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Wills - Testamentary Additions to the Corpus of An Inter Vivos Trust-Recent Judicial and Legislative Developments

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WILLS—TESTAMENTARY ADDITIONS TO THE CORPUS OF AN INTER VIVOS TRUST—RECENT JUDICIAL AND LEGISLATIVE DEVELOPMENTS—The shape of the law relating to testamentary additions to the corpus of an inter vivos trust was outlined in 1951 by Professor George E. Palmer in an article entitled "Testamentary Dispositions to the Trustee of an Inter Vivos Trust."¹ It is the purpose of this comment to consider recent developments in this area. A generalized formulation of the problem to be dealt with is—may a valid bequest be made to the trustee of an inter vivos trust without setting out the terms of the trust in the will?

Recent Judicial Developments

A. *Where the Trust Is Unamendable and Irrevocable.* If the inter vivos trust created was neither amendable nor revocable, Professor Palmer determined that a valid bequest to its corpus could be made in most jurisdictions without repeating the terms of the trust in the will,² either by resort to the doctrine of incorporation by reference³ or the rule "that meaning can be given to . . . [a] will by reference to facts having 'independent' or 'non-testamentary' significance."⁴ There are no current decisions adopting a contrary view.

¹ 50 MICH. L. REV. 33 (1951). Citations to Professor Palmer's article will hereinafter be made in the following form: "Palmer, p. 33."

² Palmer, p. 33.

³ Ibid.

⁴ Palmer, p. 34. See also TRUSTS RESTATEMENT SECOND, Tent. Draft No. 2, §54(g) (1955). The *Restatement of Trusts Second* was approved and adopted by the A.L.I. in 1957. See 34th Annual Meeting, The American Law Institute, Proceedings, p. 279.

B. *Where the Trust Is Amendable or Revocable but Is Not Altered Subsequent to the Execution of the Will.* Where a bequest is made to the corpus of an amendable trust without repeating its terms in the will, Professor Palmer concluded that: "Apart from the opinions of able writers the authority supporting . . . [this type] of bequest is not impressive."⁵ The decisions invalidating such bequests purport to do so in the name of the statute of wills on the theory that a "testator cannot by his will prospectively create for himself a power to dispose of this property by an instrument not duly executed as a will or codicil."⁶ Palmer rejected this generalization as a statement of the controlling rule of law, and noted a number of distinctions presented by the cases which must now be discussed.

(1) *Where the power to amend is restated in the will v. where the fact that the trust is amendable appears only in the trust instrument.* An English case, *Matter of Jones*,⁷ invalidated a bequest to the trustee of an amendable inter vivos trust, where the power to amend was restated in the will. The decision rested on the inability of the court to receive evidence which would enable it to ascertain whether or not any alterations of the trust instrument had been made by the testator subsequent to the execution of his will. The decision was criticized by Palmer.⁸ Another English case, *In re Edwards' Will*,⁹ in which there was no indication in the will that the trust was amendable, recognized that a bequest to the corpus of an amendable inter vivos trust could be upheld on an incorporation by reference theory.¹⁰ These two English decisions have been harmonized by *In re Schintz Will*¹¹ under the rule that where the power to amend the inter vivos trust is referred to in the will itself the bequest is bad; but a power to amend the trust which is not referred to in the will does not invalidate the bequest. A new distinction was drawn in the *Schintz* case, however. The bequest there was made, for the benefit of the testator's daughter, Julia, to the trustee of the inter vivos trust

⁵ Palmer, p. 45.

⁶ *Atwood v. Rhode Island Hospital Trust Co.*, (1st Cir. 1921) 275 F. 513 at 521. See also criticism by Palmer, pp. 38, 42.

⁷ [1942] Ch. 328, 1 All E. R. 642.

⁸ Palmer, p. 41.

⁹ [1948] Ch. 440.

¹⁰ See Palmer, p. 42.

¹¹ [1951] Ch. 870.

to be held in the same manner as Julia's share in the trust or upon such deed or deeds "(if any) which may hereafter be executed by me under the power of revocation and declaration of new trusts thereby reserved to me or as near thereto as circumstances will admit."¹² The court upheld the bequest even though the power to amend the trust was referred to in the will, on the theory that the power in the will was not intended to be operative, but rather merely descriptive of the terms of the trust. The language in *Schintz* is susceptible of this interpretation. The decision is encouraging in that it will tend to limit the application of the *Jones* rule.

The American cases evidently have not differentiated between the situations where the power to amend is restated in the will and where it appears only in the trust instrument. A will employing the language, "I hereby make the following disposition of my real and personal effects in accordance with the attached list of assets (made current by subsequent lists)" was upheld in *In re Protheroe's Estate*¹³ on an incorporation by reference theory without discussion of the fact that the power to amend appeared in the will itself. Of course the case did not deal with a bequest to an inter vivos trust and might be distinguished by some courts on this basis.¹⁴ In *Clark v. Citizens National Bank* a bequest to be held in accordance with the terms of an inter vivos charitable trust ". . . including such amendments to and modifications of the same, if any, as may hereafter and during my lifetime be made . . ." was held invalid,¹⁵ but on the ground that the prerequisites for incorporation by reference and independent significance were not met. By implication of the court's analysis, the mere reservation in the will of the power to amend the trust did not defeat the bequest.

(2) *Where the testator intends the property disposed of by his will to pass in accordance with the terms of the trust as they appeared when the will was executed, even though the trust may in fact be subsequently amended v. where the testator intends the property disposed of by his will to be governed by the terms of amendments to the trust which may be made after the execu-*

¹² Id. at 871.

¹³ (S.D. 1957) 85 N.W. (2d) 505 at 507.

¹⁴ See *Clark v. Citizens Nat. Bank of Collingswood*, 38 N.J. Super. 69, 118 A. (2d) 108 (1955).

¹⁵ Id. at 73, 74.

tion of the will. *Old Colony Trust Co. v. Cleveland*¹⁶ was a case in which a bequest was upheld on the ground that the testator did not intend subsequent amendments to the trust to affect the disposition of property under his will.¹⁷ Professor Palmer equated this type of situation with one involving an unamendable trust and would apply the same rules to both.¹⁸ In a recent New York case, however, where the will provided "... I do not intend to incorporate in this my Last Will and Testament any future amendments which I may make to said Agreement [the inter vivos trust] . . . ,"¹⁹ the court distinguished *President and Directors of the Manhattan Co. v. Janowitz*²⁰ and upheld the bequest on the broader ground that an amendable trust may be incorporated by reference into a will if in fact no amendments are made subsequent to the execution of the will.²¹ Query as to what decision the court would have reached had later amendments in fact been made in view of the express disclaimer by the testator of an intent to include them.²²

Since 1951 a number of courts have upheld bequests to the trustee of an amendable but unamended inter vivos trust, even though it is determined that the testator intended the property passing by will at his death to be governed by the terms of any amendments to the trust made after the execution of the will.²³ Although perhaps distinguishable, *Montgomery v. Blankenship*,²⁴ upholding a bequest incorporating a trust instrument where the

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

¹⁷ See Palmer, p. 45.

¹⁸ Ibid.

¹⁹ In re Snyder's Will, 125 N.Y.S. (2d) 459 at 460 (1953).

²⁰ 260 App. Div. 174, 21 N.Y.S. (2d) 232 (1940), where an amendment to the trust made subsequent to the execution of the will was held to have caused complete invalidity of the bequest. Discussed by Palmer at pp. 53, 61.

²¹ Two alternative grounds for upholding the bequest were available to the court. It could have adopted the approach of *Old Colony Trust Co.* and treated the trust instrument as one not subject to modification or, as it chose to do, distinguished the *Janowitz* case on the ground that the trust instrument was not in fact amended subsequent to the execution of the will.

²² It might be argued that the court's failure to adopt the theory of the *Old Colony Trust Co.* case in a situation where it was so clearly available was an implied rejection of that theory.

