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Trusts and Estates -- Pour-Over Wills -- Bequest to Subsequently Amended Trust Upheld Under Doctrine of Independent Significance

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TRUSTS AND ESTATES — POUR-OVER WILLS — BEQUEST TO SUBSEQUENTLY-AMENDED TRUST UPHELD UNDER DOCTRINE OF INDEPENDENT SIGNIFICANCE — Testator created an inter vivos trust, reserving a power to amend or revoke. Thereafter, he executed his will which left the residue of his estate to the trustee to be used according to the terms of the trust. Subsequently, testa-

tor executed an unattested instrument which altered the beneficial interests in the trust property. At testator's death, his executor petitioned the probate court for instructions whether the residue passed according to the trust's original terms, its amended terms, or whether the bequest failed, resulting in intestacy. On certification[1] to the Supreme Judicial Court of Massachusetts, *held,* there was an effective disposition to the trustee to hold subject to the terms of the trust as amended. The subsequent amendment was effective because acts of independent significance do not require attestation under the statute of wills. *Second Bank—State St. Trust Co. v. Pinion,* 170 N.E.2d 350 (Mass. 1960).

This is the first decision of its kind. Absent the aid of a statute, bequests had previously been upheld only in accordance with the terms of the trust as it was written when the will was executed[2] or held entirely invalid.[3] Later amendments to the trust, when executed in compliance with the statute of wills, have been given effect as to property passing under the will.[4] But until now there has been no decision (at least unaided by a statute) squarely holding that the willed assets could pass according to the dispositive terms of an unattested amendment made after the will.[5] In so doing the court based its decision upon the doctrine of independent significance.[6] This doctrine has long been recognized as a means of effectuating bequests which refer to nontestamentary acts or writings in order to identify a legatee or the subject matter of a gift.[7] Reference may safely be

1 MASS. GEN. LAWS ANN. ch. 215, § 13 (1955) authorizes a judge of probate court to reserve and report the evidence and all questions of law for consideration of the full court, as if on appeal.

2 See Edward's Will Trusts, [1948] 1 Ch. 440; *cf.* 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). See generally Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust,* 50 MICH. L. REV. 33 (1951); Comment, 57 MICH. L. REV. 81 (1958).

3 Atwood v. Rhode Island Hosp. Trust Co., 275 Fed. 513 (1st Cir. 1921), *cert. denied,* 257 U.S. 661 (1922); President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (1940). Where the trust has not been amended, most courts would hold the mere power to amend insufficient to defeat the bequests. See, *e.g.,* In the Matter of the Estate of Willey, 128 Cal. 1, 60 Pac. 471 (1900); *In re* Irvie's Will, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958); *In re* Snyder's Will, 125 N.Y.S.2d 459 (Surr. Ct. 1953); *cf.* Old Colony Trust Co. v. Cleveland, *supra* note 2; Swetland v. Swetland, 102 N.J. Eq. 294, 140 Atl. 279 (1928). *Contra,* Atwood v. Rhode Island Hosp. Trust Co., *supra.*

4 Stouse v. First Nat'l Bank, 245 S.W.2d 914 (Ky. 1951).

5 *In re* Irvie's Will, *supra* note 3, which upheld a bequest to an amended trust where the amendments were merely administrative in nature, apparently under the doctrine of incorporation by reference. *But see* Estate of Steck, 275 Wis. 290, 81 N.W.2d 729 (1957) which gave effect to subsequent amendments but without raising the issue of the validity of the amendments.

6 Sometimes called "reference to nontestamentary acts" by courts and writers.

7 One of the earliest cases applying the doctrine is Stubbs v. Sargon, 3 My. & Cr. 507, 40 Eng. Rep. 1022 (1838), where the court upheld a bequest to be divided "amongst [testatrix's] . . . partners who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business." See Dennis v. Holsapple, 148 Ind. 297, 47 N.E. 631 (1897) (gift to "whoever shall take good care of me, and maintain, nurse, clothe and furnish me with proper medical treatment"); Gaff v. Cornwallis, 219 Mass. 226, 106 N.E. 860 (1914) (gift of "the contents, if any, of a drawer in

made to such extrinsic acts or writings, notwithstanding their lack of formality, because their nontestamentary character reduces the likelihood of fraud; thus this approach is consistent with the underlying purpose of the statute of wills. However, many courts have invalidated amendments made after the execution of the will by applying the doctrine of incorporation by reference, a doctrine under which testamentary effect is not given to an extrinsic document unless it was already in existence when the will was executed.[8] But incorporation by reference should not be applied to a bequest conveying assets owned at death to the corpus of an inter vivos trust unless it is clear that the testator meant to create a separate testamentary trust.[9] In the absence of such evidence, it should be presumed that the testator intends to add his probate property to the previously-established inter vivos trust. Insofar as the amendment affects trust as well as probate property, it has significance independent of the disposition of the property owned at death. In the principal case, the trust amendment certainly has as much independent significance as would a subsequent change in the contents of a safe deposit box, an act which would not invalidate a bequest of the contents of the box.[10] Consequently, the trust amendment was quite properly held valid.

