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Testamentary Gifts to Amendable Trusts

Conley G. Wilkerson
University of Kentucky

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natural children and would be classed with them unless by will or some other instrument they were excluded. In the principal case, the court stated that the 1950 statute, if it were used to determine the intention of the testator, would allow adopted children to be included within the term "heirs-at-law" of the adoptive parents.

It was contended, however, that since the testator died in 1904, the holding in *Copeland v. State Bank & Trust Co.*¹¹ controlled the principal case, and the statute in effect at the testator's death should be used to determine membership in the class described as "heirs." The court, however, refused to follow this part of the *Copeland*¹² opinion, and held that in determining membership in the class described as "heirs" of the life tenant, the statute in effect at the death of the life tenant would control. Therefore, since the life tenant in the principal case died in 1952, the 1950 statute, in effect at her death, was used to construe the will, and the adopted children were allowed to share in the property left by the testator. By the specific holding in the principal case the court was not compelled to use the 1904 statute and its opposing rules of construction.

The case represents an important clarification on the status of adopted children, in accepting what is believed to be the preferable definition of the terms "heirs" and "heirs-at-law" as including adopted children. It would now seem that the 1904 statute with its contrary rules of construction is at long last dead. No longer can it plague the adopted child as it has since its enactment, and no longer will it rule from the grave as it has since its repeal.

JAMES T. YOUNGBLOOD

TESTAMENTARY GIFTS TO AMENDABLE TRUSTS

The question of whether a testator can ever devise or bequeath a portion of his estate to an amendable inter vivos trust is not one that can be readily and conclusively answered. When the bequest is to an amendable trust which has in fact been amended subsequent to the execution of the will, a further and even more perplexing problem arises. No American jurisdiction has as yet allowed property to pass into a trust which has been amended after the execution of the will, unless such amendments meet the formal requirements of the Statute of Wills. It has been suggested that perhaps the law in this respect should be changed by passing a statute allowing a formally executed

¹¹ 300 Ky. 432, 188 S.W. 2d 1017 (1945).

¹² *Supra* note 1 at 508.

will to incorporate by appropriate reference a trust instrument, together with its subsequent amendments, although neither the trust nor its amendments comply with the formalities required of a will.¹ The purpose of this note is to review the treatment by the courts of bequests to inter vivos trusts, and to make such recommendations concerning amendable and subsequently amended trusts that are considered necessary. Discussion will be centered upon the theories that may be used to sustain testamentary gifts to trusts and the problems that arise where the trust is (1) irrevocable and unamendable, (2) revocable and amendable but has not been amended and (3) revocable and amendable where there has been a subsequent amendment.

Irrevocable and Unamendable Trusts: In cases involving an irrevocable and non-amendable trust to which the testator attempts to "pour over" or devise a part of his estate on his death, there appear to be no serious problems. This can be accomplished in most jurisdictions through the doctrine of incorporation by reference.² Under this doctrine, a writing not attested and subscribed in conformity with the Statute of Wills can be included in a will if the will refers to the writing as one then in existence, shows an intention to incorporate the instrument, and the reference identifies the writing with certainty.³ Under the incorporation by reference doctrine the incorporated document is considered a part of the will for certain purposes only, usually for construction purposes and for applying the will's provisions to persons and things.⁴ Although the document must be in existence and referred to in the will as being in existence, it does not have to be present at the time of the execution of the will,⁵ and need not be probated with the will proper.⁶

In those jurisdictions that do not recognize the doctrine of incorporation by reference, another possible way by which such a bequest can be upheld is through the application of the "independent significance" theory. This theory has arisen due to the inescapable fact that to interpret the language of a will, it is usually necessary to relate

¹ Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust*, 50 MICH. L. REV. 33 (1951).

² 1 SCOTT, TRUSTS 336-37 (1939).

³ ATKINSON, WILLS 387-90 (1953). The doctrine of incorporation by reference should be distinguished from the process of integration. Though the two doctrines are different, they do overlap to a certain extent. When papers are integrated into a will, they must be present at the time of the execution of the will and become a part of the will in the fullest sense including probate with the will.

⁴ ATKINSON, WILLS 385 (1953); 1 PAGE, WILLS 522 (Lifetime Ed. 1941).

