the subject of the devise. I do not see what this has to do with cases where there is a reference to some paper that is to make a part of the Will. There it may be contended that the Will itself must specify the paper that is to be incorporated into it. Here the question is, not upon the devise, but upon the subject of it. Nothing is offered in explanation of the Will, or in addition to it. The evidence is only to ascertain what is included in the description which the Testator has given of the thing devised.[29]

Commenting on this quotation, it is stated in *Jarman on Wills:*

> Nor is it material that the description makes the objects of gift to depend upon circumstances or acts of persons which are future and contingent, or even upon the future acts of the testator himself, though this is sometimes resisted as contravening the principle of the statutory requisition of attesting witnesses. There seems, however, to be no valid ground for the objection. Every description must more or less involve inquiry into extrinsic facts; and there is no reason why the ascertainment of the ob-

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25 (1837), 2 Keen 255, 48 E.R. 626.

26 *In re Robson*, [1891] 2 Ch. 559.

27 *Re Howell's Trusts*, [1937] 3 All E.R. 647.

28 (1816), 1 Mer. 646, 35 E.R. 808.

29 *Id.*, at 811 of 35 E.R.

jects may not depend as well upon the facts or conduct, past or future, of the testator, as upon any other contingent circumstance.[30]

One American writer has pointed out that justification of the pour-over will on the theory of independent significance is acceptable but may give rise to an easy avoidance of the formalities for making wills.[31] If, for instance, the revocable trust is instituted with a very small corpus with a view to pouring-over, then the trust is not a fact of very great significance. Palmer, on the other hand, thought that the mere fact of the trust being nominal should make no difference in working out this problem.[32]

U.S. DECISIONS ON SUBSEQUENT AMENDMENTS

Most of the United States cases have been collated by Professor Palmer[33] and Professor Scott.[34] Three decisions, however, are of particular relevance to this paper. The first is *Atwood* v. *Rhode Island Hospital Trust Co.*[35]

In the *Atwood* case the decedent established an inter-vivos trust with a corpus of some two million dollars, reserving the power to "annul, change or modify" the terms of the trust. The income was to be paid to the settlor for life; at his death cash amounts were to be paid to named beneficiaries and the balance of the corpus was to be held in trust to pay the income to his widow and another for their lives, with the corpus then to be distributed to other beneficiaries in stated fractional amounts. On the same day the settlor also made a will in which he left the residue of his estate to the trustee of the inter-vivos trusts, "to be held, managed and disposed of as a part of the principal of the estate and property held by it in trust . . . in the same manner as though the proceeds of such sales had been deposited by me as a part of said trust estate". Thereafter the settlor twice amended the trust by naming additional cash beneficiaries and by eliminating a gift of $3,000.00 to one Amelia. The effect of these amendments was not in issue. The cash gifts were paid out of the trust corpus to the named beneficiaries, including those designated in the amendments, and no issue was made with respect to this action. The effect of the attempted revocation of the gift to Amelia was not passed upon be-

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30 *Jarman on Wills* 525 (8th ed. 1951).

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

32 Palmer, *supra* note 12, at 69.

33 *Id.*

34 1 Scott, *supra* note 5, s.54.3.

35 275 F. 513 (1st Cir. 1921).

cause she was not a party to the proceedings. The issue on which the Court did pass concerned the validity of the entire residuary disposition. The holding against validity was based on the fact that the settlor had reserved the power to amend the trust, not upon the fact that the power was exercised after execution of the will.

Judge Bingham dissented in the *Atwood* case. It is a powerful dissent and will repay reading. His approach was strict but accurate. He analyzed the issues in this way:

> (a) Look first to the will and you see that it does not refer to a trust instrument but to a trust fund. It is an absolute disposition to the trustee and not a reservation of the power of disposal.
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> (b) Look next to the trust deed and you see that it does not in any way refer to the will or attempt a disposition of the residue of the testator's estate. Thus, it is simply not a testamentary disposition.

Judge Bingham went on to point out that the majority found the testator by his will intended to refer to the trust deed as a paper or writing which was to be incorporated as it stood at making the will or as it might later be amended. In his view, however, the language of the will showed an intention to refer to the trust fund as an extraneous fact as it existed when the will was made or should exist at his death for the purpose of identifying beneficiaries and defining their shares. Judge Bingham supported his interpretation on the basis of the absolute disposition contained in the will.

