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"POUR-OVER WILLS": USE WITH INTER VIVOS TRUSTS

*Alan N. Polasky**

I. INTRODUCTION

The preceding article in this symposium[1] dealt largely with a most important theme, that of minimizing administration problems as an integral phase of evolving a sensible, planned disposition of a client's assets. The immediate subject of this article, the use of the "pour-over" will in conjunction with an inter vivos trust, has proven to be a device uniquely useful in this respect.[2]

The concept of the "pour-over" is not difficult. It is simply a dispositive provision which directs that all or a part of an estate is to be added to the corpus of an existing trust, to be administered according to and without the necessity of reiteration of the terms of the trust. The basic goal is to furnish a simple mechanism for adding the poured-over assets to the corpus of the existing trust in order to secure a unified administration of assets with whatever minimization of administrative expense or detail is thus possible. Within the past score of years, such clauses in wills, usually pouring-over to inter vivos trusts, have become increasingly common.

At this point, two things should be made clear. First, this article is confined to the garden-variety pour-over of probate assets, from the estate to an existing trust by a pour-over clause in the will. There are, of course, other more exotic examples of pouring-over. As Mr. Joseph Trachtman so well put it, "The pouring is usually by

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[1] This article is adapted from the talk on "Pour-Over Wills and Trusts" delivered at the Southwestern Legal Foundation's Institute on Wills and Probate on March 7, 1963. Much of the "legal background" material was previously published in Polasky, *Pour-Over Wills and the Statutory Blessing*, 98 Trusts & Estates 949 (1959), and A.B.A. Proceedings, Section of Real Property, Probate & Trust Law 45-64 (1959). Citations are to the latter and are hereinafter referred to as Polasky.

[2] A number of excellent articles have dealt with this subject. Pre-statute problems are discussed in Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust*, 50 Mich. L. Rev. 33 (1951); Lauritzen, *Can a Revocable Trust Be Incorporated by Reference?*, 45 Ill. L. Rev. 583 (1950); Shattuck, *"Pour-Over" Trusts—A Renewed Warning to Draftsmen*, 91 Trusts & Estates 207 (1952). For later articles written after the beginning of statutory treatment, see Schenck, *The "Pour-Over" Technique in Estate Planning*, 38 Taxes 57 (1960); McClanahan, *Bequests to an Existing Trust-Problems and Suggested Remedies*, 47 Calif. L. Rev. 267 (1959); Scott, *Pouring Over*, 97 Trusts & Estates 189 (1958); Lauritzen, *Pour Over Wills—Cautions in Light of Recent Statutes and Decisions*, 95 Trusts & Estates 992 (1956); Note, 57 Mich. L. Rev. 81 (1958); Note, 69 Harv. L. Rev. 1147 (1956). See also Comment, 34 Miss. L.J. 81 (1962). Articles with primarily local flavor include, Trachtman, *Pour Overs—New York Case Permits Bequest to Amended Trust*, 97 Trusts & Estates 416 (1958); Comment, 29 Fordham L. Rev. 143 (1960); Note, 41 B.U.L. Rev. 520 (1961); Note, 13 Baylor L. Rev. 301 (1961) (Texas). See also Wren, *Recent Texas Statutes Affecting Estate Planning*, 15 Sw. L.J. 479, 495-498 (1961).

Will to a living trust . . . but sometimes the laws of gravity are disregarded and assets are made to flow up instead of down, or laterally—from trust to trust—with the nonchalance of goats who leap from precipice to precipice."[3] Thus, there are pour-over clauses in trusts which direct that the assets be added to another inter vivos trust on the happening of a particular event or even directing that the assets of the inter vivos trust be added to a testamentary trust or to the estate itself. Although these clauses are less common, they are quite capable of adding "illustrative problems" to the case law as indicated by the recent opinions in *St. Louis Union Trust Co. v. Blue*[4] and *Marshall v. Northern Trust Co.*[5] Indeed, these less common patterns, though useful in selected situations, are more likely to create problems, absent careful drafting and continuing attention.

Secondly, although the popularity of the pour-over device in "common law" states[6] is directly related to the increased use of inter vivos trusts, quite separate and distinct reasons may be ascribed to utilization of the pour-over device as distinguished from those underlying employment of the inter vivos trust. Thus, one

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[3] Trachtman, *supra* note 2, at 416, appropriately adding: "The more frenzied planners do not have the sixth sense or surefootedness that nature gives to goats, and so sometimes they take these short cuts without being aware of where they lead."

[4] 353 S.W.2d 770 (Mo. 1962). A settlor created a revocable life insurance trust in 1932, created an irrevocable family trust in 1950, executed a will in March, 1954, which, *inter alia*, directed a bequest to the trustees of the family trust of "such properties out of my residuary estate as may be necessary to bring the fair market value of that trust estate up to the sum of . . . $800,000," with remainder to a charitable foundation. In November, 1954, the settlor amended the insurance trust by providing that the proceeds of the insurance should be paid to the trustees of the family trust. An issue therefore arose as to whether the executor should transmit to the trustees of the family trust the full $800,000 called for under the will *or* might reduce it by the $220,000 poured-over from the insurance trust.

[5] 22 Ill. 2d 391, 176 N.E.2d 807 (1961). A wife executed a will apparently incorporating by reference the terms of a trust "created" by the will of her husband. Further provision was made for merging her testamentary trust with the testamentary trust of the husband if deemed desirable by the trustee. The bequest in trust was to take effect only if the husband predeceased her or died within thirty days of her death. Although the husband did predecease the wife, he had, subsequent to the execution of the wife's will, revoked his own will. Because of the particular language used in framing the bequest in trust in the wife's will, by which she left the residue to the corporate trustee upon the same trusts under which the bank "may at the time of my death be holding the trust estate created by my said husband under his last will and testament . . .", a question arose as to whether the wife's will actually created a trust incorporating by reference the terms contained in the husband's now revoked will. It was held that a valid trust incorporating those terms had been created and, therefore, the wife's residuary estate did not pass by intestacy. Apart from the peculiar phrasing of the direction, the bequest would have been a typical case of incorporation by reference. It was not, in any sense, an attempt to pour-over into a trust to be created by the will of another. Yet, as an alternative to that sort of device, it illustrates the problems which could occur. See note 81 *infra*.

[6] The term "common-law states" is used as a short-hand designation of those states other than Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, the eight basic "community property states."

might anticipate greater use of both the "life insurance trust,"[7] which has become so useful in planning for the younger client, and the so-called "living trust,"[8] for the client of somewhat greater means, even without the pour-over device. It is understandable, however, that the use of the latter to facilitate unified administration of all assets further encourages the use of the inter vivos trust. Although the inter vivos trust has certain "standard" advantages, its utility may vary somewhat from state to state because of differences in local law.[9] In even greater measure, differences in state laws governing administration of testamentary dispositions affect the relative pressures to use the pour-over device. A word about this may be in order.

If the goal sought by the draftsman is merely unified administration of the probate and trust assets, he could have created a testamentary trust containing terms similar to those in the inter vivos trust and included appropriate merger clauses in each instrument. Unfortunately, the desire for merger may be frustrated if the draftsman neglects to provide identical terms for each. Moreover, in some states, it may not be possible to merge inter vivos and testamentary trusts even though the terms are identical.[10] Thus, in a state such as

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[7] See Davis, *Trust Planning,* 1 Ariz. L. Rev. 196 (1959). A number of excellent articles have been written about the life insurance trust, some with helpful local flavor. *E.g.*, Stephens & Johnson, *Life Insurance in Estate Planning,* 15 Sw. L.J. 570 (1956); Thurman, *Federal Estate and Gift Taxation of Community Property,* 1 Ariz. L. Rev. 253, 257-259, 270-272 (1959); Thurman, *Federal Estate and Gift Taxation of Community Property Life Insurance,* 9 Stan. L. Rev. 239 (1957); Wilkinson, *Life Insurance and Estate Planning Tax Aspects,* 38 Texas L. Rev. 167 (1959); Zuber, *Life Insurance Trusts and Gifts of Life Insurance,* in Texas Institutes: 5 Taxation 29 (1960).

A good example of treatment in a common-law state is Clements, *What Every Lawyer Should Know About Insurance Trusts,* 43 Ill. B.J. 336 (1955). The treatise in the field is Smith, Personal Life Insurance Trusts (1950). Earlier disenchantment of corporate fiduciaries described by Smith, *supra,* "When, during the early part of the decade 1930-1940, numerous revocable insurance trusts were abandoned as settlors felt the need for cash which could be realized from policies placed in trust, corporate fiduciaries were quite naturally disappointed," seems to have been largely dissipated. A further bibliography will be found in Stephens & Johnson, *supra,* at 570 n.1.

[8] The "living trust" is used to describe the revocable inter vivos trust, other than the pure life insurance trust. See *e.g.*, Gresham, *Lifetime Transfers and Estate Planning,* 15 Sw. L.J. 531, 534 (1961).

[9] For a discussion of the potential drawbacks of the inter vivos trust in California, for example, see Wile, *Judicial Assistance In the Administration of California Trusts,* 14 Stan. L. Rev. 231 (1962). General discussions will be found in 1 Casner, Estate Planning 93-279 (3d ed. 1961); Shattuck & Farr, An Estate Planner's Handbook 94-111 (1953); Loring, A Trustee's Handbook 319 (6th ed. 1962).

The use of the living trust to dispose of the husband's entire interests in property, free of dower and statutory rights of a surviving spouse, presents a continuing and current problem in the common-law states. In Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961), the court upheld the validity of such a trust despite the existence of earlier Ohio precedents to the contrary. See Note, 60 Mich. L. Rev. 1197 (1962), discussing the *Smyth* case, the earlier Ohio cases, and similar cases from other jurisdictions. The issue is not dead by any means, as illustrated by the recently pending case of Purcell v. Cleveland Trust Co., No. 584452, Prob. Ct. (______ ___, 1963).