²³ *Forsythe v. Spielberger*, (Fla. 1956) 86 S. (2d) 427; *Stouse v. First Nat. Bank of Chicago*, (Ky. 1951) 245 S.W. (2d) 914; In re *Ivie's Will*, 155 N.Y.S. (2d) 544 (1956), affd. 3 App. Div. (2d) 914, 163 N.Y.S. (2d) 380 (1957), affd. 4 N.Y. (2d) 178, 173 N.Y.S. (2d) 293 (1958); *State of Indiana ex rel. Citizens Nat. Bank v. Superior Court of Madison County*, (Ind. 1956) 138 N.E. (2d) 900. See also cases cited by Palmer, pp. 45, 46.

²⁴ 217 Ark. 357, 239 S.W. (2d) 758 (1950).

trust was assumed to be invalid, and *In re Protheroe's Estate*,²⁵ recognizing the validity of a bequest incorporating an amendable writing which was not a trust instrument, also support the above proposition. There are no contrary decisions among the recent cases.

The Illinois court in *Continental Illinois National Bank v. Art Institute*²⁶ sustained a bequest of the residuum of the testator's estate to the trustee of an inter vivos trust. The will made reference to the trust instrument and certain amendments thereto, but the importance of the decision as a precedent is lessened by the court's failure to address itself to the problems associated with incorporation of an amendable trust.

A New York lower court decision, *In re Snyder's Will*,²⁷ has upheld a bequest to an amendable inter vivos trust on the broad ground that mere reservation of a power to amend, if not exercised, will not invalidate the disposition. The will expressly disclaimed any intent to incorporate later amendments, however, though the court failed to discuss this aspect of the case.

In an interesting New Jersey decision²⁸ dealing with the effect of a bequest of the testator's residuary estate to the trustee of an inter vivos trust for charitable purposes, the court found that the *res* of the trust had not been delivered until after the date of execution of the will, concluded that no trust was in existence at the time of the execution of the will, and decided, "It is unnecessary to here conclude whether the doctrine of incorporation by reference has been adopted or rejected in New Jersey, since in any event one of the essential elements is lacking, i.e., the existence of a valid trust on the date of the execution of the will." It was assumed throughout the opinion that the trust instrument was in existence at the time the will was executed. This would have been sufficient ground to sustain the bequest in the majority of jurisdictions which accept the incorporation by reference doctrine, as it is generally recognized that it is the trust instrument and not the trust itself which is incorporated into the will.²⁹ The court

²⁵ (S.D. 1957) 85 N.W. (2d) 505.

²⁶ 409 Ill. 481, 100 N.E. (2d) 625 (1951).

²⁷ 125 N.Y.S. (2d) 459 (1953).

²⁸ *Clark v. Citizens Nat. Bank of Collingswood*, 38 N.J. Super. 69 at 78, 80, 118 A. (2d) 108 (1955). The case is criticized in 1 SCOTT, TRUSTS, 2d ed., §54.3, pp. 16, 17 (1956; Supp. 1958).

²⁹ Palmer, pp. 39, 40, 42, 55.

went on to state: "In the matter *sub judice* resort is sought to the *inter vivos* trust in order to ascertain the disposition of the property, the terms of the bequest. The testator attempted to dispose of his residue by a non-testamentary instrument. Such a gift is invalid, as the trust agreement has no independent significance, as above defined." The court's analysis on this issue, although consistent with the state of authorities, points up the failure of current legal opinion to achieve an integrated approach in the application of the doctrine of independent significance to different types of factual situations. Even though the doctrine is accepted in a particular jurisdiction, the court must still decide at what time the independent significance of a given act is to be tested. A majority of courts require that the trust instrument have independent significance at the time the will is executed (which means the trust must be in existence at this time), although this is not a limitation imposed in connection with application of the doctrine to acts which do not concern the creation or amendment of a trust.³⁰ Professor Palmer has suggested that the inconsistency results from the failure of the courts to divorce methods of analysis based on the doctrine of incorporation by reference, which requires an existing trust instrument, from analysis based on independent significance, and that courts carry over limitations from the former to the latter.³¹

C. *Where the Trust Was in Fact Amended or Revoked Subsequent to the Execution of the Will.* The effect of a subsequent amendment or revocation is not important if the mere reservation of the power to amend or revoke is held to invalidate the bequest. Nor should the amendment be important if the court in construing the will finds that the testator intended the property to pass in accordance with the terms of the original trust instrument.³² But where the court finds that the testator intended the

³⁰ For example, a bequest to "the persons in my employ at my death," or "to the person who is my wife at my death" would not be invalidated for want of independent significance even though the employment relationship or the marriage was not created until after the execution of the will. See Palmer, p. 35. See also the illustrations cited by the TRUSTS RESTATEMENT SECOND, Tent. Draft No. 2, §54(d) 3, 4, 5 (1955), and the discussion of the *Restatement* view in the text *infra*.

³¹ Palmer, p. 55. See also TRUSTS RESTATEMENT SECOND, Tent. Draft No. 2, §54(f) (1955), recognizing that resort to facts existing after the execution of the will is possible in certain pour-over trust situations under the doctrine of independent significance, and see discussion of the *Restatement* view in the text *infra*.

³² Palmer, p. 51. But see note 22 *supra*.

property to pass by the terms of the trust instrument in the form it took at his death, and where the reservation of a power to amend does not defeat the bequest, additional problems are raised. It becomes necessary for a court to see the distinction between situations in which it is possible to give effect to an amendment by treating it as applicable to the corpus of the inter vivos trust only, as for example, a gift of a specific sum of money which can be satisfied out of the trust corpus, and situations in which the amendment must be related to the property passing by the will in order to be given effect, e.g., a gift of land owned by the testator at death or a bequest to be distributed in the same proportions as the percentage shares held by the beneficiaries of the trust.³³ Amendments of the former type should be upheld and should not invalidate the bequest in any jurisdiction which will sustain a bequest to the trustee of an amendable inter vivos trust.³⁴ *In re Ivie's Will*³⁵ is a recent decision which lends some support to this conclusion.

With respect to amendments to the trust which are meant to operate in relation to property owned at death, there are three alternatives: (1) uphold the bequest in accordance with the terms of the trust as amended, (2) uphold the bequest in accordance with the terms of the trust as they existed at the time of the execution of the will, (3) invalidate the entire bequest.³⁶ In the first edition of his treatise on Trusts, Professor Scott advocated giving effect to later amendments, but if this was rejected he preferred complete invalidity to upholding the bequest in accordance with the terms of the trust as they appeared at the time of execution of the will.³⁷ In his recent second edition Professor Scott has concluded that giving effect to the bequest in accordance with the terms of the trust as they existed when the will was executed more closely approximates the testator's wishes in the typical case than complete invalidity of the bequest, and therefore reversed himself

³³ Palmer, pp. 52, 53.

³⁴ Palmer, p. 53.

³⁵ 155 N.Y.S. (2d) 544 (1956). See discussion of this case in text *infra*.

³⁶ Palmer, pp. 53, 54.

³⁷ 1 SCOTT, TRUSTS 299 (1939). Professor Palmer also advocates giving effect to later amendments which have *in fact* some independent significance, and agrees with the position now taken by Professor Scott in the second edition of his treatise should the courts refuse to give effect to the subsequent amendments. See Palmer, pp. 54, 59, 60, and note 38 *infra*.

as to the more desirable alternative should his preferred view be rejected by the courts.³⁸ The recently adopted revision of the American Law Institute's *Restatement of Trusts*, in applying the doctrine of independent significance, takes the position that amendments to the trust made after the execution of the will are generally effective.³⁹ This view is subject to the criticism that it may not provide the courts with a sufficiently flexible approach to the problems which confront them. No court has yet expressed a willingness to give effect to a bequest in accordance with the terms of later amendments to the trust,⁴⁰ and the *Restatement* fails to suggest an alternate solution should the courts refuse to give effect to later amendments.⁴¹ Furthermore, although recognizing that the doctrine of independent significance can apply to facts which come into existence after the will is executed, the *Restatement* rigidly limits its application with respect to such later facts to those which have independent significance at the time of the death of the testator. According to the *Restatement* view the doctrine of independent significance can apply in the context of the pour-over trust problem only to facts which have such significance either when the will is executed or at the death of the testator.⁴² This requires the existence of a valid trust at one of these two points

³⁸ 1 SCOTT, TRUSTS, 2d ed., §54.3, p. 377 (1956). If the independent significance of the trust amendment in any particular case is not sufficient to require that it be given dispositive effect, it is doubtful that it can be used in arriving at a quantitative determination whether the testator would have in fact preferred complete invalidity of the bequest as opposed to allowing the willed property to pass in accordance with the terms of the trust as they appeared when his will was executed. "The legal objection is that the provisions of an unattested writing . . . [cannot be] used in construing the will. . . ." Palmer, p. 64.

