

Problems with Pour-Over Wills

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I. INTRODUCTION

In 1959 Professor Alan N. Polasky published his often-cited article “‘Pour-Over’ Wills—And the Statutory Blessing,”¹ noting the enactment of statutes that validate a testamentary gift to a trustee of an existing trust, including a revocable, amendable inter vivos trust amended *after* the execution of the “pour-over” will. In 1960 the Supreme Judicial Court of Massachusetts held in *Second Bank-State Street Trust Co. v. Pinion*² that a testamentary gift of a residuary estate should be held and disposed of in accordance with the terms of an amended inter vivos trust that had been established by the testator and his wife, and which had been amended after the execution of the will.³ That same year the Uniform Testamentary Additions to Trusts Act⁴ was approved, and subsequent adoptions of the Uniform Act, or variations of the Act,⁵ ensured that nearly all of the states would now recognize the effectiveness of a “pour-over” of assets from the probate estate to the trustee of a revocable, amendable inter vivos trust, with the assets to be held and distributed in accordance with the terms of the trust as amended after the execution of the pour-over will.⁶ These events highlight the acceptance of the pour-over will as an effective device for the disposition of testate property.

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1. 98 TRUSTS & ESTATES 949 (1959).

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

3. *Id.* at 367, 170 N.E.2d at 351.

4. UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT, 8A U.L.A. 600 (1983) [hereinafter cited as UNIFORM ACT].

Sections 1 and 2 of the Uniform Act are as follows:

§ 1. Testamentary Additions to Trusts

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 amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

§ 2. Effect on Prior Wills

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

Id. at 603, 614.

5. *Id.* at 599, 604–12.

6. Section 1 of the Uniform Testamentary Additions to Trusts Act is section 2–511 of the Uniform Probate Code, 8 U.L.A. 126 (1983).

When a pour-over is made to an inter vivos trust, the trustee is not required to report to the probate court. Although trust property originates in probate assets, the trust is not a testamentary trust, and unless the trust is the subject of litigation, the terms of the trust remain confidential.

Typically, the creator of the receptacle trust is also the testator of the pour-over will. Because the creator of a revocable, amendable inter vivos trust ordinarily can change the terms of the trust in a relatively informal fashion (for example, by letter delivered to the trustee), the combination of the revocable, amendable inter vivos trust and the pour-over will is a popular estate planning device, described in estate planning materials,⁷ taught in law schools, and taken for granted by both general practitioners and estate planning specialists regularly engaged in drafting dispositive instruments.

What is the basis for the effectiveness of the pour-over will in the United States today? After a quarter-century of widespread acceptance, is the pour-over device always clearly differentiated from a much older drafting technique, incorporation by reference? How does a pour-over provision affect the rights of a spouse electing to take against the will? Do pour-over statutes provide clear descriptions of what occurs if a receptacle trust is terminated or revoked after the death of the testator? These are the principal questions discussed below.

II. THE BASIS FOR AN EFFECTIVE POUR-OVER

Judicial acceptance of the pour-over technique is grounded on viewing the receptacle trust as a “fact of independent significance”—that is, as a device that has a purpose other than distributing property at death without complying with the requirements of the Statute of Wills. The judicial view of the receptacle trust is stated by the Supreme Judicial Court of Maine in *Canal National Bank v. Chapman*⁸ as, “The trust . . . at no time was a mere shell without the body of a trust. The trust . . . has had . . . and continues to have an active independent life of its own.”⁹

It bears emphasis that the receptacle trust need not be a revocable, amendable trust for the pour-over technique to be effective. The receptacle trust might be irrevocable. Similarly, the receptacle trust need not be created by the testator; it might be an inter vivos trust created by a spouse of the testator, for example. A testator might pour over assets to another person’s testamentary trust, although there is no evidence that testators frequently pour over assets from their probate estates to testamentary trusts created by others. If a trust existing at the execution of the pour-over will still exists for receptacle purposes at the testator’s death, it is a matter of indifference whether the trust is revocable or irrevocable, inter vivos or testamentary, created by the testator or created by another; it is a fact of independent significance, qualified to govern the distribution of property originating in the testator’s probate estate.

7. J. PRICE, *CONTEMPORARY ESTATE PLANNING* § 10.8 (1983).

8. 157 Me. 309, 171 A.2d 919 (1961).

9. *Id.* at 312, 171 A.2d at 920.

The Uniform Act encompasses the judicial view that a receptacle trust is a fact of independent significance, but it does not limit effectiveness of the pour-over provision in a will to those instances where the independent significance of the receptacle trust is indisputable. The Uniform Act says that the receptacle trust qualifies "if the trust is identified in the testator's [pour-over] will and its terms are set forth in a written instrument . . . (regardless of the existence, size, or character of the corpus of the trust)." ¹⁰

A trust with no corpus is no trust at all, and a trust with no corpus is a far cry from the trust with "an active independent life of its own" described by the Supreme Judicial Court of Maine in *Chapman*.¹¹ With its insistence on a written instrument of trust, the Uniform Act makes effectiveness of the pour-over technique turn on reliability of the evidence of a trust or an intended trust, irrespective of whether the receptacle trust is a going concern at the execution of the pour-over will, at the testator's death, or, indeed, after the testator's death. The liberality of the Uniform Act in this respect removed doubts about the effectiveness of a pour-over to a revocable unfunded life insurance trust when the only trust property consists of the trustee's right as beneficiary to receive the proceeds of insurance on the life of the testator of the pour-over will, and when the trustee has no duties to perform during the testator's lifetime.

While the Uniform Act requires that the written instrument of trust be executed "before or concurrently with the execution of the testator's [pour-over] will,"¹² the fact of independent significance theory does not impose such a requirement.¹³ In this respect the Uniform Act echoes an element of incorporation by reference,¹⁴ and the Act is less liberal than it might be. Requiring that the written instrument of trust be in existence at execution of the pour-over will lends credence to the contention that the techniques of incorporating by reference and pouring-over are not always necessarily differentiated.