[10] Polasky, *supra* note 1, at 46.

Illinois, which does not provide for continuing supervision of a testamentary trust, there may be a valid reason (other than savings occasioned by not having to reiterate the trust terms) for using a pour-over.

In states like Michigan, Ohio, or California, which require continuing judicial supervision by the court with probate jurisdiction of testamentary trusts, there may be additional impetus to use the pour-over as a means of avoiding the additional expense and restrictions of a testamentary trust. Thus, while failure to achieve a combined administration in Texas or Illinois might be only mildly inconvenient, the failure would be somewhat more significant in Michigan. Moreover, in many states, the trustee of a testamentary trust of a domiciled decedent must be a resident of the domiciliary state. Not only may the bulk of assets be administered by a nonresident if an inter vivos trust is created, but, in addition, the probate assets may be added to those held by the non-resident through use of the pour-over.[11]

It would be unfortunate, however, to overemphasize these differences in pressures to use the pour-over because there are cogent reasons for its use in any state in which its validity is not subject to doubt. Apart from its simple convenience, which alone might persuade many attorneys, it is generally felt that the pour-over avoids the publication of the dispositive terms of the estate in situations in which the client would prefer that the terms not be a matter of public record.[12]

Despite the increasing use of the pour-over will during the past score of years, several scholarly articles published about a dozen years ago raised some serious questions about the use of the device.[13] These articles were not a source of comfort to the estate planner! As

[11] For example, a young couple domiciled in Michigan might want both custody of their minor children and administration of their assets to be handled by a relative in Arizona if both parents die during the minority of a child. Although Michigan law would require a Michigan fiduciary to act as trustee of a testamentary trust, subject to provisions for certain nonresident corporate fiduciaries, an Arizona relative may be made trustee through creation of an inter vivos trust, usually nominally funded, with further use of a pour-over will provision conveying interests in probate property.

[12] This statement should be qualified. A very fine midwestern probate judge has suggested that he would require the trust to be produced and published at the time the will is offered for probate. Matter of Harzfeld, No. 68955, Prob. Ct., (______ ___, 1952) (Opinion of Welch, J.). Most attorneys who have studied the question would probably conclude, however, that only the will need be offered for probate in most courts, and though some courts might require production of the trust for inspection to determine the validity of an order of *distribution* of the poured-over assets, it is usually not necessary to publish the terms of the trust, absent a contest.

[13] Lauritzen, *supra* note 2; Palmer, *supra* note 2; Shattuck, *supra* note 2.

a result, over two-thirds of the states have enacted some form of legislation dealing with pour-overs.[14]

This is the background of the pour-over device and suggests that attention be directed to:

(a) the factors which have made the inter vivos trust the popular device that it is (and have thus contributed to the popularity of the pour-over);[15]

(b) the legal problems which cast doubt on the effectiveness of the pour-over;

(c) the recent legislation enacted to obviate these "doubts." Within the past three years, fourteen states have enacted the new Uniform Testamentary Additions to Trusts Act,[16] and "non-uniform" pour-

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[14] An analysis of the seventeen statutes enacted prior to August, 1959, is found in Polasky, *supra* note 1. Included is legislation from Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Maryland, Mississippi, Montana, Nebraska, North Carolina, Oregon, Pennsylvania, Virginia, Washington, Wisconsin, and Wyoming. The Florida statute has been revised and Connecticut has adopted the Uniform Testamentary Additions to Trusts Act. See Fla. Stat. Ann. §§ 736.27, 737.24 (1944); Conn. Gen. Stat. Rev. § 45-173a (Supp. 1961). In addition to Connecticut, the Uniform Testamentary Additions to Trusts Act, 9C Unif. Laws Ann. 110 (Supp. 1962), has been enacted in: Arizona: Ariz. Rev. Stat. Ann. §§ 14-141 to -143 (1961); Arkansas: Ark. Acts 1962, No. _____; Idaho: Idaho Code §§ 68-1101 to -1104 (Supp. 1963); Michigan: Mich. Stat. Ann. §§ 26.78(1)-(4) (Supp. 1963); Minnesota: Minn. Stat. § 525.223 (Supp. 1963); New Hampshine: N.H. Rev. Stat. Ann. §§ 563A:1 to :4 (1961); New Jersey: N.J. Stat. Ann. § 3A, tit. 3 (Supp. 1963); North Dakota: N.D. Cent. Code §§ 56-07-01 to -04 (1961); Oklahoma: Okla. Stat. Ann. tit. 84, §§ 301-04 (1961); South Carolina: S.C. Code §§ 19-295 to -298 (1962); Tennessee: Tenn. Code Ann. § 32-307 (1961); Vermont: Pub. Act No. 291 (1961); West Virginia: W. Va. Code ch. 41, art. 3, §§ 8-11 (1961).

Three other states have enacted quite similar, though non-uniform statutes: Alabama: Ala. Code tit. 61, § 4(1) (Supp. 1961); Ohio: Ohio Rev. Code Ann. § 2107.63; Texas: Tex. Prob. Code Ann. § 58(a) (Supp. 1962) (see Note, 13 Baylor L. Rev. 301 (1961); Wren, *supra* note 2). For the status of the pour-over in other states, consult Schaefler, *Validity of "Pour-Over Trusts,"* 102 Trusts & Estates 265 (1963), suggesting that only in Louisiana is the pour-over clearly lacking in validity. Wren, *supra* note 2, at 495, reaches the same conclusion.

[15] This refers primarily to states which have statutes or which clearly validate pour-overs under exsiting decisions, *e.g.*, Maine and Massachusetts are illustrative of the latter. The pour-over device is apparently much more sparingly used in New York.

[16] See note 14 supra. 9C Unif. Laws Ann. 110 (Supp. 1962) 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 bcome a part of the trust to which it is given and (b) shall be administered and disposed of

over statutes have been enacted in four other states,[17] including the 1961 Texas Act[18] which is actually quite similar in scope to the Uniform Act. It would seem appropriate to consider and compare the provisions of the Uniform Act and the Texas Act and briefly to consider what the statutes were designed to accomplish and the extent to which these goals have been reached. Since approximately one-third of the states are without legislation, including some in the Southwest, it might be helpful to consider what can be done by the draftsman in these states.

(d) a few problems which the draftsman must recognize and consider, such as the effect of amendments of the trust after the testator's death if the testator pours into a trust over which someone else has a power of amendment, perpetuities, "fees" (a not inconsiderable factor in some jurisdictions in which pour-overs and inter vivos trusts have become popular), and the mobility of the client. A word or two about such problems and the mechanics of using pour-overs seems in order.

II. Advantages and Problems of Use of the Pour-Over Clause With the Inter Vivos Trust

A. *Impetus To Use Of The Inter Vivos Trust*

One of the major reasons for the increased popularity of the inter vivos trust in almost every state is to be found in the changing composition of the assets around which the client's dispositive plan is built. Today, to an ever-increasing degree, the major factors in the estates of both younger and older clients are life insurance and

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 terminaion of the trust before the death of the testator shall cause the devise or bequest to lapse.

[17] See note 14 *supra.*

[18] See note 14 *supra.* Tex. Prob. Code Ann. § 58(a) (Supp. 1962) states:

By a will duly executed pursuant to the provisions of this Code, a testator may devise or bequeath property to the trustee of any trust (including an unfunded life insurance trust, even though the trustor has reserved any or all rights of ownership in the insurance contracts) the terms of which are evidenced by a written instrument in existence before or concurrently with the execution of such will and which is identified in such will, even though such trust is subject to amendment, modification, revocation or termination. The property so devised or bequeathed shall be added to the corpus of such trust to be administered as a part thereof and shall thereafter be governed by the terms and provisions of the instrument establishing such trust, including written amendments or modifications thereto made before the death of the testator. An entire revocation of the trust prior to the testator's death shall cause the devise or bequest to lapse.

occupation connected benefits. Indeed, in the case of the younger client, life insurance benefits[19] and social security benefits[20] are likely to be the major resources in the event of premature death. As the client grows older and advances to executive status, employment connected benefits become more and more important. Group life insurance, deferred compensation arrangements, and benefits under qualified pension and profit sharing plans call for consideration. Often the earlier executed life insurance trust becomes a broadened inter vivos trust with a tailored disposition of the various executive benefits.

Subsequently, attention will be directed to the inter vivos trust for the executive or other client of means. But, for the moment, consider the more typical client and the reasons why the life insurance trust with pour-over will may be significant in planning for him.

1. *Use of the Revocable Life Insurance Trust in Common Law States*

a. *Impetus in Common Law States.*—Although the distinctive facets of the community property system and the excellent system of estate administration in Texas[21] generally inhibit the use of the revocable life insurance trust coupled with a pour-over will,[22] the Texas lawyer is likely to encounter this type of dispositive plan; therefore, he should be familiar with it. The reason is simple. In the Midwest, there is an ever-increasing use of the revocable life insurance trust coupled with the pour-over will. Because of the mobility of our population, it is likely that the Texas lawyer will encounter some of these plans in his practice.

The popularity of the pour-over will and revocable life insurance trust in the North is well deserved. For example, consider a younger client who has a wife, several minor children, a heavily mortgaged home in joint tenancy, life insurance, and a future. In a common-law state, intestacy may be disastrous for many reasons; survivorship rights in the real estate and the usual life insurance beneficiary desig-

[19] Thurman, *Federal Estate and Gift Taxation of Community Property*, 1 Ariz. L. Rev. 253 (1959), suggests that the face amount of life insurance in force in 1958 was $500 billion. More recent estimates place it in excess of $600 billion.