³⁹ TRUSTS RESTATEMENT SECOND, Tent. Draft No. 2, §54(i) (1955). The *Restatement of Trusts Second* was approved and adopted by the A.L.I. in 1957. See 34th Annual Meeting, The American Law Institute, Proceedings, p. 279.

⁴⁰ See note 44 infra.

⁴¹ However, where the bequest fails because, for example, there is no property included in the trust at the testator's death, the *Restatement* suggests that later amendments may be excluded and the bequest be given effect in accordance with the terms of the trust as they appeared when the will was executed. See TRUSTS RESTATEMENT SECOND, Tent. Draft No. 2, §54(i), illus. 9 (1955).

⁴² Id., §54(i), and especially illus. 9. The reporter takes the position that where the testator manifests an intent ". . . that the property bequeathed should be held upon the terms of the trust as they were at the time of the execution of the will, . . ." the doctrine of independent significance can be utilized to uphold the bequest if the trust was in existence when the will was executed. Where the testator manifests an intent ". . . that the property bequeathed should be held upon the terms of the trust as they should be at the time of his death, . . ." the reporter again recognizes that the bequest can be upheld by utilizing the doctrine of independent significance, provided that the trust was in existence at the time of the testator's death.

of time: when the will is executed if the testator does not intend his will to operate in accordance with later trust amendments; at the death of the testator if he intends the property disposed of by his will to go in accordance with later amendments to the trust. But the theory underlying this doctrine requires no such limitation. For example, a testator can bequeath property to persons now in his employ; to persons who will be in his employ at his death; or to persons who will be in his employ one year from the date of execution of his will. The time at which the independent significance of a fact must be assessed cannot be arbitrarily established; it must be gleaned from the will itself. No doubt the testator usually intends his will to speak as of the time of execution or at the time of his death, but he is not limited to these two points of time. Suppose that a testator executes a will making a bequest to an amendable inter vivos trust which he intends to create at some future date, and expresses an intent that amendments to the trust are not to affect the dispositions made by his will; or suppose that a testator makes a bequest to an existing amendable inter vivos trust and indicates that his will is to operate in accordance with any trust amendments and is not to be affected by a later revocation of the trust. If amendments are made to the trust in the first case, or if the trust is amended and then revoked in the second hypothetical situation, the doctrine of independent significance as it is espoused by the *Restatement* could not be used to give effect to the testator's intent.⁴³ A testator should be able to accomplish either of these results, and the doctrine of independent significance should be stated broadly enough to accommodate his needs. The *Restatement* view limiting the application of the doctrine to situations in which the trust was in existence at the time of the execution of the will or at the time of the death of the testator is an unwarranted restriction of its usefulness.

⁴³ With respect to the first hypothetical, the trust was not in existence when the will was executed and therefore had no independent significance at this point of time. Assuming it is in existence at the testator's death it has independent significance at this point, but only in its amended form. With respect to the second hypothetical, if the trust was in existence when the will was executed it had independent significance at this point, but it was not in existence at the death of the testator and therefore has no independent significance in its amended form. See TRUSTS RESTATEMENT SECOND, Tent. Draft No. 2, §54(i) and (j). The reporter recognizes that the principle underlying the rule of dependent relative revocation may be invoked to give effect to the bequest in the first hypothetical in accordance with the terms of the trust as they appeared at the testator's death, or in the second hypothetical in accordance with the terms of the trust as they appeared when the will was executed. See *id.*, §54(i), *illus.* 9.

The cases dealing with amendments meant to operate in relation to property owned at death are few, but no court at common law has given effect to a bequest in accordance with the terms of such an amendment to an inter vivos trust where the amendment was made after the will was executed.⁴⁴ With respect to the second and third alternatives mentioned above, the little available authority is in conflict.⁴⁵ None of the recent decisions deal directly with this problem. Amendments made subsequent to the execution of the will, but drawn in accordance with the statute of wills, were given effect in *Stouse v. First National Bank of Chicago*.⁴⁶ In dictum the court observed that subsequent amendments not executed in accordance with the formalities required by the statute of wills would be disregarded and that the estate would pass by the terms of the trust instrument as they appeared at the time of execution of the will. The court in *In re Ivie's Will*⁴⁷ gave effect to subsequent amendments which concerned only the administration of the trust. It distinguished amendments of this type from amendments which are testamentary in nature and in dictum stated that the bequest is invalid if amendments of the latter type are made. The decision could be classified with those cases holding it possible to give effect to the amendment by treating it as an amendment of the trust alone. An amendment to an inter vivos trust was given effect as a part of the will in *Forsythe v. Spielberger*,⁴⁸ but on a pleading technicality. The complaint failed to allege that it was executed subsequent to the will and not in accordance with the requirements of the statute of wills. In dictum the court in *Montgomery v. Blankenship*⁴⁹ stated that it would disregard subsequent amendments and give effect "to the provisions of the trust as they existed at the time of execution of the will." Also in dictum, the court in *In re Snyder's Will*⁵⁰ stated that amendment of the trust subsequent to the execution of the

⁴⁴ In 1951 Professor Palmer found no decision giving effect, in accordance with the terms of a trust amendment made after the execution of the will, to a disposition which operated in relation to property owned by the testator at death (Palmer, p. 54), and none has been located among the recent cases.

⁴⁵ Palmer, p. 61.

⁴⁶ (Ky. 1951) 245 S.W. (2d) 914.

⁴⁷ 155 N.Y.S. (2d) 544 (1956), *affd.* 3 App. Div. (2d) 914, 163 N.Y.S. (2d) 380 (1957), *affd.* 4 N.Y. (2d) 178, 173 N.Y.S. (2d) 293 (1958).

⁴⁸ (Fla. 1956) 86 S. (2d) 427.

⁴⁹ 217 Ark. 357, 239 S.W. (2d) 758 (1950).

⁵⁰ 125 N.Y.S. (2d) 459 (1953).

will would invalidate the bequest. The same result can be implied from dictum in *In re Protheroe's Estate*.⁵¹

Recent Statutes

Legislation dealing with testamentary additions to the corpus of an inter vivos trust has been enacted in ten states.⁵² The forerunner of these statutes was the Indiana act of 1953. Its influence can be seen in the form and language of the Illinois and North Carolina statutes which followed almost simultaneously in 1955, and which served as the basic prototypes for most of the subsequent legislation. The Nebraska statute, in the main, is a composite of the terms of the Illinois and North Carolina statutes; many of the provisions of the Pennsylvania statute have been taken from the North Carolina act, and the Mississippi statute to a large extent consists of provisions taken from the North Carolina and Illinois statutes. The Wyoming statute is a verbatim enactment of the Illinois statute. Wisconsin has adopted a different approach and its legislation in form is unrelated to the other statutes. The Connecticut and Oregon statutes are largely outside the main current of the liberalizing trend which runs through the legislation of the other states and in most instances will be treated separately.⁵³

These statutes will be discussed in relation to their bearing upon the problems existing at common law, their prerequisites for applicability, and the new doubts and uncertainties introduced by the statutes themselves.

