Title

Would a devise to the trustee of an inter vivos trust lapse or fail if so-called trust lacked property at time of testator's death?

Text

Common law as enhanced by equity. At one time, protocol for executing a revocable inter vivos (I-V) trust instrument and its associated pour-over will was to first deal with the trust instrument. Settlor signed it, trustee accepted in writing trusteeship, trustee acknowledged receipt in writing of, say, a $1.00 bill, which was then stapled to the schedule of assets (usually last page). It was all about compliance with doctrine of [facts of, acts of, events of] independent legal significance (ILS). Independent of what? Independent of the pour-over will. If, on the other hand, the sole purpose of a trust instrument was to "complement" the will then, for the trust's dispositive provisions to be enforceable as to the pour over, compliance with the execution formalities (signing, witnessing, etc.) of the applicable wills statute was required. The trust instrument's pages would have to be present as part of the will at the time the will was executed or duly incorporated by reference into the will or duly executed as a codicil to the will. The end-product, however, would be a public testamentary trust, not a private I-V trust.

Back to ILS. The trust is a fiduciary relationship with respect to property. A token-funded revocable I-V trust is such a relationship. Doctrinally it exists independently of the ambulatory pour-over will. The non-testamentary trustee is in office available to receive future additions to the trust corpus, whether I-V or postmortem. A pour-over will executed before the trust instrument raised concerns that the trust would lack ILS such that the pour-over would lapse. For an I-V trust to come into being there must be a present I-V transfer of some property interest. A legacy or devise under the will of a living person being a mere expectancy, i.e., not property, I-V token funding proved an easy work-around. So also did an I-V designation of the trustee as beneficiary of a life insurance contract, the I-V inception property being the contractual rights. Once the revocable I-V trust had ILS by virtue of its token funding, the settlor could, post execution of the pour-over will, effectively execute amendments to the trust without having to go back each time and re-execute his will. For more on ILS, see §8.15.9 of *Loring and Rounds: A Trustee's Handbook*, which section is reproduced in appendix below. The Handbook is available for purchase at: https://law-store.wolterskluwer.com/s/product/loring-roundstrustees-hanbook-2023e/01t4R00000Ojr97QAB.

Statute. Efforts have been made legislatively to maintain the revocable I-V trust's doctrinal independence from the pour over will while dispensing with the I-V funding requirement, rendering ILS irrelevant in the context of testamentary additions to trusts and making it doctrinally possible for an enforceable I-V trust to come into existence postmortem.

Uniform Testamentary Additions to Trusts Act (1960) (1960 Act). The 1960 Act was "problematic." It never came right out and said that I-V trusts with associated pour-over wills no longer need I-V funding, token or otherwise, to be enforceable as to pour-overs. Instead, it spoke of pouring over into a trust "regardless of the existence, size, or character of the corpus of the trust." The term "trust" not being defined in the statute, one defaulted to equity's definition with

its property requirement. Classic circularity. It also referred to a life-insurance trust funded with contractual rights as being "unfunded." The judicial confusion that ensued is chronicled in UPC §2-511's official comment.

Uniform Testamentary Additions to Trusts Act (1991) (1991 Act) [now UPC § 2-511]. The 1991 Act is the 1960 Act barnacled up with qualifications and additions. Better to have started afresh, perhaps by deeming an I-V relationship to be a trust relationship for purposes of the 1991 Act, provided it would qualify as a trust relationship but for the lack of subject property. In any case, the 1991 Act "makes clear," its words, that in lieu of token funding "the devise itself," its words, may now effectively serve as the I-V trust's inception asset. See UPC §2-511 cmt.

Appendix

§8.15.9 *Doctrine of [Facts of, Acts of, Events of] Independent Legal Significance* [from *Loring and Rounds: A Trustee's Handbook* (2023), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-roundstrustees-hanbook-2023e/01t4R00000Ojr97QAB].

The common law doctrine of [facts of, acts of, or events of] independent legal significance in its most common manifestation is a gloss on the statute of wills.[291] Most wills statutes provide in part that for a will to be valid it must be in writing and signed by the testator and two witnesses. What if a will contains a bequest to "those in my employ at the time of my death"? Would an employee who was hired after the will was signed and witnessed be entitled to take? Under the common law doctrine of independent legal significance he would.[292] This is because the acts of hiring and firing are acts whose significance are independent of the will.[293] The preparation of a post-execution unattested writing purporting to set forth additional takers under the will, however, would not be such an act as its sole purpose would be to "complement" the will.[294] An early invocation of the doctrine may be found in an 1838 decision of the Chancellor in the case of *Stubbs v. Sargon*.[295]

The Restatement (Third) of Property, which gathers "facts of, or acts of, or events of" under the umbrella term "external circumstances," confirms that the doctrine is not about motive: "An external circumstance has independent legal significance if it is one that would naturally occur or be done for some reason other than the effect it would have on the testamentary disposition, *notwithstanding that it might occur or be done, or did occur or was done, for the purpose of affecting the testamentary disposition*."[296]

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[291] 1A Scott on Trusts §54.2.