[20] Current survivorship benefits range up to $254 per month for a widow of a fully insured employee with two surviving children under the age of eighteen. Discounted at 3½%, and assuming two infants, the benefits are the equivalent of almost $40,000 of life insurance. In addition, there are provisions for widow's benefits commencing at age sixty-two ranging to $104.80 per month and a lump-sum death payment of $255. See U.S. Dep't of Health, Education, and Welfare, Your Social Security (1961). An earlier in-depth treatment, but antedating the 1961 changes in benefits, is Larson, Know Your Social Security ( ).

[21] See Winn, 17 Sw. L.J. ___ (1963).

[22] There are probably persuasive reasons for using the pour-over in Texas, too. See text accompanying note 46 *infra*.

nations are no substitute for a proper estate plan. In virtually every case, a will is needed for the following reasons, among others.

First, there will usually be some property apart from the insurance and the jointly held property, and in the absence of a will, this property passes by intestate succession with up to two-thirds going to the children. This necessitates a guardian of the property for the children and strict compliance with guardianship procedures. Often, this occasions unnecessary expense which can be ill afforded.[23]

Secondly, even the jointly held property which would pass to the spouse is not appropriately disposed of if both the client and his wife should die while the children are minors. Here, the common-law planner does not have the problems that an attorney in community property states like Texas,[24] California,[25] and Washington,[26] faces in characterizing property purchased with community funds and taken in joint tenancy designation. In addition, there are the problems arising from the payment of insurance proceeds to guardians if the original beneficiary designation was not tailored for this contingency. Of course, the possibility of both parents dying while a child is a minor is a problem in both the community property and the common-law states. Thus, it is one of the factors suggesting a trust to cover that contingency in any of the states.

Thirdly, most attorneys are painfully aware that the failure of parents to specify in their wills their choice for guardian of the person of the minors can lead to the unfortunate spectacle of relatives fighting over custody of the minor when both parents are deceased. Thus, the properly counseled young client realizes that he

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[23] Common-law states, *e.g.*, Michigan, do not have those helpful community property provisions which pass the property acquired by the community to the wife in the event of intestacy. See Polasky, Mullin, & Pigman, *Estate Planning for Migrating Clients: Problems When Couple Moves from Community Property State to Common Law State*, 101 Trusts & Estates 876 (1962). Neither is there the equivalent of the quite helpful California "quasi-community" property provision which would pass certain of the separate property to the wife. *Id.* at 876; Schreter, *"Quasi-Community Property" in the Conflict of Laws*, 50 Calif. L. Rev. 206 (1962); Sikora, *Recent Developments Under Probate Code 201.5 and Related Non-Community Property Problems*, 14th Ann. Tax Forum (Title Ins. & Trust Co., Calif.) 35 (1962).

[24] In Texas there are the intriguing problems posed by the attempt to partition community property and transmutation to joint tenancy. See Comment, *Hailey, Hilley and House Bill 670—A Study in Partition and Survivorship in Texas Community Property*, 15 Sw. L.J. 613 (1961).

[25] See Basye, *Joint Tenancy: A Reappraisal*, 30 Cal. So. B.J. 504 (1955); Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87 (1961); Robinson, *The Basis of a Surviving Spouse's Interest in Transmuted Community Property*, 32 So. Cal. L. Rev. 244 (1959).

[26] Griffith, *supra* note 25, at 107-8, discusses the problem with respect to other community property states including New Mexico and Arizona. A personal discussion in August, 1962, with trust officers in Seattle, Washington, suggests that similar problems have arisen there.

needs a plan to cover the possibility of death of both parents while the children are minors. Moreover, the plan should include a will for both husband and wife appropriately naming guardians for the children and an appropriate designation of an executor under the will to minimize administrative problems.[27]

Attorneys have come to realize that they fail to do an adequate job of estate planning unless they consider the client's insurance coverage, other available death benefits, and such modifications of settlement arrangements as seem desirable in view of the overall picture. What then are the possibilities of arranging the potential insurance benefits of the younger client? Basically, the lawyer faces a choice between execution of wills plus the selection of appropriate options under the policies as contrasted to the utilization of a trust for the life insurance proceeds. If a trust is used, he must decide whether it is to be a testamentary trust or an inter vivos trust. Which is most appropriate?

You have, undoubtedly, heard debates concerning whether the proceeds should be left under the terms of one of the insurance options *or* taken down and managed as a part of the corpus of the trust. Partisan debates on this matter are hardly appropriate because each pattern has advantages and disadvantges. The choice should be made in the light of the applicable circumstances.

On the side of selection of the options, one might suggest that they will be particularly attractive if the client wants: (1) greater certainty (in terms of assured non-fluctuating value of assets), (2) regularity of payment, and (3) predetermined control of the payments. In addition, insurance companies are happy to point out that there are no separately itemized administrative fees or expenses and that there is a contractually binding promise to pay at least a minimum interest rate on deferred withdrawals. In addition, when it may be important, the Internal Revenue Code[28] provides for the exclusion from income of up to 1,000 dollars of the interest per year on the deferred installments payable to the surviving spouse. Further, settlement options come in a splendid variety despite our tendency to talk in terms of four or five standard types;[29] a good deal of

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[27] At least some practicing attorneys who have had contact with estates administered by the public administrator would suggest the desirability of nomination of an executor by the decendent.

[28] Int. Rev. Code of 1954, § 101(d).

[29] See *e.g.*, Hoxie, *Secondary Beneficiaries and Settlement Options*, 10. J. Am. Soc'y C.L.U. 135 (1956); Noback, *Settlement Options*, 10 J. Am. Soc'y C.L.U. 324 (1956); Redecker, *Designating Beneficiaries and Using Settlement Options*, 4 Prac. Law. 17 (1957); Redecker, *Life Insurance Settlement Options*, 97 Trusts & Estates 940 (1958); Redeker, *Problem Areas of Beneficiary Designation and Settlement Option Agreements*, 12 J. Am. Soc'y C.L.U.

flexibility may be built into the plan through judicious selection of these options.

On the other hand, the use of the trust in coordination with the administration of other assets offers somewhat different advantages because it:

(1) minimizes the problem of coordinating benefits from different policies issued by different companies;

(2) permits discretion in the trustee to invade principal for emergency or other uses and to modify the plan in the light of changing and unforeseen circumstances (without putting this power in the hands of the beneficiary);

(3) permits effective utilization of the proceeds in a coordinated plan designed to qualify, to the extent desired, for the federal estate tax marital deduction—particularly in the larger estate;[30]

(4) maximizes the income yield as well as generally increasing the flexibility necessary to maintain purchasing power during periods of inflation. Of course, a professional trustee will charge a fee, but it may be more than made up by increased yield.

There will be times when the proceeds do not aggregate sufficient funds to justify the minimum fee of the corporate fiduciary who would take down, reinvest, and manage the funds. Here, the use of options in combination with an individual family trustee, who is chosen to act primarily because of his power to elect options and vary their use, may be advisable. Although the funds may warrant the use of a corporate fiduciary to collect funds and secure normal trust investment advantages, there is an occasional temptation to set up a trust naming an individual trustee. This "may" result in the rendition of capable services without fees. Rarely, however, will this be advisable. If the individual is competent, the lawyer does him no favor by saddling him with the time-consuming activity of preparing form 1041 and explaining the tax consequences to the beneficiaries; if he is not competent, little more need be said.

146 (1958); Steinberg, *Mathematical and Legal Factors in the Selection of Settlement Options*, 12 J. Am. Soc'y C.L.U. 350 (1958).

[30] Obviously, it is possible to qualify the rights under individual policies, provided one is careful to scrupulously observe the requirements of either section 2056(b)(6) of the 1954 Code or the estate-trust requirements. See Polasky, *Estate Tax Marital Deduction in Estate Planning*, 3 Tax C.Q. No. 2, 1, 31, 37 (1959). The lessons suggested by the opinions in several cases involving unfortunate fact situations should be carefully considered. *E.g.*, Meyer v. United States, 364 U.S. 410 (1960); Werbe v. United States, 273 F.2d 201 (7th Cir. 1959). *Werbe* was not followed by the Tax Court in Estate of Jennings, 39 T.C. 39 (1963). See also Estate of Cornwell, 37 T.C. 69 (1962); Eggleston v. Dudley, 257 F.2d 398 (3d Cir. 1958). Where separate property is involved, the attorney in the community property state may want to utilize the marital deduction through qualification of life insurance (including the husband's share of community policies). See Stephens & Johnson, *supra* note 7, at 608.

The attorney may be certain of one thing. In each case, there should be provision for a trust that will operate for the benefit of any minor children if both the husband and wife die prematurely. There are several ways of handling this. Occasionally, when the amounts involved are small and it seems apparent that existing tax consequences are not sufficiently important to weigh against giving the wife complete control,[31] the client will want to pass it to the wife to do with as she sees fit. Despite the common-law state theory that the property is that of the husband and the concept in Texas of the husband as manager of the community,[32] some clients feel that the wife handled the money up to this point and she should not be deprived of full control simply because her husband died. If the client insists that all assets go outright to the wife, then certainly there should be a trust to receive any proceeds payable at her death, as well as to receive the residue of her estate for the benefit of minor children. It will usually be desirable to avoid successive probate expenses and succession taxes;[33] thus, it will usually make sense to set up a trust initially. If the wife is competent, she can act as trustee with a corporate trustee to act after her death; in other cases, it will be in the family's best interest for a professional trustee to act, at least following the husband's death.