In sum, judicial acceptance of the pour-over technique in such cases as *Pinion*¹⁵ and *Chapman*¹⁶ turned on viewing the receptacle trust at the testator's death as a going concern to which an addition is made from probate assets. The Uniform Act and its counterparts in numerous states go beyond the judicial view and sustain a pour-over where the intended receptacle trust is created in writing, irrespective of whether it is a going concern at the testator's death. Thus, even if the intended receptacle trust is, in the words of *Chapman*, a "mere shell" at the testator's death,

10. UNIFORM ACT, *supra* note 4, at 603 (emphasis supplied).

11. Canal National Bank v. Chapman, 157 Me. 309, 312, 171 A.2d 919, 920 (1961).

12. UNIFORM ACT, *supra* note 4, at 603.

13. For example, the testator's pour-over will might provide that his residuary estate pass to the "Faithful Trust Company as trustee of a trust I shall establish hereafter by a written instrument of trust, to be added to that trust as an indistinguishable part thereof, and to be administered and distributed under the terms of that trust." If the testator does thereafter establish such a trust, and dies leaving a residuary estate, the residuary estate passes to the trustee of the trust because the trust has a purpose other than transferring property at death without complying with the requirements of the Statute of Wills.

14. The writing incorporated into a will by reference must be in existence at the time the incorporating will is executed. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 385 (2d ed. 1953).

15. 341 Mass. 366, 170 N.E.2d 350 (1960).

16. 157 Me. 309, 171 A.2d 919 (1961).

and is not a fact of independent significance, the pour-over is nonetheless effective. As a matter of policy, when evidence of donative intent is in writing, other requirements of the Statute of Wills need not be met under circumstances set out in the applicable pour-over statute.

III. TREATING POUR-OVER LANGUAGE AND INCORPORATION BY REFERENCE LANGUAGE AS INTERCHANGEABLE

A writing in existence at the execution of a will may be incorporated into the will by reference. Incorporating one extrinsic writing into another by reference is not a technique used solely by drafters of dispositive instruments;¹⁷ indeed, since the general acceptance of the pour-over technique in the 1960s, it is probable that drafters of wills incorporate by reference infrequently. Nonetheless, incorporation by reference persists, and it might be recognized by statute. For example, Ohio Revised Code section 2107.05 provides in part, "An existing document . . . may be incorporated into a will by reference, if referred to [in the will] as being in existence at the time the will is executed."¹⁸

When the terms of a trust are set out in a writing already in existence at the execution of a will, those terms can be incorporated into the will for purposes of creating a testamentary trust by identifying the trust in the will and stating that the terms of the existing trust are incorporated into the will as if fully set forth therein.

Unambiguous language of a will mandates differentiating a pour-over will from an incorporating will. Nonetheless, a court intent on reaching what it deems to be a desirable result can take clear pour-over language and "construe" it beyond recognition. *Miller v. First National Bank & Trust Co.*¹⁹ is a recent case in point.

In *Miller*, the testator, William J. Miller, was married three times. In 1971, six months after his second marriage to Betty Lou Miller ended in divorce, Miller married Frances L. Miller. A month later he executed two instruments, one a will, the other a life insurance trust, that were prepared simultaneously. Eight months before Miller's death in 1976, his marriage to Frances also ended in divorce.

The life insurance trust was to be funded by policies on Miller's life, the proceeds being payable to a bank as trustee. The trust terms directed the trustee to pay \$50,000 to Frances, if that amount was left after payment of debts and expenses, and \$25,000 each to Jerry, the son of Frances, to April, the daughter of Miller, and to William, the minor son of Miller, but only after the payment to Frances was satisfied. The trust terms further directed that any residue be distributed to Frances at \$750 a month for life, or as the trustee deemed necessary for her welfare and comfort.²⁰

Miller's will left to Frances his homestead and all personal effects, and then provided as follows:

17. 2 A. CORBIN, CONTRACTS § 516, at 754 (1950).

18. OHIO REV. CODE ANN. § 2107.05 (Page 1976).

19. 637 P.2d 75 (Okla. 1981).

20. *Id.* at 76, n.3.

I have heretofore created an inter vivos trust under and by virtue of a certain trust agreement under date of the 15th day of October, 1971, between myself, as Trustor, and First National Bank & Trust Company . . . as Trustee. I hereby give, devise and bequeath the rest, residue and remainder of my estate, real, personal, or mixed, of whatsoever kind and character, and wherever situated, unto First National Bank . . . as Trustee of such trust, and said residue shall become a part of the corpus thereof and shall be held, administered and disposed of pursuant to the terms of said trust agreement.²¹

Miller was survived by Betty Lou Miller, Frances L. Miller, his daughter April, and his son William. An Oklahoma statute in effect at Miller's death provided:

If, after making a will, the testator is divorced, all provisions in such will in favor of the testator's spouse so divorced are thereby revoked. Annulment of the testator's marriage shall have the same effect as a divorce. Provided, however, this section shall not apply if the decree of divorce or of annulment is vacated or the testator remarries his former spouse.²²

The bank named as trustee by the trust instrument was appointed executor of Miller's estate, and as executor, the bank filed a declaratory judgment action to determine its rights, powers, and duties under the trust and the will. The Oklahoma district court found that the statute on divorce revoked the gifts under the will to Frances L. Miller, the divorced spouse, but that, since the will and the trust instruments were separate and distinct, the statute did not affect provisions in the trust instrument for Frances.²³

Betty Lou Miller as guardian of William, the minor son of the testator, and April and William, the testator's children and heirs at law, appealed the district court's holding, contending that the will incorporated the trust, and that provisions in the trust for Frances were revoked by statute, just as gifts by will were revoked. A majority of the Supreme Court of Oklahoma found the issue to be "whether the *trust* was incorporated by reference into the will, thereby invalidating . . . provisions for the divorced spouse. . . ." ²⁴

Despite the existence of an Oklahoma statute²⁵ explicitly permitting a pour-over of probate assets to an inter vivos trust, including an unfunded life insurance trust, and despite the use of prototypical pour-over language in Miller's will, a majority of the Supreme Court of Oklahoma found that the trust was indeed incorporated into the will, and that, therefore, both the provisions in the will for Frances and the provisions in the trust for Frances were invalidated by statute.²⁶

The *Miller* decision is wrong in two respects. First, as pointed out in a dissenting opinion, the language of the will referring to the trust was for the purpose of identification, not incorporation.²⁷ The majority of the Oklahoma court resorted to incorporation by reference to prevent the flow of benefits to Frances. In truth, there

21. *Id.* at 76, n.2.