The use of pour-over wills has been urged by legal writers[11] because it permits the unified administration of trust and probate property, minimizes administrative expense, avoids the continued court supervision and accounting required of a testamentary trustee, and allows greater flexibility in the disposition of probate property. In many states, the result reached by the principal case has been accomplished by statutes which make dis-

said safe"); Lear v. Manser, 114 Me. 342, 96 Atl. 240 (1916) (gift to "such person or persons . . . as shall care for me in my last sickness"); Abbott v. Lewis, 77 N.H. 94, 88 Atl. 98 (1913) (gift to testator's employees at date of death); *In re* Reinheimer's Estate, 265 Pa. 185, 108 Atl. 412 (1919) (gift to "the party or parties . . . who may be farming my farm and taking care of me at the time of my death").

[8] See Atwood v. Rhode Island Hosp. Trust Co., *supra* note 3; President and Directors of Manhattan Co. v. Janowitz, *supra* note 3. For a complete discussion of the two doctrines and of cases applying each, see McClanahan, *Bequests to an Existing Trust,* 47 CALIF. L. REV. 267 (1959); Palmer, *supra* note 2; Comment, *supra* note 2.

[9] The residuary clause of the trust involved in the principal case provided that the assets distributed to the trustee were to be "held, administered and distributed solely under the provisions of such indenture and in no way as trustee under this will. . . ." The court concluded that this language rendered incorporation by reference inapplicable. Principal case at 351.

[10] Gaff v. Cornwallis, *supra* note 7.

[11] See 1 SCOTT, TRUSTS § 54.3 (2d ed 1956); Evans, *Nontestamentary Acts and Incorporation by Reference,* 16 U. CHI. L. REV. 635 (1949); McClanahan, *supra* note 8; Palmer, *supra* note 2; Polasky, *Pour-Over Wills,* 98 TRUSTS & ESTATES 949 (1959); Shattuck, *Some Practical Aspects of the Problems of the Alterable and Revocable Inter Vivos Trust in Massachusetts,* 26 B.U.L. REV. 437 (1946). *But see* Lauritzen, *Pour-Over Wills,* 95 TRUSTS & ESTATES 992 (1956); Lauritzen, *Can a Revocable Trust Be Incorporated by Reference?* 45 ILL. L. REV. 583 (1950).

positions to an existing trust valid.[12] Undoubtedly, the result will lead to greater utilization of the pour-over device by removing the uncertainty over the validity of trust amendments made after the execution of the pour-over will.

The decision in the principal case does not reach the situation where a testator leaves property to another person's inter vivos trust. For instance, if a wife's will leaves the residue of her estate to her husband's inter vivos trust in which he has reserved a power to amend or revoke and the husband amends the terms of the trust after his wife's death, the question arises whether the amendment can also control the disposition of her probate property. Although the requisite independent significance is still present, a court may conclude that the wife did not intend to give her husband such unrestricted control over her probate property.[13] This conclusion would be unfortunate for it would require the wife's property to be separately administered and thereby forfeit the advantages of the pour-over will. It is just as likely that a person leaving property to another's amendable trust would have no intention of restricting the settlor's power. This would especially be true in the husband and wife situation. If a court was inclined to uphold the subsequent amendment, it could do so by analogizing the wife's bequest to her husband's amendable and revocable trust with a bequest to him of a general power of appointment.[14] The fact that a testator who intends to create such a power usually does so in express terms should not preclude the court from invoking this analogy when the relationship of the parties or other circumstances surrounding the execution of the will suggest that the wife intended to give her husband this control over her probate property.

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[12] S.B. No. 116, Reg. Sess. (Ariz. March 22, 1961); COLO. REV. STAT. ANN. § 152-5-45 (Sess. Laws 1959, ch. 286); DEL. CODE ANN. tit. 12, § 111 (Supp. 1960); FLA. STAT. § 736.17 (Supp. 1960); ILL. REV. STAT. ch. 3, § 194(a) (1959); IND. ANN. STAT. § 6-601(j) (1953); MD. ANN. CODE art. 93, § 350A (Supp. 1960); MISS. CODE ANN. § 661.5 (Supp. 1960); MONT. REV. CODES ANN. § 91-321 (Supp. 1961); NEB. REV. STAT. § 30-1806 (Supp. 1959); N.C. GEN. STAT. § 31-47 (Supp. 1959); H.B. No. 915, Reg. Sess. (N.D., March 14, 1961); PA. STAT. ANN. tit. 20, § 180.14(a) (Supp. 1960); R.I. GEN. LAWS ANN. § 33-6-33 (Supp. 1960); Ch. 303, Reg. Sess. (Tenn., March 17, 1961); S.B. No. 140, Reg. Sess. (Texas, March 25, 1961); VA. CODE ANN. § 64-71.1 (Supp. 1960); WASH. REV. CODE § 11.12.250 (1959); WYO. STAT. ANN. § 2-53 (1957).

[13] Such a result would undoubtedly be reached under the Uniform Testamentary Additions to Trusts Act § 1 which requires an authorization in the will in order to validate amendments made after testator's death.

[14] *Cf.* Dormer Estate, 348 Pa. 356, 35 A.2d 299 (1944). However, the draftsman should be aware of the estate tax consequences of giving the settlor of the inter vivos trust the power to control the testator's probate assets. The power to amend or revoke the trust would probably qualify as a general power of appointment, resulting in the inclusion of the testator's probate assets in the estate of the settlor. INT. REV. CODE OF 1954, § 2041(a)(2).