If the trust seems desirable, it is common to set up a revocable, unfunded life insurance trust, setting forth provisions for the administration of the proceeds of policies made payable to the trustee upon the death of the settlor.[34] During his lifetime, the insured may retain full rights of modification, revocation, and control of the policies, and he continues to be responsible for payment of the premiums. Later, other policies, including group life insurance, and benefits payable under employee benefit plans are also made payable to the trust.[35] There are no federal succession tax advantages to the revocable trust;[36] it is simply an aid to dispositive planning. A good

[31] Of course, taxes should not be all-important. There may be cogent reasons for granting the wife rather complete control through an outright transfer or, at least, giving her a general power of appointment which can be exercised during life coupled with a testamentary general power of appointment. Indeed, even tax considerations may suggest the desirability of such a course. See Polasky, *supra* note 30, at 32-36. Discussion here is limited to the smaller estate.

[32] See Stephens & Johnson, *supra* note 30, at 586; Thurman, *supra* note 19, at 257.

[33] Sucessive estate taxation is, of course, subject to the relief provisions of section 2013 of the 1954 Code, which deal with the credit for tax on prior transfers.

[34] It has been generally assumed by most lawyers that a change of beneficiary designation of the trusteed policies is preferable to assignment of the policies. However, state law may indicate otherwise. No investigation of the laws of the various states has been undertaken and this comment is simply inserted to alert attorneys to the necessity for checking the applicable local law.

[35] See Schenck, *supra* note 2, at 60.

[36] The focus here is upon the *revocable* inter vivos trust; revocability precludes income

deal has been written about the possibility of minimizing federal estate taxes and possibly income taxes through the use of an irrevocable life insurance trust.[37] For present purposes, suffice it to say that *usually* the attorney will prefer to retain flexibility with an amendable, revocable trust for the younger client.

While recognizing the possibility of the use of a testamentary trust, the creation of the inter vivos trust may be preferred for a number of reasons.

First, if the proceeds are payable to the estate, the proceeds will frequently be subject to inheritance taxes which would not be applicable to proceeds payable to named beneficiaries.[38] Thus, payment of the proceeds to the estate would result in loss of the complete exemption of insurance proceeds in a state like Michigan and of the 40,000 dollar exemption in Texas.[39] Similarly, designation of the estate or executor as beneficiary often subjects the proceeds to creditor's claims from which they are otherwise free.[40]

Secondly, although designation of the "trustees named in my will" as beneficiaries of the policy may be thought to avoid some of these problems, such a designation may create a very difficult problem for life insurance company counsel.[41] In short, what if the client dies without a will, or leaves an instrument which is not entitled to probate as his will, or executes more than one will naming different trustees in each? Although the trustee is identified by name, problems may arise if the terms of the trust are to be determined from the will and questions arise as to the validity of the will. Successive wills may also present problems. Some attorneys suggest that in those instances in which it is desirable that the trustee be permitted to elect options, they have found that some companies clearly permit it while others ostensibly do not.[42] They also suggest that a carefully worded letter, indicating that the client's choice of insurance

tax and estate tax "saving" by virtue of the provisions of sections 676 and 2038 of the 1954 Code.

[37] See *e.g.*, Rice, California Family Tax Planning c. 19 (1959); Bennion, *Life Insurance Trusts in Estate Planning*, 14th Ann. Tax Forum 6 (1962); Moses, *Irrevocable Life Insurance Trusts Can Be Attractive Estate Planning Tool*, 18 J. Taxation 206 (1963); Stephens & Johnson, *supra* note 30, at 605; Walker, *Use of Life Insurance Trusts in Estate Planning*, 1957 So. Calif. Tax. Inst. 489; Wilkenson, *supra* note 7, at 185-188.

[38] Schenck, *supra* note 2, at 58.

[39] Stephens & Johnson, *supra* note 30, at 585.

[40] *Id.* at 579; Schenck, *supra* note 2, at 58.

[41] See Lawthers, *Testamentary Trusts as Beneficiaries Under Life Insurance Policies*, 9 J. Am. Soc'y C.L.U. 307 (1955); Schipper, *Designating Trustee Under Will as Beneficiary of Insurance—Legal Problems*, 94 Trusts & Estates 819 (1955); Stephens & Johnson, *supra* note 30, at 602.

[42] A quick analysis of policy features is obtainable by referring to Flitcraft, Settlement Options.

company will be influenced by the availability of option elections by the trustee (together with a properly drafted exculpatory clause for the company), is generally effective in gaining acquiescence. Similarly, it is possible to persuade insurance company counsel to permit the designation of testamentary trustees. In the latter situations, it would seem that their objections are legitimate, and attorneys should consider use of the inter vivos trust.

A further reason in states like Michigan and Ohio, although inapplicable in Texas, is to avoid the continuing judicial supervision of testamentary trusts with the attendant costs and administrative burdens, to say nothing of increased probate fees.

Thus, in many states, the inter vivos life insurance trust will be utilized to avoid testamentary supervision, to minimize administration expense, inheritance taxes, and possibilities of subjection of proceeds to creditors' claims, and to permit designation of a fiduciary without the restrictions attendant on choice of a testamentary trustee. Each attorney should ask himself how many of these reasons would be present in his state.

b. *Mechanics.*—What about the mechanics?[43] Usually, the policies are made payable to the named trustee—frequently, a corporate fiduciary. The policies are sometimes physically deposited with the trustee, but ordinarily they will *not* be assigned since revocation of the trust is a real possibility. Incidentally, the client may balk if the corporate fiduciary insists on an initial acceptance fee. It is possible that the client may name himself as trustee and a bank as successor trustee; in such case, it is usually wise to submit the instrument to the potential corporate trustee for suggestions and, of equal importance, to make sure that it will be willing to act. In many cases, it makes good business sense for the bank to waive an acceptance fee, even though it clearly costs something to accept and review the trust and, admittedly, some such trusts never mature.

With the trust established and receiving the insurance, the stage is set for use of a pour-over will. A frequent pattern is an initial provision disposing of the clients personalty. Then, there may be a separate disposition of the residence for the benefit of the wife with appropriate consideration of exoneration of any mortgage. Succeeding paragraphs provide for specific bequests, such as:

> I give unto ________________________ six hundred shares of stock of the Douglas Dome Gold Mine Company, which he sold to me on

[43] See generally Stephens & Johnson, *supra* note 30.

> the damnedest misrepresentation conceivable and which he can use as a marker in his prayer book. . . .[44]

These paragraphs may then be followed by the pour-over clause, simply adding all remaining assets to the corpus of the existing trust to be administered as a part thereof. A typical clause might read:

> I hereby convey to the trustee of the John Jones Life Insurance Trust No. 1, dated ____________19_____, all of the rest and residue of my estate, to be added to said trust and to be administered according to the terms thereof, including any amendments thereto, and as a part of said intervivos trust.[45]

2. *Community Property States—Advantages and Mechanics* The inter vivos life insurance trust may be just as popular in Texas or Arizona as in Michigan and Illinois, but for a somewhat different reason. Of course, the community property state couple, with minor children, should recognize the desirability of having a trust to handle the proceeds if both die while the youngest child is under age. Moreover, they may feel that inheritance tax factors make the inter vivos trustee designation preferable to payment to the estate. Perhaps more importantly, counsel may point out that the husband, as manager of the community, may set up a life insurance trust disposing of both his and the wife's share of the rights in the community insurance. If it is not fraud of the wife's rights (leaving her a life estate, as is usually done, would not seem to give rise to that claim), it would seem to be effective in disposing of both the husband's and wife's interest in the community property. On the other hand, a testamentary disposition by the husband would leave the wife with an election to abide by his disposition or to take her half of the community property.[46]

But having utilized an inter vivos trust, why would a Texas testator use a pour-over? The problems of continued testamentary supervision, difficulties of merger, and the like would not seem to arise in Texas.[47] Yet, once again, the simplicity of the pour-over may commend it to the Texas attorney if it is desired to add additional probate assets, including those handled by the independent executor, to the existing trust. Further, a desire for lack of publicity

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[44] This was shamelessly "lifted" from Gest, *Some Jolly Testators*, 8 Temp. L.Q. 297 (1934).

[45] It will be noted that this clause subjects the property poured-over to all later amendments of the trust. This clause would not be appropriate in Alabama, Texas, Utah, and certain other states *if* the pour-over is to a trust over which a power of amendment is held by someone other than the testator executing the pour-over. See text accompanying note 81 *infra*.

[46] See Stephens & Johnson, *supra* note 30, at 603; Zuber, *supra* note 7, at 34.

[47] Stephens & Johnson, *supra* note 30, at 603.

with respect to disposition of the assets might suggest use of the inter vivos trust and pour-over.

The mechanics may be quite similar to those generally used in the North. If the assets are sufficient in amount so that it is desirable that the husband's half not be includible in the wife's gross estate for federal estate tax purposes on her subsequent death, the attorney will probably suggest placing at least the husband's share and probably the wife's share in trust taking care that the wife is not given the equivalent of a general power of appointment, at least over the husband's half. Yet, to prevent any question that the wife made a gift, she should be granted at least a special power of appointment as to her half. Absent the latter provision, it would seem that she would make a gift equivalent to the difference between her interest in half the community and the actuarial value of her interest in the trust estate at the time the trust became irrevocable.[48] This might occur either when an irrevocable trust is initially created or, in the more common situation, when the previously revocable trust becomes irrevocable upon the death of the husband.