22. OKLA. STAT. ANN. tit. 84, § 114 (West Supp. 1984-85).

23. *Miller v. First Nat'l Bank & Trust Co.*, 637 P.2d 75, 76 (1981).

24. *Id.* at 77 (emphasis supplied).

25. OKLA. STAT. ANN. tit. 84, § 301 (West 1970).

26. *Miller v. First Nat'l Bank & Trust Co.*, 637 P.2d 75, 78 (1981).

27. *Id.* at 79 (Hargrave, J., dissenting).

simply was no incorporation by reference. Second, were there an incorporation by reference, the terms of the inter vivos trust instrument, not the trust itself, became a part of the will as if set forth therein, and the result was a testamentary trust, the corpus being Miller's net probate estate.

What led the majority of the Oklahoma court into doctrinal error? Neither the majority nor the dissenting opinion gives all the facts helpful in deducing cause, but the majority opinion provides clear hints. First, in describing the position of Miller's children, the opinion states that "[t]he appellants assert . . . that it was not Dr. Miller's intention that the bulk of his estate should go to [his] divorced spouse who was not the mother of his children."²⁸ The provision in Miller's will for Frances, including provision for her created by any testamentary trust, clearly was invalidated by statute. Therefore the bulk of Miller's estate (probate and non-probate) probably consisted of proceeds of insurance on his life payable to the bank as trustee of the insurance trust. Second, the opinion notes that "[i]t was Frances Miller's status as wife . . . which was the main inducement for making . . . provisions for her."²⁹ On divorcing, Miller and Frances executed a property settlement. The opinion does not describe the terms of the settlement, but one might sensibly infer that a majority of the court thought that Frances should not benefit from Miller's property through any additional device, including a life insurance contract.

It is, of course, a virtual certainty that errors of judgment were made following Miller's divorce from Frances. If Miller was represented by counsel on entering into a property settlement with Frances, the terms of the trust and the will should have been before the parties, who should have considered them explicitly before entering into a settlement. If Miller was not represented by counsel, he should have recalled the provisions of his trust and will himself. If, as the majority opinion states, "[i]t was Frances[]" . . . status as wife . . . which was the main inducement for making testamentary provisions for her,"³⁰ then surely Miller, a person experienced in both marriage and divorce, realized that Frances was a preferred beneficiary under both his trust and his will. After the divorce, eight months elapsed before Miller died. If Miller was competent during this period, he had ample time to amend his trust (if amendable), or to change the beneficiary of the life policy (if the right to change existed). He had ample time to change his will. He did nothing.

The Oklahoma statute on which the court in *Miller* relied invalidates a gift by will to a spouse divorced after the execution of the will.³¹ Because the statute does not apply to a gift made by an inter vivos trust, the court, by construction, treated Miller's trust as a part of the will: "He signed the will and the trust contemporaneously, indicating *one instrument* and a scheme of testamentary disposition."³² By this *tour de force*, the court disqualified the divorced spouse from sharing in the insurance proceeds.

28. *Id.* at 77.

29. *Id.*

30. *Id.*

31. OKLA. STAT. ANN. tit. 84, § 114 (West Supp. 1984-85).

32. *Miller v. First Nat'l Bank & Trust Co.*, 637 P.2d 75, 77 (1981) (emphasis supplied).

Numerous devices are available to a donor to dispose of property at death without complying with the requirements of the Statute of Wills. Among them are the joint tenancy and the tenancy by the entirety in real property, survivorship bank accounts, and contracts of life insurance. These devices are used routinely to transfer property at death to a surviving spouse. If divorce occurs, with or without a formal property settlement, the existence of such devices should be considered.

All too often the existence of the devices mentioned above is ignored. Although life insurance proceeds frequently are the only substantial asset that a decedent leaves at death, owners of life policies die leaving beneficiary designations that invite dispute and litigation. In *Grelle v. Nationwide Life Insurance Co.*,³³ Walter William Grelle, III, the decedent, was insured under three policies of life insurance designating his wife Carol as beneficiary. Walter and Carol ended their marriage after entering into a separation agreement that was incorporated into the divorce decree. Four months after the divorce Walter committed suicide. Although Walter had not changed the beneficiary designation of the life policies, the administrator of his estate contended that the following provision of the separation agreement had the effect of removing Carol as beneficiary:

Each of the parties hereto is hereby barred from any and all rights or claims by way of dower, inheritance, descent and distribution, allowance for a year's support, right to remain in the mansion house, and other claims as widow, widower, heir, distributee, survivor or next of kin *and any and all other rights or claims whatsoever in or due to the estate of the other, whether real or personal, or whether now owned or hereafter acquired.*³⁴

Despite this sweeping language in the separation agreement, the Ohio Court of Appeals held that binding Ohio precedent³⁵ required a "specific reference to or statement of elimination of the spouse as beneficiary" for the separation agreement to work a change of beneficiary.³⁶ Carol, therefore, was entitled to the proceeds of the three life policies. Ironically, the separation agreement did make specific reference to both an automobile insurance policy and a home insurance policy.³⁷

Miller is not alone in treating pour-over language as the equivalent of language incorporating by reference. The Supreme Court of Ohio did so in *Hageman v. Cleveland Trust Co.*³⁸ There Katharine L. Hageman executed a revocable trust agreement and a pour-over will three days before her death. By the trust agreement Katharine provided for gifts at her death to charity and to benefit a friend and companion for life.³⁹ To her brother, Howard C. Hageman, Katharine gave a right to live in a dwelling maintenance free. The source of gifts was to be "the trust estate as augmented by any property added thereto"⁴⁰ by Katharine's will.

33. 63 Ohio App. 2d 144, 409 N.E.2d 1056 (1979).

34. *Id.* at 147, 409 N.E.2d at 1058 (emphasis in original).

35. The court cited *Cannon v. Hamilton*, 174 Ohio St. 268, 189 N.E.2d 152 (1963).

36. 63 Ohio App. 2d at 148, 409 N.E.2d at 1059 (1979).

37. *Id.* at 147, 409 N.E.2d at 1058.