A. *Scope of Applicability—Unamendable, Amendable, and Revocable Trusts.* The Connecticut, Illinois, Indiana, Mississippi, Nebraska, North Carolina, Pennsylvania, Wisconsin, and Wyoming statutes all apply to unamendable, amendable, and revocable trusts. If the statutory prerequisites for applicability are met it is possible under these statutes to make a valid bequest to an inter vivos trust, whether or not such trust is amendable or revocable,

⁵¹ (S.D. 1957) 85 N.W. (2d) 505.

⁵² Connecticut, Illinois, Indiana, Mississippi, Nebraska, North Carolina, Oregon, Pennsylvania, Wisconsin and Wyoming. The text of each of these statutes is set out in full in the Appendix, *infra*. Compare the provisions of the Illinois and North Carolina statutes with the legislation suggested by Palmer, pp. 67-68.

⁵³ The Connecticut statute, although conservative when compared to the legislation of other states, should be read in the light of the rejection by the Connecticut courts of the doctrines of independent significance and incorporation by reference. See *Hatheway v. Smith*, 79 Conn. 506, 65 A. 1058 (1907).

without repeating the trust terms in the will. The Oregon enactment provides that a "bequest shall not be invalid because the trust is amendable," but the substantive rules established by the statute probably will also be held to apply to trusts where a power of revocation is reserved, either by interpreting the statutory language to be broad enough to comprehend such a power,⁵⁴ or by analogizing with the literal statutory language on the basis of legislative policy.⁵⁵

B. *Statutory Prerequisites for Applicability.* A written trust instrument, in existence at the time the will is "executed," and identified in the will, are express prerequisites for applicability of the Illinois, Mississippi, Nebraska, and Wyoming statutes.⁵⁶ North Carolina and Oregon require an existing written instrument, but do not provide that it must be identified in the will.⁵⁷ To the extent that the application of these statutes depends upon an existing written trust instrument referred to in the will they are declaratory of the common law doctrine of incorporation by reference.⁵⁸ The Pennsylvania statute sets up alternative conditions of applicability with respect to the requirement of an existing written trust instrument. The statute provides that either a written trust instrument must be in existence when the will is executed, or that the trust instrument must be signed by the settlor if the writing is made at some future time after the execution of the will. The Connecticut statute also allows incorporation of a trust instrument into a will if in addition to the above prerequisites certain stipulated formalities are observed in the exe-

⁵⁴ An analogous construction problem is encountered where a settlor reserves a power to modify the trust and the question arises whether this power includes the power to revoke. According to Scott ". . . an unrestricted power to modify includes a power to revoke the trust." 3 SCOTT, TRUSTS, 2d ed., §331.2 (1956).

⁵⁵ Of course it is always possible to reach the opposite result by making a "statute in derogation of the common law" argument, and this argument may be especially strong here where the statute was obviously copied in part from the North Carolina act which specifically applies to revocable trusts.

⁵⁶ The term actually employed by these statutes is "made," but it presumably is synonymous with "executed." But see *Berkeley v. Berkeley*, [1946] A.C. 555 at 570-571. Although the decision dealt with construction of the term "provision" in §25 of the Finance Act of 1941, the question being whether it referred to the language of a will or the bequest itself, Lord Thankerton discussed a presumption indulged in under Scottish law that a will is "made" at the time of the testator's death.

⁵⁷ But even without an express provision to this effect the trust instrument must be sufficiently identified in the will to meet the standards of the statute of wills. See note 68 *infra*.

⁵⁸ See discussion of the requirements of the common law doctrine, Palmer, p. 39.

cution of the trust instrument.⁵⁹ In Wisconsin the statute merely requires that the trust be "created by a written instrument." No provision is made for prior existence of the trust instrument or for its identification in the will. It could be argued that the Indiana statute does not require a written trust instrument so long as the "... trust or trust fund . . . is clearly identified in [the testator's] will" and "... is in existence when [the testator's] will is executed." But the later reference in the statute to "instrument or instruments governing the trust or trust fund" will probably serve as sufficient indication that this statute also contemplates a writing.⁶⁰

The requirement that a written *trust instrument* must be in existence at the time the will is executed should be sharply distinguished from the question whether it is necessary that there be a valid and subsisting *trust* at this time. The issue is clearly presented by *Clark v. Citizens National Bank of Collingswood*⁶¹ where the trust instrument was in existence when the will was executed but the *res* of the trust was not delivered to the trustee until after the execution of the will. The Illinois, Mississippi, Nebraska, and Wyoming statutes seem to be satisfied merely by the existence of the *trust instrument* when the will is executed,⁶² while the North Carolina and Oregon statutes appear to require the existence of the *trust* as well prior to the execution of the will.⁶³ It is recognized, however, that this interpretation perhaps places too much emphasis on the use of the word "evidenced" in the Illinois, Mississippi, Nebraska, and Wyoming legislation (and the location of the modifying phrase "written instrument") as compared with "established" as used in the North Carolina and Oregon enactments.⁶⁴

⁵⁹ The trust must be acknowledged by the settlor and witnessed by at least two persons. The Connecticut statute of wills requires three attesting witnesses. 3 Conn. Gen. Stat. (1949) §6951.

⁶⁰ "Unless the will provides otherwise, the property so devised shall be subject to the terms and provisions of the *instrument or instruments* governing the trust or trust fund even though amended or modified after execution of the will." Emphasis added.

⁶¹ 38 N.J. Super. 69, 118 A. (2d) 108 (1955).

⁶² The Illinois statute provides that "... a testator may devise and bequeath real and personal estate to a trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will. . . ."

⁶³ The North Carolina statute provides that "A devise or bequest in a will . . . may be made in form or substance to the trustee of a trust established in writing prior to the execution of such will."

⁶⁴ See notes 62 and 63 *supra*. It could also be argued that the language of the Illinois, Mississippi, Nebraska, and Wyoming statutes permitting a devise to the "*trustee of a trust* which is evidenced by a written instrument in existence when the will is made . . ." (emphasis added) requires a valid and subsisting trust at this time. Even if these statutes are construed as not requiring the existence of the trust when the will is executed they

The Pennsylvania statute provides that the trust may be "established" after the execution of the will if the trust instrument is signed by the settlor, and Connecticut requires only the existence of the trust instrument prior to the execution of the will.⁶⁵ The Indiana statute stipulates that the trust itself must be in existence when the will is executed. Wisconsin has taken a different approach and has conferred upon a trust "created by a written instrument" entity status for the purposes of making it "eligible to receive property bequeathed, devised, or appointed."⁶⁶ The statute does not speak on the question whether the trust must be in existence at the time the will is executed, but it would seem that the general rules applicable to devisees and legatees would control and that, as with any other entity eligible to receive property by will, a trust need not be in existence when the will is executed in order to be capable of receiving property under the will at the testator's death.⁶⁷

The conclusions reached with respect to the provisions of these statutes concerning the requirements of a trust instrument, in existence, and identified in the will are summarized below:

(1) Each of these elements is a statutory prerequisite in Connecticut, Illinois, Mississippi, Nebraska, and Wyoming. The North Carolina and Oregon statutes require a writing in existence; although they do not expressly provide for its identification in the will, some means of identification must of course be contained in the language of the will.⁶⁸

(2) Pennsylvania requires a writing, but it need not be in existence at the time the will is executed if signed by the settlor. If it is in existence at the time the will is executed it need not be signed. No express provision is made by the Pennsylvania statute for identification of the writing in the will.

still may be construed to require its existence at the testator's death. See discussion of these statutes in text *infra* relating to revocation of the trust. The Mississippi and Nebraska statutes expressly provide that revocation prior to the testator's death revokes the bequest.

⁶⁵ The Connecticut statute provides that the "document creating . . . [the] trust" be in existence when the will is executed. Although this language is probably merely descriptive of the nature of the document, it might be argued that the statute requires the existence of the trust itself at this time.

⁶⁶ No provision is made in the Wisconsin statute for identification of the trust in the will. However, like every other devisee or legatee it must be sufficiently identifiable to meet the standards of the statute of wills. See 2 JARMAN, WILLS, 8th ed., 1233, 1234 (1951).