[292] 1A Scott on Trusts §54.2.

[293] 1 Scott & Ascher §7.1.2.

[294] 1A Scott on Trusts §54.2. "A devise to the persons named or of the property identified in an unattested writing to be prepared by the testator in the future has no independent significance, and is invalid unless authorized by statute or unless enforceable as a secret trust." Restatement (Third) of Property (Wills and Other Donative Transfers) §3.7 cmt. e. Secret trusts are taken up in §9.9.6 of this handbook.

[295] Stubbs v. Sargon (1838) 3 My. & Cr. 507, 40 Eng. Rep. 1022 (Ch.).

[296] Restatement (Third) of Property (Wills and Other Donative Transfers) §3.7 cmt. a.

The UPC codifies the doctrine's application in the wills context: "A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or after the testator's death. The execution or revocation of another individual's will is such an event."[297]

The trustee needs to be concerned about the doctrine primarily in the context of testamentary pour-overs to *revocable* inter vivos trusts.[298] Let us take the following situation: A will provides that the residue of the testator's estate shall be distributed to the trustee of a certain revocable inter vivos trust to be held in accordance with the terms of said trust, "as from time to time amended."[299] Would the statute of wills permit the residue to be administered in accordance with the terms of a trust that had been amended *by a writing* of the testator *after* the will had been signed and witnessed? Under the doctrine of independent legal significance, it would.[300] Because the revocable inter vivos trust is an arrangement of independent legal significance, *i.e.*, independent of the will, it follows that trust amendments, like hirings and firings, are the product of acts of independent legal significance.[301] In many states the doctrine has been adopted or codified through legislation.[302]

The doctrine of independent legal significance also can rear its head in the estate tax context. Say a settlor establishes an irrevocable inter vivos trust for the benefit of his children, including children conceived or adopted after the trust is funded. The settlor dies. Is the subject property part of his federal gross estate for tax purposes? The argument for inclusion is that he retained a power to change the beneficial interests of the trust by conceiving or adopting children.[303] The argument against inclusion, which is the argument that is likely to carry the day, is that "the act of bearing

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[297]UPC §2-512 (events of independent significance).

[298]1A Scott on Trusts §54.3.

[299]*See generally* Restatement (Third) of Trusts §19 cmt. e.

[300]1A Scott on Trusts §54.3.

[301]1A Scott on Trusts §54.3. *See generally* Second Bank-State St. Tr. Co. v. Pinion, 341 Mass. 366, 170 N.E.2d 350 (1960). Massachusetts has since codified its doctrine of independent legal significance. *See* Mass. Gen. Laws ch. 190B, §2-512.

[302]*See* 1A Scott on Trusts §54.3. For a compilation of state statutes codifying the doctrine of independent legal significance in the context of inter vivos trusts and associated pour-over wills, *see* Jeffrey A. Schoenblum, Multistate Guide to Estate Planning 5-45 through 5-59 (Table 5.02) (CCH 2008). *See generally* §2.2.1 of this handbook (the pour-over statute). The Restatement (Third) of Property describes the Doctrine of Independent [legal] Significance as follows: "The meaning of a dispositive or other provision in a will may be supplied or affected by an external circumstance referred to in the will, unless the external circumstance has no significance apart from its effect upon the will." Restatement (Third) of Property (Wills and Other Donative Transfers) §3.7 (1998). The Reporter's Note to §3.7 discusses the doctrine's history, beginning with the English case of Stubbs v. Sargon (1838) 3 My. & Cr. 507, 40 Eng. Rep. (Ch.) 1022, which upheld a testamentary disposition to those who were copartners of the life beneficiary at the time of her death. *See also* §8.15.17 of this handbook (the doctrine of incorporation by reference).

[303]*See* I.R.C. §2036(a)(2) (providing that the value of the gross estate shall include the value of any interest in property transferred by a decedent if the decedent has retained for life the right, alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom); I.R.C. §2038(a)(1) (providing that the value of the gross estate shall include the value of all property transferred by the decedent if the enjoyment of the property was subject to change at his death through the exercise of a power by the decedent, alone or in conjunction with any person, to alter, amend, revoke, or terminate). *See generally* §8.9.4 of this handbook (tax-sensitive powers).

or adopting children is an act of independent significance, the incidental and collateral consequence of which is to add the child as beneficiary to the trust."[304]

To the extent an exercise of an inter vivos power of appointment created under the terms of a power-grantor's will is enforceable, it is not on account of the doctrine of independent legal significance. Rather, the exercise would be enforceable "on the theory that the exercise relates back and becomes part of the … [power-grantor's]… will, even if the writing exercising the power is not executed in accordance with the statutory formalities for wills."[305] The power of appointment is discussed generally in §8.1.1 of this handbook.

[304]Rev. Rul. 80-255.

[305]Restatement (Third) of Property (Wills and Other Donative Transfers) §3.7 cmt. e.