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Be Careful Not to Spill: Pour-Over Clauses in Wills

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A "pour-over" clause in a will is an easy drafting shortcut. In circumstances where there is an existing trust, a testator can use such a clause to have a bequest paid into that trust. The approach seems to make sense where pains have been taken to establish a valid trust, either testamentary or inter vivos; perhaps a family trust or a Henson Trust.

As described in *Quinn Estate*[i], a pour-over clause refers to a provision in a will "whereby the residue figuratively "pours over" into the corpus of a non-testamentary inter vivos trust."

However, before putting such a clause into a will, beware! Pour-over clauses have not been accepted as valid in Ontario in certain circumstances.

A pour-over clause was considered in *Vilenski v. Wolfman*[ii]. There, the deceased left a will that transferred the residue of her estate to the Trustees of a family trust that the testator settled just before making the will. No beneficiary or potential beneficiary of the estate took issue with the disposition. However, the Estate Trustees sought the direction of the court on the validity of the clause, noting that no decided Ontario case dealt directly with the validity of such a clause, and that there were competing authorities from other provinces, some which held them to be valid, and some which held them to be invalid.

The Ontario court chose to follow B.C. precedents which held pour-over clauses to be invalid. In particular, the Ontario court followed the B.C. Court of Appeal decision in Quinn Estate.

The court's concern with such a clause appeared to be that it had the effect of allowing a testator to make testamentary dispositions without following the due execution formalities required under the legislation. The trust (and therefore the disposition under the will) could be amended after the fact without the need to have the will duly executed.

The Ontario court declined to follow a Nova Scotia precedent whereby the court focussed on whether the trust was actually amended after the will was executed, as opposed to simply being amendable.

Under the law now applicable in Ontario, the validity of a pour-over clause does not depend on whether the trust was actually amended after the will was made. The mere possibility that the trust could be amended or revoked renders the clause invalid. The judge in Vilenski specifically acknowledged that, in the matter before her, there were no changes to the trust after the making of the will. However, the judge went on to hold that the pour-over clause was invalid

In Quinn, the court dismissed the argument that the doctrine of "incorporation by reference" could save the clause. The doctrine requires a valid pre-existing document. As the trust was amendable and revocable, it was not a "presently existing document" and thus the doctrine could not apply.

The court in Quinn also rejected the application of the doctrine of "facts of independent significance". Under this doctrine, a bequest of, for example, "a car", is allowed to stand even if the car changes identity after the will is made. Reference to "a car" is said to be limited. The term can only refer to certain things. However, a bequest to a trust where there is a power to amend the trust is not so limited. "Extending the doctrine to pour-over clauses would grant testators unlimited power to amend the disposition of their estate without following the strictures of [the relevant execution legislation]."

As noted in Quinn, a pour-over clause "is not a clause finding much support in Anglo-Canadian law." The clause appears to be more widely used in the United States. In fact, in Quinn, the will was drafted by a California lawyer. Many states have enacted legislation validating pour-over clauses in wills. The Uniform Law Conference of Canada made recommendations for similar legislation in 1967, and again in 2019. Ontario has not enacted such legislation.

As a result of the invalidity of the pour-over clause in Vilenski, the estate passed on an intestacy. The deceased's adult children benefitted from the gift, rather than the deceased's extended family and charities. However, the judge observed that there was nothing to prevent the adult children from

distributing the residue that they were to receive in accordance with the terms of the trust.

It would appear that the problem can be avoided if the pour-over clause in the will refers to a trust that is neither revocable nor amendable. In such a situation, the clause may survive. Alternatively, the will could establish a trust on terms similar to the existing trust (albeit, without the option of making the testamentary trust revocable or amendable. However, the will could be amended or revoked by a capable testator prior to death).

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[i] 2019 BCCA 91. The matter involves the estate of Pat Quinn, former NHL player and Toronto Maple Leaf coach for 7 seasons.

[ii] 2022 ONSC 2116 (CanLII).