38. 45 Ohio St. 2d 178, 343 N.E.2d 121 (1976).

39. *Id.* at 183-86, 343 N.E.2d at 125-27.

40. *Id.* at 183, 343 N.E.2d at 125.

By her will Katharine left her residuary estate “to the Cleveland Trust Company . . . as trustee under a certain trust agreement which I have heretofore entered into . . . to be held, managed and disposed of in accordance with the terms and provisions of said trust agreement *as the same may exist at the time of my death.*”⁴¹

Katharine’s brother and sole heir Howard considered himself “virtually disinherited.”⁴² He sought to contest the will. Having failed in that tactic, he then filed suit attacking both the trust and the will on the ground that Katharine lacked capacity to execute the instruments, and further contending that there was no trust because Katharine had transferred no property to the trustee.⁴³ The trial court dismissed the action on two grounds: (1) The will and trust agreement were closely related, they had to be considered together, and a dismissal of the action to contest the will barred the instant suit; and (2) a disinherited heir had no standing to set aside an inter vivos trust into which a pour-over was made unless the will was also set aside.⁴⁴ Howard appealed.

The appellate court reversed,⁴⁵ stating that the trust instrument and the will:

must be considered separately and independently in determining the validity of either. In the instant case the invalidity of the will would not invalidate an existing trust; and the invalidity or termination of the trust would not invalidate the will. The real issue here is whether there is a beneficiary with legal capacity to take the devise and bequest under [the pour-over provision] of the will. The crux of the matter is that the [Ohio pour-over] statute authorizes a pour-over only into an *existing trust*. It therefore follows that the existence of a valid trust is of paramount importance for otherwise the [pour-over] bequest . . . fails for want of a taker. This issue was not and could not have been determined in the will contest even if the case had been tried on its merits.⁴⁶

The court of appeals explicitly found that the dispositive technique used by Katharine was the inter vivos trust with a pour-over will. “By no stretch of the imagination can it be held that the testator intended to create a testamentary trust and any argument to the contrary must be treated as being without merit.”⁴⁷ The court remanded the case to the trial court.

The Ohio Supreme Court granted a motion made by the trustee and other appellants to certify the record. The appellants argued that the trust instrument was incorporated into the will under section 2107.05, the incorporation by reference statute.⁴⁸ Howard argued that section 2107.63, the pour-over statute,⁴⁹ applied

41. *Id.* at 186, 343 N.E.2d at 127 (emphasis supplied).

42. *Id.* at 180, 343 N.E.2d at 123.

43. *Id.*

44. *Hageman v. Cleveland Trust Co.*, 41 Ohio App. 2d 160, 161, 324 N.E.2d 594, 595-96 (1974).

45. *Id.* at 164, 324 N.E.2d at 597.

46. *Id.* at 163, 324 N.E.2d at 597 (emphasis in original).

47. *Id.* at 163, 324 N.E.2d at 596.

48. OHIO REV. CODE ANN. § 2107.05 (Page 1976).

49. The statute is as follows:

2107.63 Addition to trust estate

A testator may by will devise, bequeath, or appoint real or personal property, or any interest in such property, to a trustee of a trust which is evidenced by a written instrument executed by the testator or any other person either before or on the same date of the execution of such will and which is identified in such will.

instead, and if there were no trust in existence at Katharine's death, the pour-over provision of the will failed for lack of a receptacle trust.

A majority of the Supreme Court found that Katharine had shown no intent to plan her estate pursuant to any particular statute, and even if no valid trust existed at her death, Katharine had incorporated the trust instrument into her will by reference and Howard was not advantaged in any event.⁵⁰ Two justices dissented, without opinion.

The Uniform Testamentary Additions to Trusts Act validates a pour-over to a trust "regardless of the existence, size, or character of the corpus of the trust."⁵¹ Ohio's pour-over statute has no such language.⁵² If Katharine's intended trust had no corpus, it failed as a trust and the pour-over provision of her will was ineffective.

The Ohio Supreme Court in *Hageman* did for the testatrix what the testator did for himself in an earlier Ohio case, *Knowles v. Knowles*.⁵³ There, George Knowles left his residuary estate to his brother Miles, trustee, "in augmentation of any property held by him under the terms of a certain trust agreement heretofore entered into between me and said trustee dated the 16th day of January, 1962."⁵⁴ No valid trust existed because there was no trust corpus. However, after the pour-over language set out above, George included the following: "It is not my intention to incorporate said Trust Agreement hereunder as a probate trust unless it is necessary so to do to prevent my property from being disposed of as intestate property"⁵⁵ There being no trust, this language incorporated the trust agreement under Ohio's incorporation by reference statute,⁵⁶ creating a testamentary trust of George's residuary estate.

The Ohio Supreme Court in *Hageman* was willing to reform Katharine's will, if necessary, in the guise of construction. When the facts and circumstances of the execution of the trust agreement and the will are considered at execution, it is clear that Katharine intended by will to augment the corpus of a revocable, amendable inter vivos trust existing at death, in whatever form the trust then took. Neither the opinion of the court of appeals nor the opinion of the supreme court states explicitly that the inter vivos trust failed for want of a corpus. The questions remain, however, why the trustee argued incorporation by reference on appeal, and why the supreme court

The property or interest so devised, bequeathed, or appointed to such trustee shall be added to and become a part of the trust estate, shall be subject to the jurisdiction of the court having jurisdiction of such trust, and shall be administered in accordance with the terms and provisions of the instrument creating such trust, including, unless the will specifically provides otherwise, any amendments or modifications thereof made in writing before, concurrently with, or after the making of the will and prior to the death of the testator. The termination of such trust, or its entire revocation prior to the testator's death, shall invalidate such devise, bequest, or appointment to such trust.

This section shall not affect any of the rights accorded to a surviving spouse under section 2107.39 of the Revised Code.

This section applies to wills executed before October 5, 1961 as well as to wills executed thereafter.

50. 45 Ohio St. 2d 178, 181, 343 N.E.2d 121, 123 (1976).

51. UNIFORM ACT, *supra* note 4, at 603.

52. OHIO REV. CODE ANN. § 2107.63 (Page 1976).

53. 4 Ohio Misc. 153, 212 N.E.2d 88 (P. Ct. Cuyahoga County 1965).