The majority in the *Atwood* case would not stretch the facts to fit within the independent significance doctrine because in their view the cases showed this doctrine applied only where the act did not depend entirely upon the volition of the testator. Reference to persons in the employ of the testator at his death represented an act of volition by both the testator and the person. On this point the majority seemed to be overly conservative. Judge Bingham, in his dissent, cited Denio C.J. in *Langdon* v. *Astor's Executors.*[36] This citation sheds much light on this otherwise shadowed terrain. Bingham J. quoted Chief Justice Denio as follows:

> There is no principle in the law which forbids the making of testamentary gifts dependent upon the happening or not happening of any event in the future, whether in the testator's lifetime or afterwards. A bequest may be made with a provision that it shall not be operative if the legatee shall in the testator's lifetime receive a particular sum of money from another person, or if he shall within that time become entitled to an estate as the heir or legatee of another. So a testator may very properly provide that a legacy given in his will shall not be operative if he shall in his lifetime give the legatee the like sum. This is not the reservation of a license to alter or revoke his will by an unattested paper. The fact which is to destroy the legacy in such a case is not a change of purpose,

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36 16 N.Y. 9, 25 (1857).

> a new act of testamentary volition, which requires an instrument in writing clothed with testamentary forms. The gift inter-vivos is in fact in pais, which does not require a writing and the effect given to it, of superceding and extinguishing the legacy, is prescribed by the will itself, and is authenticated in the same manner as the legacy, of which it is in fact a part. It differs, it is true, from a condition which looks to the act of a third person, or the happening of an event in respect to which the testator is to have no agency; and I concede that a testator cannot prescribe in his will that an act to be performed by him indifferent in itself and having no pertinency except its effect upon his testamentary dispositions, shall change such dispositions. Such a provision would allow a testator to alter his will otherwise than by an attested instrument. He cannot therefore declare that any mere entry in his books or other writing without attestation according to the statute, shall in itself have any effect upon the provisions of his will. But the bestowal of a substantial sum of money or amount of property is an act of a different kind. It is a pecuniary transaction belonging to the actual business of life. It is an act which he may perform whether he has made a will or not. It effects a substantial change in the pecuniary condition both of the testator and the donnee. * * * The circumstance which is to determine whether the testamentary gift shall be operative at the testator's death is, in this case, an act taking effect in praesenti, and is one of those transactions of business which every owner of property may perform for its own sake, and without reference to its operation upon any instrument he may have executed. There is nothing in the policy of the law requiring it to be proved by other than the usual evidence. There is no special danger that it may be stimulated or set up by false testimony against the truth of the case. Not being promissory or executory in its character, but taking effect as it does eo instanti, with the volition of which it is the result, there is no danger that it may be done without a due appreciation of its character; as testaments, promises and other engagements, looking to the future for their consummation may be and frequently are. It has not one of the characteristics of a testamentary act, and there is not, in my opinion, anything in the law that requires that it should be authenticated by testamentary formalities.[37]

Massachusetts law at one point held that the testamentary disposition did not fail and the original instrument, though not the amendment, was incorporated by reference.[38] This state of the law in Massachusetts was altered by *Second Bank-State Street Trust Pinion.*[39] In this case a testator left the residue of his estate to the trustee under a revocable and amendable inter-vivos trust established by him and his wife under date of "September 13, 1945, as amended". At the execution of the will, the inter-vivos trust was amended. Thereafter the testator died and the executor asked to be instructed whether the residue passed to the trustee to hold

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37 275 F. 513, 531-32 (1st Cir. 1921).

38 *Old Colony Trust Co.* v. *Cleveland*, 291 Mass. 380, 196 N.E. 920 (1935).

39 341 Mass. 366, 170 N.E. 2d 350 (1960).

under the trust as amended, or, if not, subject to the terms of the unamended trust, or how it should be distributed. It was held that the trustee should distribute the funds received from the executor in accordance with the terms of the amended trust. The Court said that this result could not be reached under the doctrine of incorporation by reference, but that the doctrine of facts of independent significance was applicable even though this result was in opposition to the former state of the law as enunciated in the *Old Colony Trust Company* case. The Court stated that in the *Old Colony* case the doctrine of independent significance had not been relied on by counsel.