Even in California, the revocable life insurance trust is growing in popularity although there the wife may elect to set aside the husband's attempted inter vivos disposition of her half of the community. Although the mechanics are somewhat the same as in Texas, it is usually more than legal artistry[49] which underlies the suggestion that the wife execute the trust as co-settlor, coupled with a provision that the trust becomes irrevocable after the death of the husband.[50]

In other southwestern community property states, the situation seems less clear. In Arizona, for example, the pour-over is gaining popularity, particularly with the enactment of the Uniform Act.[51] However, is the situation more akin to that of Texas or California? If the "conventional" arrangement is followed, *i.e.*, the entire interest in the community property insurance is placed in trust by the husband and wife as co-trustors, it would seem to make little difference. Under this arrangement, the wife is given a life estate and special power of appointment over Trust "A" which comprises her half of the community interest in the policies. There are varying provisions as to Trust "B" which comprises the "husband's half," and the entire

[48] *Id.* at 604.

[49] *Id.* at 603, suggesting that the wife join in Texas.

[50] Thurman, *Federal Estate and Gift Taxation of Community Property Life Insurance*, 9 Stan. L. Rev. 239, 248 (1957). See also Schwartz, *Community Property Life Insurance Planning*, 16 J. Am. Soc'y C.L.U. 57, 58 (1962).

[51] Ariz. Rev. Stat. Ann. §§ 14-141 to -144 (1961).

trust arrangement becomes effectively irrevocable upon the husband's death. If, however, the wife does not join in the conveyance to the trustee, under California law, the wife may avoid the provision as to her half, but under Texas law, her husband may effectively tie up the wife's half. One of the ablest commentators on the estate planning aspects of community property life insurance has suggested that Arizona law follows the Texas pattern.[52] On the other hand, discussions with several Arizona attorneys and trust officers indicated a rather general belief that, although the husband has managerial rights over the community during his lifetime, he could not effectively dispose of the wife's half of the community, including life insurance, without informing her and securing her agreement. As a result, there is a distinct tendency to follow the California practice of strongly suggesting, if not actually insisting, that the wife join as co-trustor of the revocable insurance trust. Further discussion of this area is reserved for another forum.[53]

For varying reasons, the usual pattern in community property states is to divide the trust into two separate portions, "Trust A" comprising the wife's share of the community and "Trust B" comprising the husband's share. In California, it is common to provide that the wife receives a life estate in "Trust B" only if she acquiesces in the husband's disposition of her half of the community—"Trust A"—and does not elect to take her half outright.[54] In all of the states, as noted, the provisions governing "Trust B"—the husband's half—are usually drafted to prevent inclusion in the wife's estate upon her subsequent death. Tax factors may suggest further alternatives. Thus, she may be given the income, or if income tax factors so suggest, the income may be subject to a discretionary "spray" provision for the benefit of family.[55] Ordinarily, in such a case, there should be a provision for invasion for the benefit of the wife,[56] but this may be conditioned on prior exhaustion of the "Trust A" proceeds.[57] In addition, the wife may be given a special power of appointment over "Trust B" if this is desirable for flexibility. The wife will normally be given at least a special power of appointment

[52] Thurman, *supra* note 19, at 257-259.

[53] An article in preparation by the author compares the use of the trust device in the several community property states.

[54] Bennion, *supra* note 37, at 8; Thurman, *supra* note 50, at 273-274.

[55] The advantages of the "spray" provisions are no different here than in the common-law state. For a detailed discussion, see Stevens, *Pitfalls in Inter Vivos Trusts*, 37 Taxes 1088, 1106 (1959), discussing the irrevocable inter vivos spray trust, but equally applicable to the spray trust established as "Trust B." See also Rice, *California Family Tax Planning* c. 10, § 28 (1961).

[56] Rice, *supra* note 55, at §§ 24, 35.

[57] Bennion, *supra* note 37, at 9.

over "Trust A" to forestall any question of gift tax[58] upon the death of her husband as to the difference between her half of the community and what she takes under the trust.[59] Any balance in "Trust A" will probably be included in her estate at death.[60]

Because of the generally accepted view that the residue of "Trust A" is included in the wife's gross estate, the wife may be given a testamentary general power of appointment if the desire of the husband is only to prevent inter vivos transfers of corpus. If the sole goal is to prevent a reaching of the assets by creditors or by a subsequent spouse, an inter vivos general power may be given.[61] Of course, these are matters governed by varying local laws. Occasionally, in the case of larger estates, if the presence of separate property makes use of the marital deduction available and desirable, all or a portion of "Trust B" can be qualified by granting the wife a life estate plus a general power of appointment in accordance with the requirements of section 2056(b)(5) of the Internal Revenue Code.[62] Parenthetically, it might be noted that this inter vivos trust can be utilized for pouring-over other assets to the trust. If all the property is community, the husband's will may provide for adding his share of the community to the "Trust B" with the wife's share being directed to "Trust A." In California, she may, of course, choose to take her half of the community outright. Opinion among California lawyers varies as to the desirability of using a bit of "persuasive leverage"

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[58] Stephens & Johnson, *supra* note 30, at 604; Treas. Reg. § 25.2511-2(b) (1961).

[59] Commissioner v. Siegel, 250 F.2d 339 (9th Cir. 1957); *Accord,* Zillah Mae Turman, 35 T.C. 1123 (1961). See Estate of Vardell v. Commissioner, 307 F.2d 688, 693 (1961). The cases are discussed in Comment, 37 Tulane L. Rev. 297 (1963).

[60] Estate of Vardell v. Commissioner, *supra* note 59; Lillian B. Gregory, 39 T.C. 104 (1963). Whether a reduction of the gross estate may be effected by virtue of section 2043 of the 1954 Code when the widow completely transfers her interest in her behalf of the community in return for the provision for her under the trust remains an open question. The Tax Court has held section 2043(a) inapplicable if the widow had a general power of appointment. Lela B. Vardell, 35 T.C. 50 (1950), but the case was reversed. Estate of Vardell v. Commissioner, *supra* note 59. Wisdom, J., dissented on the ground that the widow had sufficient power, by virtue of the power of appointment, that economic benefits shifted only on her death and therefore required inclusion of the corpus under section 2033. However, he expressly excluded application of his dissent to the transaction in which the widow receives a life estate in the trust of the whole in lieu of her outright interest in her half of the community. This suggests his agreement that section 2043 would be applicable to reduce the corpus includible in the widow's gross estate in such circumstances. The Tax Court continues to adhere to its earlier position, Lillian B. Gregory, *supra.*

[61] That this grant of a general power *may* have tax consequences for federal estate tax purposes, with respect to availability of section 2043, is suggested by Wisdom's well reasoned dissent.

[62] It might be appropriate to mention that the possibility of completely exempting a portion of the value of the community from federal estate tax has been sparked by the *Vardell* decision and fanned by the opinions in the *Stapf* case, United States v. Stapf, 309 F.2d 592 (5th Cir. 1962), *cert. granted,* 372 U.S. 928 (1963), and the ensuing law review treatment. See note 59 *supra;* Ray, *The Widow's Election—A Study in Three Parts,* 15 Sw. L.J. 85 (1961), an excellent analytical study of *Vardell* and *Stapf.*

to prevent such an election by conditioning the wife's rights in "Trust B" upon her acquiescing in the provisions made for her in "Trust A." Some instruments will go so far as to require an inter vivos agreement by the wife, while others will simply condition her rights under "Trust B" and, perhaps, in other separate property of the husband upon her not "taking her half outright." Although some Texas lawyers have speculated upon the possibility of an inter vivos disposition by the husband of community assets, other than life insurance, without the wife's agreement, it seems fair to suggest that the effectiveness of such a disposition is not free from doubt. Most Texas lawyers with whom the author has discussed the matter seem to feel that, apart from life insurance which seems to be regarded as *"sui juris,"* the situation is similar to that in California with respect to the wife's rights in her "half" of the community property conveyed to a revocable inter vivos trust without her express consent and agreement.

3. *Marital Deduction Consideration* As the assets of the young client in the common-law state increased, provision was made for dividing the life insurance trust into "Trust A," the proceeds of which would qualify for the marital deduction, and "Trust B," tailored so that its assets would not be included in the wife's estate at her death. Usually, the wife will be given the "income" from "Trust A" together with a general testamentary power of appointment over remaining assets. If insurance options can be used, a definition of "income" is appropriate.[63] She may also be given a power of withdrawal of corpus, and in any event, there will be provision for invasion in time of need. However, "Trust B" will usually require "Trust A" to be exhausted before the corpus of "Trust B" is invaded. It would be possible, of course, to use the so-called "estate-trust" in which the wife need not be given all the income during her life, but which requires that all income and corpus not distributed to her during life must be payable to her estate.[64] The principal attraction of the estate-trust is the possibility of minimization of income tax through accumulation in the trust when the wife's income may be expected to reach a very high bracket.

[63] For example, suppose that a portion of the proceeds flow from proceeds left at interest while other receipts represent contractual distributions pursuant to a family-income rider. It is certainly arguable that although the bulk of the distributions under the family income rider constitute return of corpus and are so recognized for purposes of computing the exclusion ration for income tax purposes, the testator-settlor may have regarded these as income distributable to the income beneficiary. The solution would seem to be recognition of the problem and specification of desired treatment in the dispositive instrument, including provision for treatment where the trustee takes down the commuted value.

[64] See Polasky, *supra* note 30, at 37.