54. *Id.* at 155, 212 N.E.2d at 91.

55. *Id.* at 160, 212 N.E.2d at 94.

56. OHIO REV. CODE ANN. § 2107.05 (Page 1976).

admitted the possibility that the will incorporated the trust agreement by reference, thereby creating a testamentary trust. With concomitant periodic accountings to the probate court, a testamentary trust entailed costs that might have been avoided.

In *Hageman* one need not speculate about Katharine's attitude regarding her brother Howard—he simply was not a primary object of her bounty. A majority of the Ohio Supreme Court carried out Katharine's intention to virtually disinherit him, though not necessarily by the method she intended.

Neither the Supreme Court of Oklahoma in *Miller* nor the Supreme Court of Ohio in *Hageman* intended that henceforth every pour-over provision meeting the requirements of incorporation by reference be construed to incorporate. In *Miller*, giving pour-over language its customary construction would not have achieved the result a majority of the Oklahoma court clearly wanted, namely, disinheritance of a divorced spouse. Furthermore, in *Hageman*, customary construction might not have achieved what a majority of the Ohio court clearly wanted—testamentary provision for a longtime companion of the decedent rather than intestacy benefiting a brother of the decedent. Therefore, in both cases a majority of the justices of the respective courts was willing to abandon customary construction to achieve a preferred result.

Alternative routes were open in both instances. In *Miller*, the majority of the Oklahoma Supreme Court could have achieved its purpose by extending the reach of the divorce statute⁵⁷ from testamentary gifts to inter vivos gifts that were incomplete at the death of the donor.⁵⁸ In *Hageman*, the majority of the Ohio Supreme Court could have achieved its purpose by reforming Katharine's will.⁵⁹

Such a forthright means to the desired end would have been preferable in both cases. Considered in the context of the facts of each case, each decision is of limited precedential value. The difficulty is that lawyers do not confine citations to cases that are on point, resulting in the misapplication of both *Miller* and *Hageman*.

IV. THE POUR-OVER WILL AND THE FORCED SHARE

Common law or separate property states giving a surviving spouse, under certain circumstances, the right to take against the will of the deceased spouse and receive a "forced," or elective, share of the testator's estate might or might not accept the notion of an augmented or enhanced estate for forced share purposes.⁶⁰ For example, a state might treat a revocable trust created by the testator as testamentary for purposes of a forced share statute. As a consequence, the value of the corpus of the

57. OKLA. STAT. ANN. tit. 84, § 114 (West Supp. 1984-85).

58. In Massachusetts, if testamentary provision is made for a spouse who is divorced after the execution of the will, the provision is revoked on divorce. MASS. ANN. LAWS ch. 191, § 9 (Michie/Law. Co-op 1981). In *Clymer v. Mayo*, 393 Mass. 754, 473 N.E.2d 1084 (1985), on facts strikingly similar to those of *Miller*, the Supreme Judicial Court of Massachusetts applied the divorce statute to a provision for a spouse made by an unfunded, revocable inter vivos trust instrument executed by the testatrix contemporaneously with a pour-over will. Neither the majority nor the dissenting opinion in *Miller* states that Miller's trust was revocable, but it probably was.

59. Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

60. The Uniform Probate Code uses the expression "augmented estate." U.P.C. § 2-201 (6th ed. 1982).

trust would enter into the calculation of that arithmetical sum assigned to the decedent's "estate" for forced share purposes.

In the ordinary election case, when a surviving spouse elects to take against the will, the spouse rejects provision, if any, made for the spouse by the will. For example, if the spouse is a life income beneficiary under the will, election to take against the will invalidates the income interest. In cases where a revocable trust is treated as testamentary, and the trust designates the surviving spouse as a beneficiary of a life income, the estate, for forced share purposes, includes the corpus of the trust. Election to take against the will invalidates the income interest under the trust, and the forced share is satisfied by property payable from both the probate estate and the trust estate, in proportion to their respective values.

Some states do not recognize the augmented or enhanced estate for forced share purposes. The Indiana Probate Code, for example, is quite explicit when it states: "In determining the net estate of a deceased spouse for the purpose of computing the amount due the surviving spouse electing to take against the will, the court shall consider only such property as would have passed under the laws of descent and distribution."⁶¹ One problem that arises in a state not recognizing the augmented estate occurs when a testator creates an inter vivos trust making his spouse a life income beneficiary, and dies thereafter with a pour-over will that passes his estate to the trustee of the inter vivos trust. The surviving spouse, the life income beneficiary of the trust, elects to take against the will and is allocated a share of the net probate estate. That part of the net probate estate not allocated to the spouse passes to the trustee of the inter vivos trust. The issue becomes whether the spouse should be permitted to take trust income to the extent that the income is enhanced by the addition to the corpus of the trust.

The Missouri Court of Appeals faced that problem in *Lorch v. Mercantile Trust Co. National Association*.⁶² The testator, Walter W. Lorch, Jr., in 1974 created a revocable trust, funded with \$1,000, from which his wife, after his death, was to receive the income until she remarried or died. Lorch's will, admitted to probate in 1980, devised his tangible personal property to his wife, who survived him, and his residuary estate by a pour-over provision to the trustee of the inter vivos trust. The residuary estate was valued at about \$400,000.

The spouse elected to take against the will, and brought a declaratory judgment action against the bank, trustee under the trust and executor under the will, to establish her right to the income interest in the inter vivos trust in addition to her statutory share of the net probate estate.⁶³ The Missouri Circuit Court for St. Louis County granted the wife's motion for judgment on the pleadings, and denied the defendant bank's motion for judgment on the pleadings.⁶⁴ The bank appealed, contending that the surviving spouse electing to take against the will should not be permitted to take both a statutory share of the net probate estate and an income

61. INDIANA CODE ANN. § 29-1-3-1(a) (Burns 1984).

62. 651 S.W.2d 540 (Mo. Ct. App. 1983).

63. *Id.*

64. *Id.*

interest for life in the balance of the net probate estate, by way of the testamentary addition to the corpus of the trust effected through the pour-over provision of the will. The Missouri Court of Appeals rejected this argument and held that:

[The surviving spouse] did not receive double benefits. She received only her statutory share of the probate estate. The trust, an independent entity, was the beneficiary of the residuary devise.