The next decision is *Canal National Bank* v. *Chapman.*[40] This is a decision of the Maine courts and follows the *Second Bank-State Street Trust* case. The facts were that the testatrix executed her will on September 24, 1948, and died January 31, 1960. The will left the residue to the trustee of an amendable inter-vivos trust created by the testatrix in 1934. The trust was amended in 1942, 1948 and 1955. The 1955 amendment was executed without the formalities of the Wills Act, *i.e.*, there was only one witness. The Court stated that the cardinal rule in the construction of wills was to give effect insofar as possible to the intentions of the testator, and found that the testatrix in this case obviously intended the trust to stand as amended. The Court held the doctrine of incorporation by reference could not be used since the 1955 amendment was not in existence when the will was executed. Relying upon the *Restatement (Second) of Trusts*,[41] the Court upheld the bequest.

Both the *Second Bank-State Street Trust* and *Canal National Bank* cases relied on the *Restatement* for the decision. Each is based on the theory that, insofar as possible, the Court should give effect to the intentions of the testator. In addition to this rule the doctrine of facts of independent significance was used as support for the decision.

It cannot be doubted that these decisions represent an extremely broad application of this doctrine. The rule was judicially created to give validity to otherwise uncertain bequests. In this respect it was limited to identifying the subject or object of the gift and it found its most useful application in what might be termed subsidiary parts of the will. Thus, devises of the contents of a desk and devises to employees have always been upheld.[42] In

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40 157 Me. 309, 171 A.2d 919 (1961).

41 *Restatement (Second) of Trusts*, s.54 (1959).

42 *Supra*, notes 26, 27.

both of these examples, the desk and the persons who are the employees at the date of death are facts of independent significance. But is this doctrine capable of validating gifts to a revocable and amendable trust, after the trust has been amended?

Looking back to the judges who created and nurtured the doctrine of facts of independent significance, it is difficult in the extreme to conceive that they felt it could be so broadened. Indeed, where a separate document, such as a trust agreement, is in existence, the courts have always looked to the doctrine of incorporation by reference to use it with the will. If this view is not taken and the doctrine of independent significance is given broad scope then the trust is, in effect, being viewed as a separate entity. This, of course, does not accord with generally accepted notions of trust law. It can be argued with force that the trust is much more than a fact of independent significance. It is formal and deliberate. It will deal with the dispositions of property and the administrative duties devolving on the trustee. Things of this nature were never before attached to the doctrine of facts of independent significance, and thus the analogy between those cases supporting the doctrine and the pour-over will situation breaks down. It becomes a case of apples and oranges, the only similarity being that they are both fruit. This was the conclusion at which Professor Lauritzen arrived. After a review of the cases he said:

> It is submitted that this analysis of the applicable cases shows that an inter-vivos trust cannot be given testamentary validity by referring to it as an act of independent legal significance. Any such attempt is barred by the well-settled rule that a testamentary trust must be set forth in the will or in some document validly incorporated therein. The non-testamentary act doctrine serves a useful purpose and when kept within accepted bounds, its application is recognized by virtually all courts. But it is clear that this doctrine cannot be expanded to cover the reference in a will to an unattested document and every court which has carefully considered the question has expressly rejected the attempt to extend the application of this doctrine in this fashion.
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> . . . Thus, it appears that the theory of referring to a revocable trust as an act of independent legal significance has no support among the decided cases. On the contrary, the courts have almost unanimously turned thumbs down on this and similar devices because they realize that 'no multiplication of words or refinements can alter the result above stated that [the testator] had by this plan sought prospectively to create for himself the power to dispose of property vested in him at the time of his death by instruments not executed in accordance with the statute of wills'.[43]

It should be noted that the *Second Bank-State Street Trust* and the *Canal National Bank* cases had not been decided when Lauritzen wrote.

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43 Lauritzen, *supra* note 19, at 608.

On the other hand, Professor Palmer, also writing before these cases were decided,[44] advocated their result. His thesis was based on the rule of giving effect to the testator's intentions.