On the other hand, the "section 2056(b) trust" has certain quite different advantages. If the wife doesn't exercise her general power of appointment, and she usually won't, the assets pass in accordance with provisions of the clause to the takers in default. This is precisely what the husband desired, and in states in which a power is subject to inheritance tax only when exercised, there is a savings in inheritance tax as compared to use of the estate-trust. Further, assuming non-exercise of the power, the corpus is usually not reachable by creditors or by the second husband.[65]

Furthermore, as far as "Trust B," the non-qualifying trust for marital deduction purposes, is concerned, it may provide for income to the wife or for "spraying" income to minimize taxes by giving the wife a special power of appointment where flexibility makes this desirable. Incidentally, it is common in tailoring the disposition of these assets to carve out specific dispositions before using any sort of formula to achieve the maximum marital deduction. Thus, the survivorship benefits under a qualified pension plan may be specifically allocated to the non-marital trust. Under a non-contributory plan, which is now the normal pattern, no part of the annuity benefits will be included in the gross estate if they are payable to a beneficiary other than the estate or the executor.[66] Since they will not qualify for the marital deduction and there is no reason to desire the inclusion of any residual benefits in the wife's estate at her death, they should not be placed in the marital trust. Similarly, if a sufficient amount of other property can be qualified for the marital portion, it may be desirable to assign the deferred compensation contract to the non-marital trust so that an income tax deduction for estate taxes paid on the value of the contract will be available.[67] In addition, this makes it possible to take advantage for the possibility of spraying income among various beneficiaries if the value of the asset, as here, will be rapidly translated into taxable income.[68]

[65] Stephens & Johnson, *supra* note 30, at 605. The brief for the Cleveland Trust Company in Purcell v. Cleveland Trust Company, 172 Ohio St. 489, 179 N.E.2d 60 (1916), suggests that one purpose may be to avoid "the fate of a Sir Peter Teazle who, as appears from Richard Brinsley Sheridan's reports, The School for Scandal (1777) Act 1, Scene 2, found cause to lament, along with many other husbands in life and literature, that his young wife 'dissipates my fortune' in 'all the extravagent fopperies'. . . ."

[66] Int. Rev. Code of 1954, § 2039. See Stevens, *supra* note 55, at 1106. Further, if the trustee is authorized to pay debts, expenses, etc. of the estate or to turn over funds to the executor for this purpose, care should be taken to specify the exhaustion of other assets before resort to the excluded survivorship benefits.

[67] Int. Rev. Code of 1954, § 691(c).

[68] These benefits will be treated as income in respect of a decendent under section 691(a) and included in the income of the recipient, with a deduction available under section 691(c) for the pro rata portion of the estate tax attributable to inclusion of the then present value in the decedent's gross estate for federal estate tax purposes.

4. *Advantages of the "Living Trust"* There will be times when the inter vivos life insurance trust, perhaps amended and expanded to accommodate employee benefits, will be most appropriate. However, there will be times when the use of the inter vivos "living trust" will make good sense. For the client of substantial assets, the revocable inter vivos trust may offer such advantages as:

(1) freeing the client currently of administrative responsibility, if this is desirable for the client.

(2) freeing the assets from probate expense and avoiding publicity of dispositive provisions.

(3) permitting administration free of the supervision required of testamentary trusts.

(4) permitting a "testing out" of the dispositive plan with opportunity for amendment (a particularly useful factor where a closely held business is involved).

(5) assuring continuation of normal operations without interruption by death or disability, and in this connection, not the least important (though a bit delicate to put to a client) is the protection afforded against the need for a conservatorship in the event of mental decline in later years.[69]

(6) the possibility of localizing asset administration where the assets and beneficiaries may be permanently located. This may be particularly important when the settlor contemplates "roaming," and there may be significant possibilities of "choosing" the law which will govern the administration of trust assets.

(7) possible avoidance of ancillary administration.

These reasons are quite persuasive to men of wealth, particularly when put by an adept trust company "new-business" man, and, indeed, the lure may extend to suggestions of tax minimization through the use of the irrevocable trust. There is probably less cause for enthusiasm for the irrevocable variety of inter vivos trust—the "ulcer-inducer" as some attorneys rightly refer to them. At times, visions of dollar signs, sugar-coated with sweet talk about tax savings, seem to mesmerize client and counselor alike. All too often, the search for tax savings obscures the basic question, "Does the plan really make sense considering the client's age, beneficiary situation, and needs?" In short, tax savings aside, does it make sense for the client to "kiss the property goodbye" at this point? More importantly, the question to be asked is whether the client really recognizes that this

[69] Although local law may vary, there is competent authority to the effect that a conservator of an incompetent cannot exercise any right of revocation which his ward had, with respect to an inter vivos transfer effected during a period of competence, absent a court order.

will be irrevocable and that he can not change his mind or "straighten things out" at a later date when some unforeseen change of financial condition or tax law may bring him back to the office with the suggestion that only he and thee know of the arrangement and "let's change it." The federal income tax and estate tax provisions are not neatly correlated, and any plan drafted to avoid taxation of the income to the grantor must be carefully checked against sections 671-677 of the Code. Similarly, trusts drafted to eliminate the assets from the grantor's gross estate for federal estate tax purposes must be checked against the estate tax sections and regulations, particularly those involving sections 2036 and 2038. The debris littering the reports of tax cases as a result of the creation of an irrevocable trust by a settlor who doesn't really want to cut the strings and who seeks to retain powers as trustee is abundant.[70] Certainly, there is a place for the irrevocable inter vivos trust, but it takes careful thought. However, when appropriate, this inter vivos trust may be a receptacle of the pour-over from the probate estate.

B. *Use Of The Pour-Over*

1. *The Legal Background* If the case has been made for the utility of the inter vivos trust and for the pour-over as a desirable way of effectuating a unified administration of assets of the living trust and of the residual probate estate, then the question is, of course, "Why not simply use the pour-over to the inter vivos trust?"

In the more than thirty states with enabling statutes, there is little reason not to use pour-overs.[71] But the reason for the recent legislation and the problem in the states without pour-over statutes, including major states like New York and California, can best be understood by a brief look at the doubt raised some years back.

[70] With respect to powers over enjoyment of trust benefits, see, *e.g.*, Lober v. United States, 346 U.S. 335 (1953); Commissioner v. Estate of Holmes, 326 U.S. 480 (1946). As to retained administrative powers, see State Street Trust Co. v. United States, 263 F.2d 635 (1st Cir. 1959). See generally Gray & Covey, *State Street—A Case Study of §§ 2036(a)(2) and* 2038, 15 Tax L. Rev. 75 (1959); Smith, *Dominion and Control in the Taxation of Trusts,* 37 Taxes 1074 (1959). *But cf.* United States v. Powell, 307 F.2d 821 (10th Cir. 1962) (retained powers of settlor, as co-trustee of irrevocable trust, deemed subject to requirement of reasonable exercise subject to control of courts under Kansas law); Estate of King, 37 T.C. 973 (1962) (broad powers of investment control, retained by the grantor of an irrevocable trust, deemed subject to court control under New York law, requiring impartial exercise for the benefit of both life tenants and remaindermen, and the power thus did not amount to a power to affect enjoyment by successive beneficiaries so as to require inclusion in the gross estate of the settlor), non-acq. I.R.B. 1963-16.

[71] This is subject to a caveat with respect to certain administrative problems. These will be the subject of a talk by Professor Joseph Hawley of New York University at the annual meeting of the A.B.A.'s Section of Real Property, Probate and Trust Law, in Chicago, scheduled for August 13, 1963, and to be published in the 1963 Proceedings of the Section and in the October, 1963 issue of Trusts and Estates.

That doubt arose from the suggestion that, in effect, the testator was disposing of his property by reference to an instrument—the inter vivos trust—which had not been executed with the formal requirements for testamentary dispositions by will. In other words, the suggestion was that the disposition was being governed by terms that were not found in the will itself.[72]

Although an effective will would seem to require that both the subject matter and the object of bounty should be sufficiently identified to permit carrying out the dispositive provisions, the courts have not insisted that the property and beneficiary be ascertained solely from the will. Apart from resort to "a look outside" to assist in "interpreting" the language of the will, two doctrines have been evolved for sustaining the bequest in those instances in which it has been necessary to look beyond the will.[73] The first of these is usually referred to as "incorporation by reference" and applies if the will indicates an intent to *incorporate the provisions* of an *existing* document, sufficiently identified by the will, so as to apply those *terms* to the separate testamentary trust or other disposition without the need for reiteration. The second method of ascertaining the object of bounty and the applicable terms is by what might be called "an act of independent significance."[74] The theory is that the act, such as the creation of the inter vivos trust, has a significance quite apart from any secondary effect in disposing of testamentary assets. The theory is not that there has been compliance with the wills legislation, but rather that the policy underlying the statute of wills, that dispositions should be safeguarded from undue influence and fraud, is satisfied because the independent act is not essentially a testamentary disposition.

How do these doctrines apply to the use of the pour-over? It may be suggested that incorporation by reference is not really applicable since the draftsman has no intention to create a new testamentary trust incorporating the provisions spelled out in the inter vivos instrument. Rather, he intends that the probate assets shall be disposed of by the terms of the extrinsic, unattested document—the inter vivos trust instrument. So long as the extrinsic trust was in existence and unamendable, it would seem clear that mere reference to it in the will should create no danger. But what if the terms of the extrinsic trust are amendable or revocable—as most inter vivos life insurance trusts will be? Theoretically, as long

[72] The theory and subject matter in general, briefly summarized here, is discussed in Polasky, *supra* note 1, at 46.

[73] *Ibid.* See also Wren, *supra* note 2, at 496.

[74] *Ibid.* See also Heyert & Rachlin, *Pour-Over Trusts*, 34 N.Y.U.L. Rev. 1106 (1959).

as the trust had independent significance, and so long as the trust had not been amended after execution of the will, it would seem that the dependent testamentary disposition should be valid. However, theory aside, what have the courts done?