⁶⁷ See 1 JARMAN, WILLS, 8th ed., 108, 116 (1951); 3 *id.*, 1689-1697.

⁶⁸ See 2 *id.*, 1233-1246.

(3) In Wisconsin a writing is required. The statute makes no provision with respect to identification of the trust instrument in the will and does not require that it be in existence when the will is executed. The Indiana statute will probably also be construed to require a written trust instrument, and in this connection the requirements that the writing be in existence at the time the will is executed and that it be identified in the will may also be read into the statute.

The interpretations made of the different statutes with respect to the requirement that the trust itself be in existence when the will is executed may be summarized as follows:

(1) The Connecticut and Wisconsin statutes do not require that the trust be in existence when the will is executed. The provisions of the Illinois, Mississippi, Nebraska, and Wyoming statutes are less clear, but will probably be similarly construed.

(2) The existence of a valid trust when the will is executed is a prerequisite to the application of the Indiana, North Carolina, and Oregon statutes.

(3) Under the Pennsylvania statute the trust need not be in existence when the will is executed if the trust instrument is signed by the settlor.

If the above statutory interpretations are correct the bequest in *Clark v. Citizens National Bank of Collingswood*⁶⁹ would be upheld under the Illinois, Mississippi, Nebraska, Wisconsin, and Wyoming statutes, as the trust instrument was in existence when the will was executed. It would be invalid under the Pennsylvania statute unless the trust instrument was signed by the settlor, and invalid under the Connecticut statute because the trust instrument was not witnessed or acknowledged. The bequest would fail under the Indiana, North Carolina, and Oregon statutes because the trust was not in existence when the will was executed.

Where the bequest would be invalid under statute the further problem remains whether it could be upheld at common law. In other words, the question becomes: do the statutes displace common law rules, or do they merely constitute other means for upholding a bequest to the corpus of an inter vivos trust in addition to those existing at common law? The common law doctrine of incorporation by reference, for example, demands only the existence of the trust instrument, not the trust itself, prior to the ex-

⁶⁹ 38 N.J. Super. 69, 118 A. (2d) 108 (1955).

ecution of the will. The initial question with which a court faced with a problem of this type would be confronted is whether the statute is indicative of a legislative intent to preempt the entire field.⁷⁰ A finding that the statute abolished all the common law rules pertaining to incorporation by reference of an instrument creating an inter vivos trust is unlikely in view of the obvious purpose of the legislation to facilitate the upholding of such bequests. The next question is whether the particular common law rule under consideration has been changed by the statute. The North Carolina statute, for example, provides that "A devise or bequest in a will . . . may be made in form or substance to the trustee of a trust established in writing prior to the execution of such will." The critical language is "may be." Does this mean "may only be"? The legislative purpose to liberalize the common law rule and the fact that imperative language was not employed make probable a finding that the common law doctrine of incorporation by reference was not affected by the statute.

C. *Effect of an Amendment of the Trust Subsequent to the Execution of the Will.* Under the Connecticut statute the bequest is invalidated if the trust is amended subsequent to the execution of the will or codicil in which it is made, but it can be reinstated by republication in a later codicil to the will. The language of the Oregon statute declaring that a bequest to an inter vivos trust shall not be invalid ". . . provided that the will or the last codicil thereto was executed subsequent to the time of execution of the trust instrument and all amendments thereto" seems to imply that the bequest is void where the trust is amended after execution of the will or last codicil.⁷¹ Under this construction the net effect of these two statutes is merely to allow a testator to make a bequest to the corpus of an amendable inter vivos trust without repeating the terms of the trust in the will. Any modification of the trust provisions must be carried out in conjunction with a re-execution of the will or execution of codicil thereto or else the bequest is to

⁷⁰ This, of course, must assume that the jurisdiction in question has accepted the common law doctrine of incorporation by reference.

⁷¹ In support of a more liberal construction of the Oregon statute it could be argued that all that is affirmatively required is that a bequest to an inter vivos trust shall not be held invalid if the will was executed following all trust amendments, that it does not establish any rule of law with respect to trusts which have been amended after execution of the will, and that the courts are left free to establish their own rules for such cases. If this was really the legislative intent, however, the statute is poorly drafted.

be void.⁷² Both statutes require that the bequest be held invalid if the will is not re-executed after amendment of the trust even though the trust amendment was minor with respect to the overall dispositive scheme. Further, although it should be possible to avoid this construction, strict adherence to the statutory language would require invalidity of the bequest if the will is not republished after trust amendments even where the testator has expressly disclaimed in his will an intent to include later amendments to the trust.⁷³ However, where the settlor of the trust is someone other than the testator or where a power of amendment is vested in some other person, there is little doubt that the courts will depart from the literal meaning of these statutes rather than read them as requiring that the bequest be held invalid if the trust is amended after the death of the testator.⁷⁴

If an amendment is made in writing after the execution of the will and before the death of the testator, the willed property passes

⁷² The Connecticut statute does allow "addition to or withdrawal of any or all assets from said trust or a change of the trustee or trustees of such trust . . ." without requiring re-execution of the will. Compare the provisions of this statute with the decision in *In re Ivie's Will*, note 47 *supra*, where the court recognized that amendments to the trust made after the execution of the will but which concerned only the administration of the trust did not invalidate the bequest.

⁷³ The Connecticut statute stipulates that "if such trust by its terms may be . . . amended, such devise or bequest shall be deemed invalid, if, subsequent to the execution of such will or codicil, the trust is . . . amended . . .," and the Oregon statute that "Such devise or bequest shall not be invalid because the trust is amendable by the settlor or any other person or persons, provided that the will or the last codicil thereto was executed subsequent to the time of execution of the trust instrument and all amendments thereto." It seems doubtful that these statutes were meant to apply to situations where the testator did not intend amendments to the trust made after his will was executed to affect the dispositive provisions of his will. The legislative purpose was to liberalize the common law rules in order to facilitate the upholding of bequests made to the corpus of an inter vivos trust, not to add new barriers to those already existing. In most common law jurisdictions a bequest of this type would be upheld.

⁷⁴ See the language of the statutes in note 73 *supra*. It is doubtful that the courts will construe them as requiring invalidity of the bequest where amendments to the trust are made after the testator's death even though neither statute expressly provides a cut-off time for the operation of the provisions invalidating the bequest because of amendments made after the execution of the will. See in this respect the terms of the Illinois, Mississippi, Nebraska, North Carolina, and Wyoming statutes establishing the death of the testator as the last point of time at which trust amendments are to have any effect upon the testator's will. An analogous principle that the validity of the bequest is to be tested as of the time of the death of the testator will probably be read into the Connecticut and Oregon statutes as it is unlikely that either legislature was concerned with the effect of trust amendments made after the testator's death. The limitations imposed upon the amount of discretion which the trustee or some other person may exercise in relation to the trust after the death of the testator is more properly a matter for the law of trusts rather than the law of wills. See 1 JARMAN, WILLS, 8th ed., 496-497 (1951).

in accordance with the terms of the amended trust under the Illinois, Mississippi, Nebraska, North Carolina, and Wyoming statutes unless the will provides otherwise. By implication it is possible to argue that amendments to the trust made after the death of the testator are not effective with respect to the willed property.⁷⁵

The Indiana and Pennsylvania statutes require that unless it is otherwise provided in the will the property disposed of under the will shall pass in accordance with the terms of the trust as amended. Where a power to amend is vested in some person other than the testator these statutes are broad enough to allow amendments to the trust relating to the willed property and made after the death of the testator to be given effect.⁷⁶

The Wisconsin statute provides that an amendment of the trust made after the execution of the will is effective to change the dispositive provisions of the will with respect to property passing to the trust at the testator's death, and like the Indiana and Pennsylvania legislation it is broad enough to comprehend amendments made by some person other than the testator after his death.⁷⁷

The problem deserving special consideration is raised by the

⁷⁵ The wording of the North Carolina statute, "Unless the will provides otherwise, such devise or bequest shall operate to dispose of property under the terms of the trust as they appear in writing at the testator's death . . .," however, makes this construction unlikely, as it is possible to contend with some force that the legislature was concerned only with the effect of a bequest up to the time of the testator's death and that there was no intent to legislate with respect to trust amendments made after the testator's death. And even if the statute does apply to amendments made after the testator's death a power to amend the trust held by some person other than the testator should be exercisable with respect to the willed property if such power was reserved "under the terms of the trust as they appear in writing at the testator's death." These same arguments are more difficult to make under the provisions of the Illinois, Mississippi, Nebraska, and Wyoming statutes which read: "Unless the will provides otherwise the *estate* so devised and bequeathed *shall be governed* by the terms and provisions of the instrument creating the trust including any amendments or modifications in writing made at any time before or after the making of the will and *before the death of the testator*." (Emphasis added.) It might also be argued that these statutes allow the testator to stipulate in his will that trust amendments made after his death are to be given effect.