⁵ ATKINSON, WILLS 385 (1953); *In re Willey's Estate* 128 Cal. 1, 60 Pac. 471 (1900).

⁶ 2 PAGE, WILLS 67 (Lifetime Ed. 1941).

the language to extrinsic facts. It is permissible for the testator to make the designation of the beneficiaries or the amount of the devises or bequests dependent upon future acts which have independent significance, that is, are non-testamentary or have effect apart from and independent of the disposition of the property by the will.⁷ This theory is subject to the objection that the testator might alter his will by an unattested act, but certainly this objection would not be valid where the testator refers to his past act for the purpose of identifying the beneficiary. Professor Scott says:

If by deed a valid trust was created prior to the execution of the will and the settlor reserved no power to revoke or modify the trust, it seems clear that, on one or both of the two grounds suggested [incorporation by reference, or ascertaining the terms of the will from facts having independent significance], the testamentary trust can be upheld.⁸

From the foregoing, it can be concluded that where the inter vivos trust is irrevocable and unamendable a person can make additions to the trust by referring to that trust in his will without setting out the detailed terms of the trust.

Amendable Trusts not in fact amended: Where the trust instrument reserves to the settlor a power to amend or revoke, a more difficult problem arises. Even though an amendable trust has not in fact been amended after the will was executed there is confusion as to whether it will be permitted to be incorporated by the will. Though considerable authority supports the affirmative, some of the decisions are of limited value. For example, in two cases often cited as upholding the incorporation of an amendable trust, the courts did not discuss the issues raised by the fact that the trusts were revocable.⁹ Perhaps the strongest support for upholding the incorporation of amendable trusts can be found in several Ohio decisions.¹⁰ Although these cases have been stated to be of no authority on the point outside of Ohio, since the cases are based on an Ohio statute,¹¹ but an examination of the statute¹² reveals that it is essentially the same as the common law

⁷ ATKINSON, WILLS 340 (1937); Evans, *Incorporation by Reference, Integration and Non-Testamentary Act*, 25 COL. L. REV. 879 at 895 (1925).

⁸ I SCOTT, TRUSTS 293, 294 (1939).

⁹ *Swetland v. Swetland*, 102 N.J. Eq. 294, 140 Atl. 279 (1928); *In re Willey's Estate*, 128 Cal. 1, 60 Pac. 471 (1900).

¹⁰ *First-Central Trust Co. v. Claffin*, 73 N.E. 2d 388 (Ohio 1947); *Fifth-Third Union Trust Co. v. Wilensky*, 79 Ohio App. 73, 70 N.E. 2d 920 (1946); *Bolles v. Toledo Trust Co.*, 144 Ohio 195, 58 N.E. 2d 381 (1944); *Koeninger v. Toledo Trust Co.*, 49 Ohio App. 490, 197 N.E. 419 (1934).

¹¹ *Lauritzen, Can a Revocable Trust Be Incorporated by Reference?* 45 ILL. L. REV. 583 at 599 (1950).

¹² PAGE, Ohio Gen. Code Sec. 10504-4 (1938). A document, book, record or memorandum in actual existence may, by reference, be incorporated in a will, if referred to as being actually in existence at the time the will is executed. . . .

rules on incorporation by reference and therefore the problem in Ohio is essentially the same in that state as elsewhere. The Ohio courts seem to regard the reference to a trust as a reference to an existing writing even though the trust is subject to amendment.¹³

Further support can be found in *Old Colony Trust Co. v. Cleveland*,¹⁴ from which it can be inferred that it is irrelevant that power to amend is reserved so long as no amendments have been made after the execution of the will. If subsequent amendments are made, such amendments will not invalidate the whole residuary bequest but these amendments will be void as to the property passing under the residuary clause and the residue will pass to the trust as it existed when the will was executed. This case involved an amendable trust, subsequently amended, in which the trustees paid out of the original trust estate all the amounts specified in the second paragraph, which was the paragraph subsequently amended by the testator. The court held that these beneficiaries were not entitled to share in the residue of the estate, since that amount was to pass to the beneficiaries named in the other section of the original trust deed which remained unchanged.