Certainly, Professor Scott advocates upholding pour-overs to an amendable trust, even where the trust is amended. He states:

> These cases seem eminently sound. Not only are they in accordance with the general principles of the law of wills permitting a resort to facts of independent significance, but they do not violate the sphere of those principles. They do not open the door to chicanery or mistake. In many states, as we shall see, it is now provided by statute that a devise or bequest to the trustees of an inter-vivos trust shall not be invalid because the trust is amendable or because it was amended after the execution of the will.[45]

4. *U.S. LEGISLATION*

This whole matter has received the attention of legislators in the United States. Most states have adopted some form of legislation on pour-over wills, and a number[46] have adopted the Uniform Testamentary Additions to Trusts Act, which was promulgated in 1960. The Uniform Act seeks to validate pour-over wills and states:

> A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee or trustees of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size or character of the corpus of the trust). The devise or bequest shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given and (b) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will) and, if the testator's will so provides, including any amendment to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

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44 Palmer, *supra* note 12.

45 1 Scott, *supra* note 5, at 402.

46 *Id.*, 409 & n. 40. From 1967 to 1974 fourteen (14) more states adopted the provision bringing the total to 33.

This provision has been dealt with by Professor Alan Polasky[47] and a number of other writers, and it is not proposed to deal with it in this paper.

III. CONCLUSION

WHAT SHOULD CANADIAN REACTION BE?

Is it possible to break new ground in this field? Could pour-overs to amendable trusts be upheld in the first instance on the grounds of incorporation by reference with a severance of the power to amend? Then, if the testator had in fact amended, could such an amendment be treated as an *act* of independent significance? This combination of the two doctrines would be useful and would go far in giving life to the wishes of the testator which, after all, is the goal being sought. To do this would not be so very much unlike what the law now allows in validating gifts to servants or to persons to whom the testator may have sold his business.

Any Canadian province that adopts legislation should, however, make provision for other possible problems that might arise. One such problem is found in Section 12(1) of the New Brunswick Wills Act.[48] Pursuant to this Section (and all other provinces[49] except Quebec have substantially the same provision), if A is an attesting witness to the testator's will then any devise or bequest under the will to A's wife is void, although A is nonetheless competent to prove the will. Now assume that A is an attesting witness to the testator's will which pours-over into a living trust. Suppose that A's wife is a beneficiary under the inter-vivos trust. In these circumstances is the gift to A's wife void?

If our law as it stands an irrevocable living trust can be incorporated by reference and this problem could easily arise in that context. One could argue that the gift to A's wife would be valid since there has not been, strictly speaking, a non-compliance with the Wills Act. Yet under the doctrine of incorporation by reference the terms of the trust are incorporated as if they had been written into

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47 Polasky, *supra* note 31, at 949.

48 S.N.B. 1959, c.15.

49 Alberta: R.S.A. 1955, c. 369, s. 12(1).
British Columbia: R.S.B.C. 1960, c. 408, s. 12(1).
Manitoba: R.S.M. 1954, c. 293, s. 11.
Newfoundland: R.S.Nfld. 1952, c. 147, s. 7.
Nova Scotia: R.S.N.S. 1967, c. 340, s. 11.
Ontario: R.S.O. 1960, c. 433, s. 16.
Prince Edward Island: R.S.P.E.I. 1951, c. 124, s. 77.
Saskatchewan: R.S.S. 1965, c. 127, s. 12.

the will. On this basis the gift would not be valid. Now when this problem is projected to an amendable trust which is later amended, perhaps even to include A's wife in the later amendment, it is clear that any future legislation in this field should be drafted with precision and after careful study.[50]

Obviously, in view of the great divergence of opinion in this subject the best way to deal with the matter in Canada is to enact legislation that permits pour-overs to an amendable trust. As a matter of policy this would seem to be desirable. The theory upon which the formalities for executing wills is based is still relevant. Yet most provinces now allow holograph wills. This change demonstrates an easing in formalities. To permit pour-overs to an amendable trust and to include subsequent amendments would raise no real difficulties in safeguarding the policy involved here. After all, trust documents are attended with substantial solemnity and formality and quite possibly less liklihood of fraud arises than with holograph wills.

From both the English and American decisions this fact emerges supreme: The legal conclusion on the validity of a pour-over will is influenced beyond reasonable proportions by the nuances of language chosen in drafting the pour-over. This, of course, will be no great shock to lawyers, since it is a commonplace to have matters turn on words. Yet in the area of testamentary dispositions more effort is perhaps warranted toward achieving the testator's intentions than in becoming the world's champion "hair splitter". A uniform legislative policy could help expand the frontiers of testamentary freedom.

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50 The Uniform Testamentary Additions to Trusts Act validates the gift in the circumstances outlined.