⁷⁶ The operative provisions of both these statutes allow later amendments to be given effect and no cut-off time is established by the statutes limiting the application of these provisions. Compare note 75 *supra*. Under the Pennsylvania statute an amendment to a trust established after the execution of the testator's will must be signed by the settlor. However, the settlor may be some person other than the testator.

⁷⁷ See note 76 *supra*. It could be argued, however, that the provisions of the Wisconsin statute sub. (6) stipulating that amendments of the trust made after the execution of the will are effective to change the disposition of the willed property "even though the will is not re-executed or republished" contemplates the continued existence of the testator and therefore applies only to amendments made during his lifetime.

terms of the will in *In re Snyder's Will*⁷⁸ which provided ". . . I do not intend to incorporate in this my Last Will and Testament any future amendments which I may make to said Agreement [the inter vivos trust]." Suppose that after such a will is executed amendments are made to the trust. As observed above, unless the will is re-executed the bequest could be held invalid under the Connecticut and Oregon statutes. But if the will is republished or if these statutes are held not to apply to trusts where the later amendments subsequent to the trust amendments are not intended to affect the will, the testator's intent that his will should exclude the later trust amendments will be carried out.⁷⁹ Similarly the later amendments will be excluded under the Illinois, Indiana, Mississippi, Nebraska, North Carolina, Pennsylvania, and Wyoming statutes.⁸⁰ The Wisconsin statute, however, contains the affirmative stipulation that a trust amendment "shall be effective" to alter the provisions of the will, which would seem to require that the terms of the trust are to control in every case.⁸¹ Where the testator indicates at the time he amends the trust that he has changed his mind and now intends the willed property to pass in accordance with the terms of the amended trust this legislation perhaps serves the useful purpose of giving effect to the most recent expression of the testator's intent, but it is difficult to see any justification for requiring the terms of the trust as amended to control when this would be contrary to the testator's intention. This provision of the Wisconsin statute will undoubtedly serve as another pitfall for the unwary in this area.

D. Effect of a Revocation of the Trust Subsequent to the Execution of the Will. The discussion of these statutes relating to the effect of revocation of the inter vivos trust could be in part re-

⁷⁸ 125 N.Y.S. (2d) 459 at 460 (1953).

⁷⁹ Both statutes are phrased in negative terms, i.e., in Connecticut "No devise or bequest given in any will or codicil or republication thereof in any codicil shall be deemed invalid by reason of any reference therein to any document creating a trust . . ." and in Oregon "Such devise or bequest shall not be invalid because the trust is amendable by the settlor or any other person or persons . . ." leaving the courts free to carry out the testator's intent to exclude later amendments. Compare discussion of the Wisconsin statute in the text *infra*.

⁸⁰ All these statutes make express provision for the situation where the testator intends to exclude later amendments to the trust by stipulating that amendments made after the will may be given effect "unless the will provides otherwise."

⁸¹ It should be noted that an ambiguity exists in the Wisconsin statute because of the provision in sub. (2) that a trust shall be eligible to receive property bequeathed or devised by the "settlor and others" and the use of the term "settlor's" will in sub. (3). "Settlor's" in sub. (3) will probably be read as "testator's."

phrased in terms of the question whether there need be a valid trust in existence at the death of the testator. In this latter form it is clear that this question must be related to the question treated above regarding whether there need be a valid trust in existence when the will is executed.

The Mississippi, Nebraska, and North Carolina statutes provide that a revocation of the trust prior to the testator's death invalidates the bequest.⁸² The same result is required by the Pennsylvania statute "unless the will directs otherwise."⁸³ The Connecticut act does not differentiate between revocations prior or subsequent to the testator's death; and, although it probably will not be so construed with respect to the latter, a literal reading of the statutory language would demand invalidation of a bequest to any trust which had been revoked after execution of the will.⁸⁴

The Illinois, Indiana, and Wyoming statutes do not expressly spell out what effect a later revocation of the trust is to have on the will. The first sentence of the Illinois and Wyoming statutes allows a bequest to be made to the trustee of a trust "even though the trust is subject to amendment, modification, revocation or termination." The second sentence of these statutes states: "Unless the will provides otherwise the estate so devised and bequeathed shall be governed by the terms and provisions of the instrument creating the trust including any amendments or modifications . . . made . . . before the death of the testator." The most probable inference

⁸² "An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest." Under the terms of these statutes the bequest fails upon revocation of the trust even though the testator stipulates in his will that such revocation is to have no effect upon the property passing at death. See discussion in text *supra* on the effect of an amendment to the trust where the testator does not intend it to affect the terms of his will, and see *In re Snyder's Will*, 125 N.Y.S. (2d) 459 (1953).

⁸³ In declaring that a revocation of the trust "shall invalidate the devise or bequest" the Mississippi, Nebraska, North Carolina, and Pennsylvania statutes all include the modifying phrase "prior to the testator's death." One inference which might be drawn from the use of the imperative "shall" is that the validity of the bequest shall not be affected by a revocation made after the testator's death, but a more probable construction of the statutes is that they leave untouched the common law rules relating to such revocations. See discussion in text *supra* with respect to these statutes regarding amendments to the trust made after the death of the testator.

⁸⁴ "No devise or bequest given in any will or codicil or republication thereof in any codicil shall be deemed invalid by reason of any reference therein to any document creating a trust . . . provided, if such trust by its terms may be revoked . . . such devise or bequest shall be deemed invalid, if, subsequent to the execution of such will or codicil, the trust is revoked. . . ." See discussion in text *supra* with respect to the Connecticut statute regarding amendments to the trust made after the death of the testator, and see note 74 *supra*.

from the legislatures' use of the term "revocation" in the first sentence and its omission from the second sentence is that they did not intend to change the common law rule governing the effect of a revocation of the trust prior to the testator's death.⁸⁵ At common law a revocation of the entire trust prior to the death of the testator would probably cause the bequest to fail.⁸⁶ Revocation of the trust after the testator's death is a matter dealt with by the law of trusts, not the law of wills.⁸⁷ If the term "modified" in the Indiana statute is construed to include trusts which are "revoked" after the will is executed, the language providing that the property devised "shall be subject to the terms . . . of the . . . instruments governing the trust" requires that a revocation prior to the testator's death cause invalidity of the bequest.⁸⁸ The operation of the Indiana statute under this construction with respect to a revocation occurring after the testator's death is not clear. If a bequest to a revocable trust is upheld at common law it would seem that upon the death of the testator the property added to the trust should be treated in the same manner as the rest of the trust corpus. There is no special virtue to a testamentary addition to a trust corpus as compared with property placed in the trust during the lifetime of the testator. A later revocation of the trust has no relation whatsoever to the validity of the bequest, and the disposition of the trust corpus after revocation depends upon the law of trusts, not the law of wills.⁸⁹ It is unlikely that the legislature intended to change the

⁸⁵ It might also be argued, however, that the omission of "revocation" from the second sentence of these statutes is indicative of an affirmative legislative intent that the estate bequeathed *shall not* be governed by revocations before the death of the testator. Compare note 75 *supra*. It is even less likely that the legislature intended to deal with the effect of a revocation of the trust after the testator's death. Compare note 74 *supra*, but see discussion in the text *supra* concerning the statutory prerequisites for applicability where the possibility of legislative preemption is considered.