On the other hand, strong authority can be found against upholding a bequest to an amendable trust. In *Atwood v. Rhode Island Hospital Trust Co.*¹⁵ where the testator devised property to an amendable trust and subsequently amended the trust, but the effect of the amendments was not in issue. The court held against the validity of the residuary disposition upon the ground that the settlor had reserved the power to amend and not upon the fact that the power to amend had been exercised after the execution of the will. Support for the position taken in the *Atwood* case can be found in *Boal v. Metropolitan Museum of Art*,¹⁶ and *President and Directors of Manhattan Co. v. Janowitz*.¹⁷

Writers discussing the problems of incorporating amendable trusts have further indicated the lack of harmony in this area of the law. Scott, in discussing the *Atwood* case, said that the decision there was

¹³ *Supra* Note 1 at 45.

¹⁴ 291 Mass. 380, 196 N.E. 920 (1935).

¹⁵ 275 Fed. 513 (1st. Cir. 1921).

¹⁶ 298 Fed. 894 (2nd. Cir. 1924). Held incorporation invalid because testator had attempted to create for himself a power to dispose of his residuary estate otherwise than by an instrument executed as a will or codicil.

¹⁷ 260 App. Div. 174, 21 N.Y.S. 2d 232 (1940). The court here points out the difference between a revocable and non-revocable trust. If non-revocable, the trust instrument is fixed and enduring and can be incorporated. If revocable, the disposition of the property would be made by the shifting provisions of the trust instrument. To allow the incorporation here would permit the testator to alter his will by an instrument not executed as required by the statute of will.

contrary to the weight of authority.¹⁸ Another writer states “. . . that the weight of authority established by the American courts which have most carefully considered the problem rejects the incorporation of revocable trusts into wills.”¹⁹ The writer of this paper feels that perhaps the majority view, and certainly the trend, is to uphold a bequest to an amendable trust where the terms of the trust have not been subsequently amended.

Amendable trusts where there is a subsequent amendment: Where the trust is amendable and there have been subsequent amendments, one line of cases has disregarded the amendments unless executed with the formalities required of a will. The trust instrument is given effect according to its original terms, or in the form that it took at the time the will was executed.²⁰ Other courts have invalidated such residuary bequests altogether where there have been amendments to the trust after the execution of the will. In such event the property passes by intestacy.²¹

The problems which arise where there is an amendment to the trust after the execution of the will can be avoided by executing a codicil to the will after the amendment to the trust, providing there are no other amendments after the date of the codicil, since the will speaks from that date.²² Also these problems can be avoided if the amendments to the trust have been executed in such a manner as to satisfy the requirements of the Statute of Wills, even though the instruments themselves are not in the form of a will. There is a recent Kentucky case holding that such formally executed amendments are a valid part of the will.²³ The basis for the holding in this case is not clear, but it is submitted that the decision is sound. The court expressly stated that the holding was not based on the “independent significance” theory.²⁴ To give effect to these amendments is clearly outside the scope of the doctrine of incorporation by reference since (1) the amendments were made after the execution of the will, and (2) the trust, as it was enforced, was clearly not in existence at the time the will was executed. Though the court did not expressly refer to the amendments as codicils, they were perhaps treated as such.

¹⁸ 1 SCOTT, TRUSTS 297 (1939).

¹⁹ Lauritzen, *Can A Revocable Trust Be Incorporated By Reference?* 45 ILL. L. REV. 583 at 600 (1950).

²⁰ Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934); Note, 157 A.L.R. 1164 (1945).

²¹ Atkinson, Wills 393 (1953). Pres. and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S. 2d 232 (1940).

²² In Re Yorks Estate, 95 N.H. 435, 65 A. 2d 282 (1949); First-Central Trust Co. v. Claffin, 73 N.E. 2d 388 (Ohio 1947).

²³ Stouse v. First National Bank of Chicago, 245 S.W. 2d 914 (Ky. 1951).

²⁴ *Id.* at 920.

There seems to be no valid objection to upholding such formally executed amendments, since the spirit of the Statute of Wills has been complied with.