First, the courts have had no trouble in upholding the pour-over as long as the inter vivos trust was unamendable and irrevocable. But if it was revocable or amendable, even though no amendment or revocation had taken place since execution of the will, the answer was not entirely clear though most courts would uphold the bequest. However, if subsequent to execution of the testator's will or a codicil there had been an amendment of the trust without testamentary formality, most courts tended either to invalidate the bequest or to ignore the amendment and effectuate the disposition according to the terms of the extrinsic instrument as it existed at the date of the execution of the testator's last will. Only within the last two years have there been decisions, by the high courts of Massachusetts[75] and Maine,[76] which have given effect to the amendment of the trust after execution of the will and which have held that the amended terms govern the disposition of probate assets. The theory was that the extrinsic trust had sufficient independent significance. Of course, in both of those cases, the amount disposed of by the inter vivos trust greatly exceeded the amount of the probate assets which "tagged along." Clearly, a five dollar inter vivos trust will not sustain disposition of a million dollars of probate assets on an independent significance theory.

It was against this background that the desirability of the pour-over statute arose. The need is clearly visible when it is recalled that most pour-overs are to an amendable, revocable life insurance trust which may have little or no corpus prior to the settlor's death. Prior to enactment of such a statute, many attorneys used the pour-over and always made sure that any amendment of the trust was followed by a codicil to the will. But the draftsman couldn't be absolutely sure, and an estate planner likes to be as certain as possible. Further, because of the existing cases, he could not be certain whether a court would follow the theory of incorporation by reference (which would seem to create a separate testamentary trust) *or* would rely on independent significance which would be harmonious with the practice of adding the probate assets to the inter vivos trust to secure a unified administration. In some states, notably Ohio and California, the courts, without seeming to concern themselves with

[75] Second Bank-State Street Trust Co. v. Pinion, 170 N.E.2d 350 (Mass. 1960).
[76] Canal Nat'l Bank v. Chapman, 171 A.2d 919 (Maine 1961).

theoretical distinctions, upheld the validity of the clause on the basis of incorporation by reference and, at the same time, approved addition of the probate assets to the inter vivos trust free of the reporting and continued supervision applicable to testamentary trusts.[77] This was a delightful result; nevertheless, the desirability of legislation was apparent.

As a result, by the summer of 1959, some seventeen states had enacted legislation of one sort or another.[78] Analyses of these statutes revealed significant differences and, in the opinion of some, significant gaps or ambiguities. Moreover, it was widely recognized that our population is extremely mobile; therefore, the possibility of shifts in the domiciles of clients made uniformity of legislation desirable in terms of minimizing possible problems of validity of the pour-over wills. Consequently, in August of 1959, the National Conference of Commissioners on Uniform State Laws considered a draft of a pour-over statute entitled the "Uniform Testamentary Additions to Trusts Act." During the ensuing year, the Act was carefully studied by a number of interested groups, including a committee of the American Bar Association's Section of Real Property, Probate and Trust Law. The proposed statute was compared to existing and proposed legislation with an eye to combining the best features of all. As a result, a somewhat modified Act was approved by the Commissioners and the A. B. A. in the summer of 1960. Since then fourteen states have enacted it, including Oklahoma and Arizona in the Southwest.[79] Non-uniform legislation was passed in five other states, including Wisconsin, whose legislation is somewhat unique, and in Texas, Alabama, and Utah, jurisdictions in which, though varying from the language of the Uniform Act, the thrust of the legislation is quite similar to the Uniform Act.[80] Without attempting to thoroughly analyze either type of statute, it may be useful to consider in brief outline the basic provisions of the Uniform Act and the narrow areas in which the Texas statute seems to differ.

2. *Comparison of the Uniform Act and the Texas Act*

a. *The Uniform Act.*—The Uniform Act specifically permits a devise or bequest by will to the trustee of a trust which is established *or to be established*, either by the testator *or* by someone else *if* the trust is *identified* in the testator's will and its terms are set out in a written instrument *other than a will* executed before or concurrently with our testator's will.

[77] Polasky, *supra* note 1, at 51-52.
[78] See note 14 *supra*.
[79] *Ibid.*
[80] *Ibid.*

Several items should be noted at this point. To obviate the danger that execution of a trust instrument without actually "funding it," as in the case of a revocable life insurance trust, may not be "deemed" to *establish* a trust for lack of a corpus, the Act makes clear that it is the *execution* of the *document* itself which must occur before execution of the will. Indeed, the Act clearly specifies that the pour-over may be made to an unfunded, revocable insurance trust. In addition, it will be recalled that the document which must be in existence was specified as one other than a "will." The reason for this language is that the statute subsequently and separately provides that if the receptacle trust is to be created under the will of another, then the bequest will be valid only if that other person predeceases the testator. This made sense for obvious reasons; it seemed undesirable to permit a pour-over if no trust could have then been in existence because the other person, whose will was referred to, was still alive.

The Act also makes it clear that lack of a "corpus" of the trust or smallness of size of any existing corpus does not invalidate the pour-over. Similarly, the mere power to amend or even an actual amendment of the extrinsic trust does not invalidate the pour-over. In fact, the Act goes further than any case in stating that amendments to the trust, including those made after the execution of the will, may govern the poured-over probate assets despite any lack of corpus on which to find an "independently significant act." But this is limited to amendments made prior to the death of the testator of the pour-over will, absent provision in the will to the contrary.

It should be noted that the pour-over may be made to a trust established by the testator or someone else; however, when the extrinsic trust is amended *after* the death of the testator, the Act provides that the terms of the receptacle trust as they existed at the date of the testator's death will control the poured-over assets, absent provision to the contrary. This situation is most likely to occur if a wife, with modest assets, pours-over those assets to a previously established revocable trust created by her husband who is still living at her death. This was a highly controversial point, but the sting of the provision is removed by the added proviso that the terms of the trust as of the date of the death of the testator of the pour-over will are controlling "unless the testator's will provides otherwise."

The Act also provides that the poured-over assets are to be administered as a part of the extrinsic trust. This results in the treatment now accorded to pour-overs in Ohio and California by freeing the poured-over assets from testamentary trust requirements. Furthermore, the Act specifies that a complete termination or revocation prior to the testator's death nullifies the bequest. Finally, the legislation makes it clear that it only affects bequests in wills executed on or after the effective date of the legislation. Again, this was a debated point, and the recently enacted Minnesota legislation and a 1963 amendment to the Michigan act provide that the statutes apply to the wills of any decedent dying after the effective date of the bills, regardless of the date of execution of the will. This, too, seems desirable. Absent such a provision, many lawyers have had the feeling that, unless there are good reasons not to do so, it is wise to execute a codicil republishing the pour-over will following the effective date of the statute.[81]

Earlier reference was made to the controversy over whether the Act should provide that amendments of the extrinsic trust subsequent to the testator's death should govern the administration and distribution of the poured-over assets. Prior to the approval of the Uniform Act, about five states applied the trust terms as amended from time to time to the poured-over assets. The other statutes, which comprised a majority of the states with legislation, permitted those amendments made after the testator's death to control *only* if the testator so provided.

Two reasons may be suggested for the majority position. First, it was felt that the testator would be willing to give only restricted control to the person with power to amend the trust. Referring to the typical situation of the wife's will pouring-over to her husband's revocable insurance trust, it was suggested that in the event of undesirable amendments by the husband prior to her death, the wife could change her will and revoke the pour-over clause. Since this power over her assets terminates at death, it was thought that the power to change the trust terms, as applied to the assets added by the wife, should also terminate, through the husband could amend the terms applicable to items *he* placed in the trust. Is it not likely that the person pouring-over to another's amendable trust has no intention to restrict the effect of such amendments?

A second reason has been suggested. Adding assets to the trust subject to the power of the settlor-husband to amend and alter the disposition would, indeed, give him a general power of appointment for federal succession tax purposes. The majority rule prevents this unless the testator specifically provides that the assets poured-over to the trust amendable by another shall be subject to later amend-

[81] *Ibid.* The Michigan amendment is S.B. No. 1064, Act 15, P.A. 1963. The Texas statute is silent on this point.

ments. Although this may be wise in order to prevent an inadvertant creation of a general power, it is suggested that the draftsman will rarely find it advantageous to so restrict the administration of poured-over assets. The main advantage of the pour-over, including the pour-over to a trust created and amendable by someone else, is to facilitate unified administration. Restriction of applicability of future amendments with respect to poured-over assets would seem to make unified administration illusory. Surely, the possibility that amendments would affect some assets and not the others would require the trustees to earmark the asets. This would require virtually separate administration of those assets subject to amendment. Whenever tax considerations are such as to make it undesirable to create a general power of appointment, circumstances will usually suggest that the assets not be poured-over at all. Rather, a separate trust should be created containing similar provisions, but granting only a special power to the surviving spouse. It is, therefore, a matter of weighing tax considerations against the advantages and savings of unified administration.

Pouring-over from the wife's estate to the husband's inter vivos trust creates no problems if the husband predeceases the wife. If the wife predeceases the husband, the device will be used rarely, and then only if her assets are minimal. In those situations in which the wife is likely to have significant assets, as may be the case in a community property state, it is not likely that there will be a pour-over so long as the husband is living and has the power to amend. However, if taxes are unimportant and unified administration is sought, the pour-over may be desirable and should permit all assets to be governed by any subsequent amendment.

b. *The Texas Act.*—The Texas statute, section 58(s) of the Texas Probate Code, became effective in August of 1961.[82] It has the advantage of being shorter than the Uniform Act, but some may feel that it leaves unanswered a few of the questions which the Uniform Act sought, perhaps laboriously, to resolve. For example, the Uniform Act makes it clear that the trust terms *only* need be in existence at the time of execution of the will; this is accomplished by specifically referring to a trust "established or to be established," *e.g.*, the revocable life insurance trust containing no established corpus when the will was executed. The Texas statute is not so specific, though it may be hoped that the language "to any trust (including an unfunded insurance trust), the terms of which are evidenced by a written instrument . . ." is broad enough to imply

[82] See note 14 *supra.*

that a pour-over clause will be valid with respect to any trust, insurance or otherwise, though only the terms and not the corpus are in existence at the time of execution of the will.