⁸⁶ Palmer concludes that the common law effect of the revocation of an inter vivos trust prior to the death of the testator should depend upon the testator's intent when he executes his will, and cites *Fifth Third Union Trust Co. v. Wilensky*, 79 Ohio App. 73, 70 N.E. (2d) 920 (1946), in support of this proposition. Palmer, p. 65. It would seem, however, that those courts which hold that amendments to the trust after the will is executed cause the bequest to fail will treat revocations similarly. See notes 44 and 45 *supra*. There is almost no authority directly on point.

⁸⁷ See note 85 *supra* and see discussion in the text *infra* on the common law effect of a revocation of the trust after the testator's death.

⁸⁸ "Unless the will provides otherwise, the property so devised shall be subject to the terms and provisions of the . . . instruments governing the trust . . . even though . . . modified after execution of the will."

⁸⁹ The testator may, of course, make provision in his will for the disposition of the property bequeathed to the trust in the event of its revocation after his death, or such provision may be made in the trust itself. In the absence of stipulations to the contrary,

common law rules governing revocation, after the death of the testator, of trusts to which bequests have been made,⁹⁰ but on the postulated construction that the statute does not differentiate between revocations prior to and after the testator's death, and if those prior to his death cause invalidity it could be argued that those subsequent to it should have the same effect. If the above construction of the term "modified" in the Indiana statute is rejected the common law rule still prevails both as to revocations of the trust prior to and after the testator's death.⁹¹

As pointed out above there is some doubt whether the Oregon statute even applies to trusts where a power of revocation is reserved.⁹² If the term "amendment" in the Oregon statute is construed to include "revocation" then revocation of the trust would cause invalidity of the bequest whether or not the "will or last codicil thereto" was executed subsequent to such revocation.⁹³ If the statutory rule does not apply either by construction or analogy to situations involving revocation of the trust then the common law rule is still in force and revocation prior to the testator's death probably will cause the bequest to fail.⁹⁴

The Wisconsin statute, subsection (3), provides that "any or all of the powers listed in subsection (1) may be exercised without affecting the validity of the trust, . . . and its independent existence and eligibility for the receipt of property . . ." by will. Among the

a revocation of the trust after the testator's death would give rise to a resulting trust in favor of the settlor or his heirs and this resulting trust would embrace both the property originally placed in the trust fund and the property which passed to it at the testator's death. In some jurisdictions the property passing to the trust by will would be administered as a separate testamentary trust. See note 101 *infra*.

⁹⁰ Compare notes 74 and 75 *supra*, and see discussion in the text *supra* dealing with the statutory prerequisites for applicability regarding the purpose for which these statutes were enacted and their possible effect upon the existing common law rules.

⁹¹ See note 86 *supra* regarding the common law effect of revocations prior to the testator's death. It should be pointed out, however, that the Indiana statute is couched in affirmative language, i.e., "such devise shall be valid and effective." If the term "modified" in the second sentence does not apply to revocations it could be argued that a revocation of the trust after execution of the will does not affect the bequest.

⁹² Notes 54 and 55 *supra*.

⁹³ "Such devise or bequest shall not be invalid . . . provided that the will or last codicil thereto was executed subsequent to the time of execution of the trust instrument and all amendments thereto." If the will or last codicil was executed after the revocation of the trust the revocation would be given effect and the bequest would fail; if not executed subsequent to the revocation of the trust the bequest would be invalid under the provisions of the statute.

⁹⁴ See note 86 *supra*. As to the common law rule governing the effect of revocations of the trust after the death of the testator, see notes 87 and 89 *supra*.

powers listed in subsection (1) is the power to revoke. This portion of the statute therefore seems to indicate that the trust may be revoked and still be eligible to receive the bequest. Subsection (3) further provides that “. . . the exercise of a power under subsection (1)(a) to amend, alter or modify the provisions of the [trust] instrument shall be effective to change such provisions as to the property devised, bequeathed or appointed by will . . .,” the implication being that the exercise of the power to revoke, also listed in subsection (1)(a) need not be given this effect. (It should be observed that this latter provision is phrased in the imperative, not the permissive form.) The import of these two provisions taken together seems to be that the effect of a revocation of the trust on the validity of the bequest depends upon the intent of the testator.⁹⁵ If he intends the revocation to cause the bequest to fail, this intent will be carried out; if he intends the revocation to have no effect on the bequest, the bequest will be upheld. It is recognized, however, that this construction is inconsistent with the general overall approach of the Wisconsin statute in treating the trust as an entity.⁹⁶

Only the Pennsylvania statute expressly makes provision for the situation where the testator intends the property owned at death to pass under the terms of the trust even though it is subsequently revoked.⁹⁷ The Wisconsin statute will probably be interpreted to reach the same result, and the Indiana statute can be construed in a similar fashion by reading the language referring to trusts which have been “modified” after execution of the will as applicable to revocations or, along with the Illinois and Wyoming statutes, by a finding that the common law rules dealing with the effect of a revocation of the trust are still in force.

E. Statutory Provisions Relating to the Trust. (1) Established by the testator v. established by persons other than the testator. In considering the applicability of the statutes to bequests to trusts generally it has been tacitly assumed up to now that a bequest

⁹⁵ It might also be argued that the failure to include the power to revoke among the powers listed in the latter clause of sub. (3) implies that the exercise of the power to revoke shall not “be effective to change such provisions as to property devised, bequeathed or appointed by will,” or in other words that a bequest cannot be revoked by revocation of the trust. Compare notes 83 and 85 *supra*.

⁹⁶ Without stipulations to the contrary in the will a bequest to an entity not in existence at the death of the testator will lapse. See 1 JARMAN, WILLS, 8th ed., 438 (1951).

⁹⁷ “An entire revocation of the trust prior to the testator’s death shall invalidate the devise or bequest *unless the will directs otherwise*.” Emphasis added.

could be made by the testator either to a trust established by himself or by some other person. Such an assumption is warranted by the express provisions of the Pennsylvania and Wisconsin statutes.⁹⁸ The Connecticut statute applies only to bequests to inter vivos trusts established by the testator, his or her spouse, or a parent or child of the testator.⁹⁹

The statutes of Illinois, Indiana, Mississippi, Nebraska, North Carolina, Oregon, and Wyoming are all broad enough to read upon trusts established by persons other than the testator, and doubtless will be so construed by the courts.¹⁰⁰

(2) *Testamentary trust v. inter vivos trust.* Some courts have indicated that the common law doctrine of incorporation by reference requires that the property passing by will to the trustee of an inter vivos trust be placed in a separate testamentary trust rather than added to the corpus of the inter vivos trust.¹⁰¹ The Mississippi, Nebraska, North Carolina, and Pennsylvania statutes stipulate that unless the will provides otherwise the property "shall not be deemed held under a testamentary trust."¹⁰² The Wisconsin and Connecticut statutes contain language of similar import,¹⁰³ but in the latter state the property passing by will "shall be administered as a testamentary trust" if any trustee resides or has its principal place of business outside of Connecticut.

The statutes of Illinois, Indiana, Oregon, and Wyoming make no provision with respect to this problem.

(3) *Existence of the trust at the testator's death.* The question whether the trust need be in existence at the death of the testator,

⁹⁸ The Pennsylvania statute provides that the trust may be established "... by the testator or any other person ..." and the Wisconsin statute declares that the trust shall be eligible to receive property from "... the settlor and others. ..."

⁹⁹ The Connecticut statute provides that the document creating the trust must be executed by "... the testator, his or her spouse, or a parent or child of such testator as settlor of such trust. ..."