After [the surviving spouse] received her statutory share pursuant to her election to take against the will and the trust received the residuary devise, the probate estate was closed. From it respondent received only her statutory share, no more. The income she is entitled to receive will come from the trust, not the probate estate.⁶⁵

In *Miller*,⁶⁶ the Supreme Court of Oklahoma transformed the pour-over language of Miller's will into incorporation by reference language. In *Lorch*, the Missouri Court of Appeals pushed pour-over language far beyond doctrinal requirements. In *Lorch*, it is undeniable that after Lorch's death his surviving spouse receives income from the trust, not from the probate estate. It is likewise true that, with respect to income originating in corpus as it existed just prior to his death, the election to take against the will is irrelevant. However, with respect to income from trust corpus *received from the net probate estate*, the surviving spouse benefits from the probate estate, and the value of that income interest is a factor that must be considered in allocating the elective share to the spouse. Lorch's children were remaindermen of the inter vivos trust. That being so, on the election to take against the will, the court might have awarded to the spouse her elective share and then distributed the balance of the net estate to the remaindermen on the basis of acceleration of the future interest.⁶⁷

In sum, when a surviving spouse elects to take against a will with a pour-over provision, if the court awards an elective share and gives effect to the pour-over provision of the will, it should not blind itself to the identity of the beneficiaries of the pour-over. It is not the trustee receiving the pour-over who is an object of the testator's bounty; the beneficiaries of the receptacle trust are the donees of the testamentary gift. The trustee is a mere conduit. If the surviving spouse is a beneficiary of the receptacle trust, the spouse might benefit from the pour-over, and the court must take account of that possibility in awarding an elective share from probate assets.

Similarly, a court should consider the identity and terms of a receptacle trust when a controversy exists over the ultimate effectiveness of an intended pour-over. For example, consider the following: The testator during his lifetime created a charitable trust to which he expected to make a substantial addition at death through a pour-over of his entire net probate estate. The terms of the charitable trust instrument directed with precision the application of the intended testamentary

65. *Id.* at 542.

66. *Miller v. First Nat'l Bank & Trust Co.*, 637 P.2d 75 (Okla. 1981).

67. Whether acceleration occurs and what the consequences are requires examining the facts of the particular case. The terms of the gift to Lorch's children are not set out in the report of the case. *See generally* L. SIMES & A. SMITH, *FUTURE INTERESTS* §§ 795-804 (2d ed. 1956).

addition. (Individuals creating charitable trusts often are unrealistically optimistic regarding both charitable objectives to be achieved and the existence of funds by which to achieve them.) At the testator's death, the modest size of the net probate estate creates controversy over whether fulfilling the purpose of the intended testamentary addition to the charitable trust is clearly "impossible or impracticable."⁶⁸ Lest the heirs who would benefit from a failure of the testamentary gift be relegated to contesting the application of *cy pres* only after the net probate estate is paid to the trustee of the charitable trust, payment should be stayed until the finality of the disposition of the net probate estate is determined in the appropriate forum.

That a devise or bequest to a trustee of a trust existing at the testator's death is a testamentary gift to the beneficiaries of the trust was emphasized in 1932 by Chief Judge Cardozo of the New York Court of Appeals in *Matter of Rausch*.⁶⁹ "What is taken as trustee is taken subject to the trust, for it can be held in no other way. A gift to a trust company as trustee of a trust created by a deed identifies the trust in describing the trustee."⁷⁰ What was true a half century ago is true today. Nothing in pour-over theory requires ignoring the identity of the beneficiaries of the pour-over. On the contrary, because a pour-over originates in property of a decedent administered by a probate court, courts are obligated to consider the effect of the pour-over gift. In *Lorch*, the Missouri Court of Appeals refused to do so, and in this respect the court was short-sighted. It is unfortunate that *Lorch* is in print. Although the case no longer reflects Missouri law,⁷¹ attorneys are not precluded from citing it to support an untenable position.

V. POURING-OVER INTO ANOTHER'S TRUST

Although the conventional pour-over is to a receptacle inter vivos trust created by the testator prior to or contemporaneously with the execution of the testator's pour-over will, a pour-over may be made to a receptacle trust created by someone other than the testator. The receptacle trust might be either a testamentary trust or an inter vivos trust.

When the receptacle trust is a testamentary trust created by a person dead at the execution of the pour-over will, the situation at execution of the pour-over will is analytically the same as when the receptacle trust is an irrevocable, unamendable trust created by the testator—neither the testamentary trust created by another nor the inter vivos trust created by the testator is subject to amendment after the execution of the pour-over will. Either, however, might *terminate* prior to the death of the testator. The result would be no trust in existence at the testator's death to which an addition might be made, and the pour-over would consequently fail.

68. 4 A. SCOTT, TRUSTS § 399 (3d ed. 1967).

69. 258 N.Y. 327, 179 N.E. 755 (1932).

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

71. Missouri now recognizes the augmented estate for purposes of the elective share. MO. ANN. STAT. § 474.163 (Vernon 1985).

Because the Uniform Act dispenses with the requirement that a receptacle trust have a corpus,⁷² one might assume it permissible under the Act to make a pour-over to the testamentary trust of a testator alive at the execution of the pour-over will. When a testator executes a will that includes provision for a testamentary trust, the testator believes that at death there will be a net probate estate from which the testamentary trust can be created. This is similar to the creator of an unfunded life insurance trust who executes the trust instrument believing that at death a life insurance policy will be in force, and that the proceeds of the policy will constitute the assets of the life insurance trust. While it is true that the testator of the will providing for a testamentary trust into which a pour-over is intended might revoke his will or amend it by codicil after the execution of the pour-over will, a receptacle unfunded life insurance trust might also be revocable and amendable, and its being so does not initially disqualify it as a receptacle trust under the Uniform Act. (If the life insurance trust were revoked prior to the death of the testator of the pour-over will, the pour-over would of course fail.) Nonetheless, the Uniform Act arguably requires that the testator of the will creating the receptacle testamentary trust be dead at the execution of the pour-over will.⁷³ The beneficiary of an executed will has nothing of value while the testator still lives, and mere execution of a will providing for a testamentary trust is not under this view a fact of independent significance. By way of contrast, when a trustee of an unfunded life insurance trust is not an assignee of the life policy, has no duties to perform before the death of the life insured, and is simply the beneficiary of the policy, execution of the instrument of trust *is* treated under the Uniform Act as a fact of independent significance. This is so despite the fact that the owner-life insured has the power to change the beneficiary at any time. Here history and practice perhaps prevail over logic, although as one writer has stated,

