

The Creation of Testamentary Trusts and Execution of Wills

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This article is to aim to make clear the situations over the creation of testamentary trusts in the United States and to offer some materials for the construction of our testamentary trust law. First of all, the author examines the legal problems of the execution of wills, particularly codicil, integration, incorporation by reference and facts of independent significance, in Chapter 2. These rules deeply combine with the drafting of a testamentary trust. As such examples, the author analyzes the development of the pour-over trust and secret trust in Chapter 3. The pour-over trust is now gradually developing as itself within trust laws separate from the strict rules of will laws. The Uniform Testamentary Additions to Trusts Act was adopted in most states. The most courts apply the flexible rule of facts of independent significance rather than the doctrine of incorporation by reference today. The secret trust, on the other hands, is in the difficult situations to keep an appropriate balance between the intent of testator and equity in most jurisdictions, which take the position that equity requires creation of constructive trust or resulting trust. The Restatement of Trusts takes the same position. As a result, it means that a testamentary trust is required to be an express trust.

American situations over the creation of testamentary trusts greatly suggest that the testamentary trust law has various legal problems, and give many suggestions to the reform of our trust law as well as the construction of it. In that sense this article is only a first step to study American testamentary laws on the comparative law basis.