Recent Legislation: Decedents' Estates--Independent Legal Significance and Pour-Over Wills

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Recent Legislation

DECEDENTS' ESTATES — INDEPENDENT LEGAL SIGNIFICANCE AND FOUR-OVER WILLS

The recent passage\(^1\) of Ohio Revised Code section 2107.63 has significantly modified the existing law and simplified the inter-relationships of inter vivos trusts with testamentary dispositions in "pour-over" wills. This section of the Code recognizes the doctrine of "independent legal significance" with respect to trusts,\(^2\) \textit{i.e.}, that a trust stands by itself as a self-sufficient entity and is not dependent upon the terms of a will to be the recipient of a testamentary gift.\(^3\) The recognition of this doctrine replaces the former requirement that the trust deed be "incorporated by reference" into the will of the testator for a testamentary gift to the trust to be effective.\(^4\)

The statute, which is retroactive in effect,\(^5\) accomplishes four positive purposes: (1) it permits a testator to leave property by will to a trustee of an existing inter vivos trust which is identified in his will; (2) it provides that the property devised by the will shall be administered in accordance with the terms of the trust as they exist at the testator's death and be subject to the courts having jurisdiction over such trusts; (3) it allows the property "pouring-over" from the will to be controlled by the terms of the inter vivos trust no matter how many times that trust has been modified after the will has been executed; and (4) it stipulates that a revocation of the trust revokes the testamentary gift flowing into it.

The effect of this statute can best be illustrated by a comparison to the legal results which existed pursuant to the former Ohio law which required "incorporation by reference."\(^6\)

First, prior to the present statutory enactment, a testator in Ohio could leave property to an inter vivos trust by will only by incorporating the trust deed "by reference" into his will.\(^7\) The terms of the trust deed became part of the will and were treated as having been set forth at

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2. See Committee Comment, OHIO REVISED CODE § 2107.63 (Baldwin, Supp. 1961).
3. 1 SCOTT, TRUSTS § 54.3 (2d ed. 1956).
4. OHIO REV. CODE § 2107.05; Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944).
5. OHIO REV. CODE § 2107.63 (Supp. 1961) provides: "The provisions of this Section shall apply to wills executed before its effective date as well as to wills executed thereafter." Authorities question whether this statute applies retroactively to wills executed and probated before the effective date.
6. See note 4 supra.
length in the will. Upon the death of the testator, property devised to the trust was administered in accordance with the terms of the trust deed as they stood at the time of incorporation into the will. Thus, the testator had both an inter vivos trust and a testamentary trust; the inter vivos trust would govern the disposition of property given during the testator's lifetime, while the testamentary trust would control testamentary gifts passing after death. However, under Ohio Revised Code section 2107.63, incorporation of the trust deed is unnecessary. The terms of the trust deed are not part of the will, and a testamentary gift passes to the trustee of the trust to be administered in accordance with the terms of the trust as it stands at the death of the testator. There is only one trust — the inter vivos trust — which controls the distribution of the property and which has "independent significance."

Second, amendment of an inter vivos trust into which a provision of the testator's will "poured over" had to be incorporated into the will of the testator by codicil under the doctrine of incorporation by reference, or the amendment would not control the property passing by will. This principle is illustrated by the case of Koeninger v. Toledo Trust Company, where the testator incorporated an existing inter vivos trust into his will, providing that the residue of his estate "pour over" into the trust. Later, prior to his death, the testator amended his trust to provide that a nephew receive $500 and ten acres of land. The testator did not amend his will to incorporate the amended trust. Part of the residue of the testator's estate consisted of the land given under the amended trust to the nephew. Considering the effect of such instruments, the court held that since the amendment to the trust had not been incorporated into the will by codicil, the gifts to the nephew under the trust amendment could not be satisfied out of property pouring over from the will. The effect was that the nephew could not take the land and the $500 gift coming from the will. However, the nephew received the $500 gift because it could be satisfied out of funds transferred by the testator to the trust during his lifetime. Thus, property pouring over from the will could only pass under the trust as it was incorporated into the will prior to amendment. Under Ohio Revised Code section 2107.63, however, the nephew would have received the land under the "pour over"

8. 1 Scott, Trusts § 54.3 (2d ed. 1956). See also Evans, Incorporation by Reference, Integration and Non-Testamentary Act, 25 Colum. L. Rev. 879 (1925).
10. Ibid.
12. 1 Scott, Trusts § 54.3 (2d ed. 1956). See also York's Estate, 95 N.H. 435, 65 A.2d 282 (1949).
provision of the will, since the trust standing independently could be modified without compliance with testamentary formalities.¹⁵

Third, under the doctrine of "incorporation by reference" a complete revocation of the inter vivos trust did not revoke the testamentary trust which had been incorporated into the testator's will, where the original will incorporating the trust by reference had not been amended or revoked. The beneficiaries under the trust deed, which had been incorporated, received their gifts out of the "pour-over" will provision.¹⁶ This is no longer true, for Ohio Revised Code section 2107.63 specifically provides that a revocation of the inter vivos trust revokes the "pour-over" testamentary gift to that trust.¹⁷

Finally, since there is only one trust, the inter vivos trust which exists after the testator's death, under the doctrine of "independent legal significance," there is no conflict over the administration of the trust. The trust is administered by the courts having jurisdiction over inter vivos trusts.¹⁸

The passage of Ohio Revised Code section 2107.63 has solved many of the complex problems relating to pour-over provisions of wills into existing inter vivos trusts. Recognition of the doctrine of independent legal significance is a step forward in the facilitation of estate planning in Ohio.

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¹⁵. OHIO REV. CODE § 2107.63 (Supp. 1961) provides: "[P]roperty . . . shall be administered in accordance with the terms and provisions of the instrument creating such trust, including, . . . any amendments or modification thereof made in writing before, concurrently with, or after the making of the will, and prior to the death of the testator." See also York's Estate, 94 N.H. 435, 65 A.2d 282 (1949); Ritchie, Alford, & Effland, CASES ON DECEDENTS' ESTATES AND TRUSTS 440 (1st ed. 1955).

¹⁶. Fifth-Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 70 N.E.2d 920 (1946).


¹⁸. Ibid.