[T]here seems to be no sound reason why a testator should not be able to provide in his will that if another predeceases him and creates a trust under a will duly admitted to probate, then in that event, certain of his property is to be added to that trust.⁷⁴

Under a less strict reading of the Uniform Act, when a pour-over is made to a testamentary trust of another, the terms of the trust are fixed before the death of the testator of the pour-over will, and the testator is presumably familiar with them. If the testator intends a pour-over to a revocable, amendable inter vivos trust of another, the testator is presumably familiar with the terms of the receptacle trust at the time of execution of the pour-over will. If the settlor of the trust revokes or amends the trust in the interval between the execution of the will and the testator's death, the testator might know of the revocation or amendment, and act accordingly. Amendment of the trust might or might not be an amendment the testator would have made had the

72. UNIFORM ACT, *supra* note 4, at 603.

73. *Id. Contra*, L. AVERILL, UNIFORM PROBATE CODE IN A NUTSHELL, § 9.06 at 90 (1978).

74. H. OSGOOD, THE LAW OF POUR OVERS AND THE UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACTS 54 (1964). Statutes on point are WIS. STAT. ANN. § 701.09 (West 1981) and MD. EST. & TRUSTS § 4-412 (Supp. 1985).

testator been the settlor. Revocation invalidates the pour-over for lack of a receptacle trust.

The testator of the pour-over will can have no knowledge of a revocation or amendment of the receptacle trust of another that occurs after the testator's death. The Uniform Act assumes that such an amendment might occur, and provides that trust assets originating in the pour-over shall be administered and disposed of in accordance with a post-death amendment, "if the testator's will so provides."⁷⁵ But if the settlor amends the receptacle trust after the testator's death and the will is silent with respect to such an amendment, the trustee in effect thereafter administers two trusts, one with assets proportionate to the value of the corpus of the receptacle trust immediately prior to receipt by the trustee of the property from the pour-over, and the other with assets proportionate to the value of the augmentation. The former is governed by the post-death amendment, the latter is not.

The Ohio pour-over statute, Ohio Revised Code section 2107.63,⁷⁶ gives the testator no choice in such a case. Relevant language of the Ohio statute is as follows:

The property . . . devised . . . shall be added to and become a part of the trust estate . . . and shall be administered in accordance with the terms . . . of the instrument creating such trust, including, unless the will specifically provides otherwise, any amendments or modifications thereof made in writing before, concurrently with, or after the making of the will and *prior to the death of the testator*. The termination of such trust, or its entire revocation prior to the testator's death, shall invalidate such devise.⁷⁷

In Ohio, if the settlor of the receptacle trust amends the trust prior to the testator's death, administration and disposition of property added to the trust by the pour-over will is governed by the amendment unless the testator specifically directs otherwise. If the testator directs otherwise, the trustee in effect administers two trusts, one with assets proportionate to the value of the corpus of the receptacle trust immediately prior to receipt by the trustee of the property from the pour-over, and the other with assets proportionate to the value of the augmentation. The former is governed by the pre-death amendment, the latter is not. If the settlor of the receptacle trust amends the trust after the testator's death, the Ohio statute gives the testator no choice. With respect to that proportionate part of trust assets originating in the pour-over, the amendment is ineffective.

By permitting the testator of a pour-over will to vary the effect of amendments to the receptacle trust, irrespective of whether the trust is one created by the settlor himself or by another, and irrespective of the sweep of the permissible variation, both the Uniform Act and the Ohio pour-over statute are at odds with one of the underlying justifications for using the pour-over technique—simplicity. At its best the pour-over will simply adds to the assets of an existing trust, and the added assets become an indistinguishable part of the corpus of a single trust, subject to the vicissitudes of that trust. When a donor gives property to another outright, he puts it at hazard. When a donor creates in another a general power of appointment presently exercisable over

75. UNIFORM ACT, *supra* note 4, at 603.

76. OHIO REV. CODE ANN. § 2107.63 (Page 1976).

77. *Id.* (emphasis supplied).

property, the holder of the power may lawfully appoint the property to himself. It is at least arguable that the testator of a pour-over will should be treated by both judges and legislators as having made a tentative choice at the execution of the will, namely, to subject probate assets to the terms of an existing trust, as those terms stand from time, both before and after the testator's death.

Both the Uniform Act⁷⁸ and the Ohio pour-over statute⁷⁹ specifically state that either revocation or termination of the receptacle trust prior to the death of the testator of the pour-over will causes the pour-over to fail. Neither statute specifically addresses revocation or termination of the receptacle trust after the death of the testator. This is a crucial omission because just as a receptacle trust created by another might be amended after the testator's death, so too it might be revoked or terminated after the testator's death.

Assuming that no circumstance under the Uniform Act or the Ohio pour-over statute requires in effect more than one trust, then revocation or termination of the receptacle trust has the same effect on that proportionate part of assets originating in the pour-over as revocation or termination has on that proportionate part of assets in the receptacle trust before receipt of the augmentation. The testator has made probate assets a part of an existing trust, subject to the terms of that trust, including revocation or termination, characteristics of the receptacle trust of which the testator should have been aware.

Suppose, however, that circumstances are more complicated: A testator in a state having the Uniform Act makes a pour-over to the revocable, amendable trust of another who survives the testator. Under the terms of the trust, income is shared by X and Y, siblings. The testator's will is silent with respect to amendments to the receptacle trust made after the testator's death. A post-death amendment is made by the settlor, eliminating X as an income beneficiary, and confirming Y as sole income beneficiary. As a consequence the trustee in effect thereafter administers two trusts. The settlor then seeks to revoke both trusts. He unquestionably can revoke that trust having assets that are attributable to the settlor. But with respect to that trust having assets attributable to the pour-over, it is at least arguable that the testator, not having permitted an *amendment* to affect them, *a fortiori* did not permit *revocation* to affect them. Therefore, the trust cannot end by revocation, but only by termination in the ordinary course of events.