The Texas statute may permit the raising of another question. The Uniform Act permits a pour-over to a trust created by the will of another, but expressly provides that the other person must have predeceased the testator of the pour-over, so that the trust provided for in the other's will either has or will be established. The Texas Act, on the other hand, makes no reference to pouring-over to a trust created by another. If the Texas Act is deemed broad enough, by virtue of its permissive pour-over to "any" trust "the terms of which are evidenced by a written instrument" in existence when the testator's will is executed, to sanction such a bequest to a trust to be created by the will of another, it could create a problem which the draftsman of the Uniform Act sought to avoid. That is, what is to be done when such a pour-over is attempted and the other person is still alive at the date of the testator's death with the result that there is no trust to pour into? The danger one might envisage is that to avoid the immediate problem, a court might interpret the word "trust" as requiring an *established* trust. In so holding, the court might create rather significant difficulties in other areas in which the terms of the inter vivos trust have been set forth, but no trust *res* has been established. Thus, to carry the conjecturing a bit further, it could be argued that a Texas testator may pour over to an "unfunded" trust, but that there must be some corpus, such as a deposit of the policies. A further interpretative possibility is that specification of pour-overs to unfunded life insurance trusts, without reference to other types of inter vivos trusts which have not been established at the time of the execution of the testator's will, will not be sufficient to validate the pour-over to the latter. Hopefully, this nightmare is but a flight of fancy. The Texas statute, surely, is aimed at the accomplishment of the same goals as those sought by the Uniform Act, and it does not seem inappropriate to suggest that a Texas court might well construe the statute to reach those results more clearly specified by the Uniform Act, thus avoiding the problem suggested.

The omission in the Texas Act of the phrase "regardless of the size of the corpus" does not seem significant. Inclusion of the clause in the Uniform Act was simply to satisfy those who wanted to emphasize that reliance on independent significance was not compromised by the smallness or lack of corpus.

Further comparison reveals that both Acts make it clear that the fact that the receptacle trust is amendable or revocable does not prevent the effectiveness of the pour-over. Similarly, each provides that an amendment prior to death of the testator shall be effective as to the poured-over assets and that revocation of the trust prior to the testator's death causes the bequest to lapse. There is, however, a further, though perhaps minor, point of difference. Like the Uniform Act, the Texas statute specifies that the poured-over assets shall be administered in accordance with the terms of the trust as of the date of the testator's death; it does not follow the Uniform Act, however, in *permitting* later amendments to govern the poured-over assets if the testator so specifies. For reasons previously outlined, this seems unfortunate and may suggest that pouring-over to a revocable trust created by another, who may be living on the death of the testator, will generally be inappropriate in Texas.

The clause in the Uniform Act which specifies that the poured-over assets are not part of a testamentary trust, but are part of the inter vivos trust is important in a state like Michigan in which the client may desire that there be no further supervision by the court with jurisdiction of testamentary trusts. Moreover, the provision will be important in states such as California in which different courts have jurisdiction of testamentary and inter vivos trusts. Its omission from the Texas statute is not important.

3. *Use of Pour-Over Clauses Absent a Statute* What should the attorney do with respect to the pour-over if no statute has been enacted? Many attorneys use pour-overs, but arrange for the client to execute a new will or codicil after each amendment of the trust. Some attorneys, out of an abundance of caution, specify in the dispositive instrument that if the pour-over provision becomes ineffective, for any reason, the terms of the inter vivos trust will be incorporated by reference, thus creating a new testamentary trust. Alternatively, others eschew the pour-over and simply provide for the creation of a testamentary trust containing the same terms as those of the inter vivos trust, trusting that appropriate merger clauses will turn the trick. In the meantime, attorneys in these states may want to press for the enactment of the Uniform Act. Incidentally, it has been suggested that pour-overs are being used in every state with the exception of Louisiana.[83]

Occasionally, attorneys worry about the implications of the Rule Against Perpetuities if two documents, the inter vivos trust and a

[83] Wren, *supra* note 2, at 495; Schaefler, *Validity of "Pour Over Trusts,"* 101 Trusts & Estates 385 (1962).

pour-over will, are involved.[84] The answer is simple. Just check the dispositive provisions of each, as you would any dispositive instrument, against the Rule to make sure neither violates it. Some will prefer to use a "coward's clause"—perhaps the term is "savings clause" —vesting all interests within the Rule's limits.

Fees, too, will cause concern in some quarters in which the inter vivos trust and the pour-over are gaining strength. Crass and mundane though the point may be, it is nevertheless disconcerting to the lawyer whose fee is based on the "probate estate" and who now sees that the use of the inter vivos trust, though perhaps best for the client, may drastically reduce his fee. This points up the inadequacy of the fee system existing in many sections of the country. In a number of areas, it has been the custom to draw twenty-five dollar wills and trusts and rely on the probate fee, based on probate assets, for recoupment. In fact, this would seem to suggest a possible conflict of interest which could interfere with the draftsman's objectivity! The solution which is used effectively in some sections of the country is to tie fees to the "taxable estate," and, ultimately, to work out a *modus operandi* by which the estate planner is adequately paid for his efforts at the planning stage.

Further, despite the popularity of the pour-over and its efficacy in most jurisdictions, the attorney must consider the mobility of both the client and the client's assets. He must warn the client that if a change of domicile occurs, the validity of the will is determinable by the law of the new "home state" and that inquiry should then be made as to whether a new will is needed. Inquiry should also be directed to whether the state of domicile will permit pouring-over to a trust established in a different state or to a trust in which no trustee is a resident of the domiciliary state.

The attorney will also want to consider certain administrative problems. If the client's economic resources will be primarily centered

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[84] It would seem quite common to measure the period for the Rule Against Perpetuities from the time when the revocable inter vivos trust becomes irrevocable or upon the death of the settlor who retained the right of revocation during his lifetime. Simes & Smith, Law of Future Interests § 1226 (2d ed. 1956). The law may be different in Texas: Stephens & Johnson, *supra* note 30, at 603, state: "[T]he period for computing the running of the Rule Against Perpetuities will probably start with the establishment of the revocable trust rather than at the insured's death, as with a true testamentary trust." Nevertheless, a recent study in depth of the subject suggests "[T]he overwhelming weight of authority holds that for revocable trusts (including insurance trusts) the period of the Rule runs from the date of the settlor's death (or the date the trust becomes irrevocable). See Berall, *Powers of Appointment Created By Revocable Trust or Settlement Option,* 101 Trusts & Estates 338, 342 (1962), citing cases from Hawaii, New York, Georgia, and Maryland as well as statutes in California, New York, Alabama, and Pennsylvania as being in accord, with only Louisiana adopting the opposite rule. The article contains citations to a number of the earlier articles on this subject.

in the inter vivos trust, what provision should be made for payment of debts, taxes, and expenses? This problem results from creation of the inter vivos trust rather than from use of a pour-over, but it is a part of the new pattern. Should the executor have, and exercise, a claim for reimbursement for expenses and taxes occasioned by trust assets, and should a decision as to exercise be discretionary? If assets are to be made available from the trust, several things should be kept in mind. Usually, if a marital trust is involved, payments should be payable first only from the non-marital portion. However, keep in mind that the non-marital trust may contain proceeds from a qualified pension trust or from insurance. To avoid making the pension plan benefits taxable, it may be well to specify that these are not to be made available to satisfy estate obligations until other assets are exhausted. A similar provision should apply to the insurance or a portion of it if its utilization for satisfaction of estate obligations would cause loss of the inheritance tax exclusion for insurance, as in California. Of course, circumstances may dictate the use of these assets despite the cost. Usually, however, the problem may be avoided by appropriate provisions permitting loans to the executor or permitting purchase of estate assets by the trustee.

III. Conclusion

The inter vivos trust, particularly the revocable life insurance trust, has proven to be a quite useful dispositive device. In most states, it is a particularly convenient method of arranging the disposition of the major assets of the younger client and is quite capable of being transformed into an excellent vehicle for the disposition of the assets of the more mature executive. In some states, the inter vivos trust is particularly useful in finessing problems of administration posed by requirements specifically directed to testamentary trusts. In other states, the possibility of exercising the husband's managerial rights over community property, so as to assure a reasonable and protective disposition of assets for the benefit of his surviving spouse and family, enhances the utility of the inter vivos trust. Facilitation of administration and avoidance of publicity have also contributed to the popularity of the living trust in most states. Accompanying this increasing popularity of the inter vivos trust is the resort to the pour-over clause in a will. In some states, it is merely a convenient method of adding probate assets to the inter vivos trust; in others, it performs the more valuable function of assuring unified administration, which is free of the supervision normally required for testamentary trusts in those instances in which this would otherwise be difficult to achieve. Doubts raised about the validity of the pour-over have been largely allayed where the Uniform Act has been enacted and in states with similar statutes. Whether a pour-over provision should be used will depend on weighing the advantages of unified administration against the tax advantages of a separate trust. If the pour-over is used, care should be taken in specifying the method of adding the assets to the various portions of the existing trust, as well as giving consideration to the source of assets to be used in satisfying estate obligations. Particularly, if the inter vivos trust is to be used for life insurance and other liquid assets, thought should be given to various methods by which these liquid assets can be made available for settlement of debts, taxes, and expenses without loss of tax advantages. Finally, it must be remembered that clients and assets are mobile and the law of all affected jurisdictions is not, as yet, identical. This surely suggests continued efforts to secure enactment of the Uniform Act in each of the states.

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