Subsequent amendments to the trust can possibly be upheld upon the "independent significance" theory, though to the writer's knowledge there have been no cases sustaining a bequest on this ground. A strong argument against applying this theory is the difficulty of determining when the act is non-testamentary. In support of its application to this situation an analogy can be made to other instances in which the doctrine has been applied. Bequests have been sustained "to such persons as shall be in my employ at the time of my death,"²⁵ and in instances where the testator bequeaths property in a certain house, room or receptacle.²⁶ By shifting the contents after the execution of the will, the testator can change the disposition of his property. It is possible that at the time he executed the will he could have had such a proposition in mind, and made such a disposition in order to circumvent the Statute of Wills. This point is not often considered in the cases and it is perhaps enough to say that such bequests are upheld because normally the acts referred to have significance apart from testamentary purposes. Though it is possible to argue that the act of amending an inter vivos trust can have independent significance, it is concededly difficult to determine when such an act is non-testamentary, and perhaps the courts are wise in not extending the doctrine to such a situation.

Noting the apparent lack of uniformity and the areas of uncertainty in the handling of bequests to amendable inter vivos trusts, one writer has concluded that there is need of legislation, and suggests the following:

A devise or bequest in a duly executed will shall not be invalid for lack of compliance with sections (the sections pertaining to the formalities of execution of a will) where it is made in form or in substance to the trustee of a trust established in writing during the testator's lifetime; nor shall it be invalid because the trust may be amended or revoked or both by the settlor or any other person or persons; nor because the trust was amended after execution of the will. The devise or bequest may operate to dispose of property on the terms of the trust as they appear in writing at the testator's death, except, that any writing prepared after execution of the will which would have the sole effect of disposing of property at death shall be disregarded.²⁷

²⁵ *In re Hirshorn's Estate*, 120 Colo. 294, 209 P. 2d 543 (1949); *Reinheimer's Estate*, 265 Pa. 185, 103 Atl. 412 (1919); *Abbot v. Lewis*, 77 N.H. 94, 88 Atl. 98 (1913).

²⁶ *Buchwald v. Buchwald*, 175 Md. 103, 199 Atl. 795 (1938); *Hastings v. Bridge*, 86 N.H. 247, 166 Atl. 273 (1933); *Gaff v. Cornwallis*, 219 Mass. 226, 106 N.E. 860 (1914); *Creamer v. Harris*, 90 Ohio St. 160, 106 N.E. 967 (1914).

²⁷ *Supra* Note 1 at 67-68.

This statute would liberalize the law as it now stands. It would allow the courts to uphold the residuary bequests according to the terms of subsequent amendments upon a determination by the court that the amendment was not a testamentary act but had significance independent of disposing of the estate owned at death.

Such a statute would be useful, and in this writer's opinion sets forth a desired proposition, in that it would uphold bequests to an amendable and revocable trust where the trust has not been amended after the execution of the will.

In upholding subsequent amendments that were not made for the sole purpose of disposing of property at death, perhaps the statute goes too far. When the subsequent amendments are simply to add beneficiaries to share in the trust, and where the disposition provided for in the amendments can be satisfied solely out of the original trust corpus, then such amendments should be allowed as this would in no way violate the Statute of Wills. Where the disposition provided for in the amendment must be satisfied out of any of the property passing to the trust under the provisions of the will, then the amendments should not be upheld unless executed with such formalities as would satisfy the Statute of Wills. To extend the "independent significance" doctrine to this situation, as suggested by the statute, would accomplish no real purpose since there would be but few instances in which subsequent amendments to trusts would have an effect independent of disposing of property at death. The burden on the courts in making such determinations, and the possible opportunity it would afford for the eventual evasion of the Statute of Wills by declaring various acts to have a non-testamentary effect, outweigh the possible good to be gained by such an extension.

The Statute of Wills was designed for the protection of those who dispose of their property by will. Compliance with its provisions affords a degree of protection against fraud, undue influence, whimsical change, etc. Therefore until such a need to dispense with the statutory requirements becomes evident by the changing conditions of society, it is believed desirable to insist that such requirements be met. Bequests to amendable and revocable trusts should be upheld where there are no amendments after the execution of the will, but subsequent amendments not executed with formalities that would satisfy the Statute of Wills should be held invalid.

CONLEY G. WILKERSON