VI. CONCLUSION

If language in a will referring to an instrument of trust in existence at the execution of the will is ambiguous, judicial construction to fix the meaning of the words of the will is both legitimate and appropriate. When language is free from ambiguity, and is clearly either pour-over language, on the one hand, or incorporating language, on the other, there is no call for construction—the matter is simply one of proper identification of the theory to be applied in the particular case. This

78. See *supra* note 4, at 603.

79. OHIO REV. CODE ANN. § 2107.63 (Page 1976).

proposition is true irrespective of some minimal overlap in pour-over and incorporation by reference theories. Judicial refusal to transform pour-over language into incorporation by reference language might lead to a disposition of property at death that the decedent would not have preferred, but such an occurrence is unremarkable. When a decedent has attempted to execute a will but has failed to comply with state requirements on attestation, no will exists, and the law tolerates that consequence. In both the Oklahoma case, *Miller v. First National Bank & Trust Co.*,⁸⁰ and the Ohio case, *Hageman v. Cleveland Trust Co.*,⁸¹ the desire of the respective courts to carry out the perceived objectives of William J. Miller and Katharine L. Hageman is understandable, but the means used to assure objectives—construction—is regrettable. A tortured construction flouts the law, confuses theory, and makes prediction difficult. Other avenues to achieving the testators' objectives were open in both Oklahoma and Ohio, but the courts left them unexplored. A court determined to try to carry out a donor's intention cannot always find a way, but often it can.⁸²

When a will provides for a pour-over of probate assets, nothing in pour-over theory requires courts to blind themselves to the ultimate disposition of pour-over assets, even though the receptacle trust does not fall under the supervision of the probate court. In particular, in separate property states with forced share statutes, courts allocating the forced share should take into account any beneficial interest the surviving spouse takes in pour-over assets through the medium of the receptacle trust. To ignore such a beneficial interest is to advantage the electing spouse at the expense of other beneficiaries of the decedent's estate. Forced share statutes are intended to give to the electing spouse a legislatively determined fair share of the estate, and no more. Judges years ago took account of numerous will substitutes and preceded legislators in creating the augmented or enhanced estate for forced share purposes.⁸³ Today, courts applying forced share statutes should be equally alert to noting the ultimate disposition of probate assets in order to assure that allocating the share to the surviving spouse not only is fair, but also is perceived by successors of the decedent to be fair.

Donors and drafters of dispositive devices intended to take effect at the death of the donor (for example, wills, life insurance contracts, and pay-on-death bank accounts) or intended to continue as dispositive devices on the death of the donor (for example, inter vivos trusts and survivorship deeds) may fail to achieve their purpose because of unanticipated events beyond the control of donors. Some examples are familiar—an intended legatee of a will predeceases the testator, no gift in the alternative has been set out by the testator, and the anti-lapse statute does not apply;

80. 637 P.2d 75 (1981).

81. 45 Ohio St. 2d 178, 343 N.E.2d 121 (1976).

82. In *Porter v. Citizens Fidelity Bank and Trust Co.*, 554 S.W.2d 397 (1977), the Kentucky Court of Appeals held that an inter vivos insurance trust without a corpus was a receptacle trust for pour-over assets because the creator of the trust intended that it be a conduit for any property devised, bequeathed, or given to it. Although the opinion does not explicitly characterize the origin of the pour-over assets, it has been described as a will. 1 A. Scott, *Trusts* § 54.3 at 65 (3d ed. Supp. 1984).

83. The basis for decision has varied. In *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937), the New York Court of Appeals found an inter vivos transfer in trust to be "illusory" and ineffective to deprive the surviving spouse of her statutory share.

the only designated beneficiary of a life insurance policy predeceases the life insured; or, before the death of the grantor of an inter vivos trust, the trust ends by its own terms because of unexpected deaths of beneficiaries.

The conventional pour-over of probate assets is to a receptacle trust created by the testator of the pour-over will. Drafters of pour-over wills can anticipate revocation or termination of the receptacle trust before the death of the grantor-testator, and can plan for an alternative disposition of probate assets. In the absence of alternative disposition, the testator can modify the will after the trust has ceased. In short, where a pour-over into a trust created by the testator is intended, the testator can either anticipate fundamental changes in the trust when executing the pour-over will, or can take account of fundamental changes by executing a codicil after a change has occurred.

But a pour-over can be made also to a receptacle trust created by a person other than the testator of the pour-over will. When such a receptacle trust might be amended or revoked not only before but also after the testator's death, the testator runs the risks of frustration of purpose associated with disposing of property through the agency of others. The power of appointment is an old device that has proved to be remarkably useful in the twentieth century, but its ancient lineage and long development do not preclude problems with its use.⁸⁴ The pour-over will is a relatively new dispositive device. It developed contemporaneously with an array of devices that minimize the relative importance of the probate process, and it competes with these other devices for developmental attention. Testators departing from conventional use of the pour-over will should be cautioned that some of the law on pour-overs has not yet been carefully charted.

Like numerous will substitutes, the pour-over will permits disposition of property at death without complying with the requirements of the Statute of Wills. But the pour-over will differs from will substitutes in that the property affected by the pour-over is inventoried as an asset of the decedent subject to administration by the probate court. Here, once again, courts, and later legislators, have acceded to the desire of donors to dispose of property at death in a flexible and informal way.

Donors and their attorneys should note, however, that variations in pour-over statutes might affect both creation of the receptacle trust and preparation of the pour-over will.⁸⁵ In particular, the possibility of significant change in the receptacle trust, both before and after the death of the testator, should be considered, as a thoughtful listing of possibilities for change might lead to appropriate directions in the pour-over will. In unusual circumstances, such a listing might lead to abandoning altogether a plan to use a dispositive device that, in its more conventional setting, gives the testator both the assurance of a will and the freedom to change that will in an informal way through modifications of the receptacle trust.

84. See, e.g., *Beals v. State Street Bank and Trust Co.*, 367 Mass. 381, 326 N.E.2d 896 (1975) (absent evidence of intent of testator to exercise power of appointment, court presumed intent).

85. See UNIFORM ACT, *supra* note 4, at 599, 604-12.