¹⁰⁰ But see Commissioner's comment on the Indiana statute to the effect that it is limited to public charitable trusts. Ind. Stat. Ann. (Burns, 1953) §6.601(j).

¹⁰¹ See *Montgomery v. Blankenship*, 217 Ark. 357, 239 S.W. (2d) 758 (1950), and dictum in *In re York's Estate*, 95 N.H. 435 at 436, 65 A. (2d) 282 (1949). But see 1 SCOTT, TRUSTS, 2d ed., §54.3, p. 382 (1956).

¹⁰² The Nebraska statute provides that the trust will be deemed nontestamentary only if "... the designated trustee is a corporate trustee authorized by law to act as an executor or administrator."

¹⁰³ The Wisconsin statute provides in sub. (2) that "No reference to any such trust in any will shall cause the trust assets to be included in the property administered as part of the testator's estate" and in sub. (3) that "Any or all of the powers listed in sub. (1) may be exercised without affecting the validity of the trust, its non-testamentary character. ..."

i.e., whether the validity of the bequest is dependent upon the existence of at least a nominal trust corpus at his death, might well have been taken up in conjunction with the prerequisites for applicability of the statutes.¹⁰⁴ It obviously must also be correlated with the problems associated with revocation of the trust prior to the testator's death. The Wisconsin statute provides that a trust shall be eligible to receive property by will ". . . whatever the size or character of its corpus. . . ." Although this language arguably contemplates the existence of some corpus, nominal or otherwise, at the testator's death, it probably will be construed to require no corpus at all. The operation of the Connecticut statute which stipulates that ". . . mere addition to or withdrawal of any or all assets from said trust . . ." will not cause invalidity of the bequest is also independent of the size of the trust corpus at the testator's death, although it may be contended that a nominal corpus is required at the time the will is executed.¹⁰⁵ No reference is made to the size of the trust corpus in any of the other statutes, and thus the existence of a nominal corpus at the testator's death, though perhaps not required by all, will suffice to satisfy the provisions of any of them.¹⁰⁶

As pointed out above, the Mississippi, Nebraska, North Carolina, and Pennsylvania statutes expressly provide that a revocation of the trust prior to the testator's death invalidates the bequest.¹⁰⁷ Therefore, insofar as a withdrawal of the entire corpus of the trust may be held to constitute a revocation, these statutes require the existence of at least a nominal corpus at the death of the testator.¹⁰⁸ Similarly with respect to the Indiana, Illinois, and Wyoming statutes, under which it was concluded that the common

¹⁰⁴ See discussion in text *supra* concerning the requirement that the trust be in existence when the will is executed.

¹⁰⁵ See note 65 *supra*.

¹⁰⁶ Some writers are of the opinion that a nominal corpus will not suffice to sustain a bequest to an *inter vivos* trust under the common law doctrine of independent significance. See 1 SCOTT, TRUSTS, 2d ed., §54.3, p. 382 (1956). It has been suggested that some of these statutes may be considered by the courts to be enactments of the independent significance doctrine. See 69 HARV. L. REV. 1147 (1956). See also Palmer, p. 69 criticizing the requirement of a specific minimum trust corpus.

¹⁰⁷ Note 82 *supra*. The Pennsylvania statute allows the testator to avoid this result by providing otherwise in his will.

¹⁰⁸ No doubt a withdrawal of the entire trust corpus terminates the trust, but Professor Scott is of the opinion that such a withdrawal does not necessarily bring to an end fiduciary relationships which existed by virtue of the trust. See 1 SCOTT, TRUSTS, 2d ed., §74.2 (1956). In other words, termination by withdrawal may not be the equivalent of termination by revocation, and the statutes make specific reference only to the latter.

law rules relating to revocation of the trust prior to the testator's death may still be in force, if a withdrawal of all the trust assets constitutes a revocation then a nominal corpus may be required.¹⁰⁹

Conclusions

Although there are significant differences in both statute and case law in the various jurisdictions, a few generalizations with respect to the overall status of the problems relating to testamentary additions to the corpus of an inter vivos trust are possible:

(1) The current trend of both judicial and legislative developments is toward a more liberal attitude in upholding such transactions.

(2) There have apparently been no decisions handed down since 1951 in which the court has struck down a bequest because it was made to an amendable or revocable trust; and the existing statutes all provide that a bequest shall not be invalid because of the mere reservation of a power to alter the trust terms.

(3) Where the trust has been modified after the execution of the will no court without the aid of statute has expressed a willingness to give effect to the bequest in the amended form. From the dicta in the cases, opinion appears to be split on the question whether such a bequest should be declared totally invalid or should be upheld in accordance with the terms of the trust when the will was executed. In general the statutes have adopted a more liberal approach, and the majority of them allow the willed property to pass by the terms of the amended trust, even where the amendment has no independent significance and relates only to the estate owned at death.

(4) The provisions of a number of the statutes are apparently satisfied by the existence of the trust instrument prior to the execution of the will and do not require that the trust itself be in existence at this time, although several of the statutes are unclear on this point. No statute imposes a minimum on the amount of property which must be placed in the corpus of the inter vivos trust during the life of the testator except as they may be read to require the existence of the trust itself when the will is executed, though some of them may be construed to require at least a nominal trust corpus at his death.

¹⁰⁹ Revocation at common law may not cause invalidity of the entire bequest. See note 86 *supra*.

(5) Some of the shortcomings of the existing statutes in this area would include a failure expressly to distinguish between amendments and revocations prior to and after the testator's death, a lack of clarity with respect to the question whether the trust itself must be in existence when the will is executed or at the testator's death, and the fact that no stipulation is made of their intended effect on the pre-existing common law rules dealing with the doctrines of independent significance and incorporation by reference.

Richard I. Singer, S.Ed.

APPENDIX

CONNECTICUT

[Conn. Pub. Acts, Jan. Sess. 1957, P.A. No. 575]

Section 2929d of the 1955 supplement to the general statutes is repealed and the following is substituted in lieu thereof: No devise or bequest given in any will or codicil or republication thereof in any codicil shall be deemed invalid by reason of any reference therein to any document creating a trust, which document was executed and acknowledged by the testator, his or her spouse, or a parent or child of such testator as settlor of such trust and witnessed by at least two persons and was in existence at the time of the execution of such will or codicil and is identified in such will or codicil by reference to the names of the parties who executed such document and the date of such execution, and such a devise or bequest may be made to the trustee or trustees of such trust; provided, if such trust by its terms may be revoked or amended, such devise or bequest shall be deemed invalid, if, subsequent to the execution of such will or codicil, the trust is revoked or amended, provided mere addition to or withdrawal of any or all assets from said trust or a change of the trustee or trustees of such trust, if such substitute trustee or trustees be a corporate trustee authorized to act as such within this state and such amendment is in accordance with the terms thereof, shall not be deemed a revocation or amendment within the meaning of the provisions hereof. Such reference in a will or codicil to such trust document by which a devise or bequest is made to such trust shall not thereby cause such trust or such part of the assets thereof distributed to it by such devise or bequest to be subject to the jurisdiction of the probate court in which such will or codicil is admitted to probate unless any trustee thereof resides or has its principal place of business outside of the state, in which event the provisions of such document of trust, if all other provisions of this section have been complied with, shall be deemed incorporated in such will or codicil, and such bequest or devise shall be administered as a testamentary trust under the continuing jurisdiction of the probate court in which such will or codicil is admitted to probate.

ILLINOIS

[Ill. Rev. Stat. (1957) c. 3, §194a]

By a will signed and attested as provided in this Act a testator may devise and bequeath real and personal estate to a trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will, even though the trust is subject to amendment, modification, revocation or termination. Unless the will provides otherwise the estate so devised and bequeathed shall be governed by the terms and provisions of the instrument creating the trust including any amendments or modifications in writing made at any time before or after the making of the will and before the death of the testator.

INDIANA

[Ind. Stat. Ann. (Burns, 1953 repl.) §6-601(j)]

If a testator devises real or personal property to be added to a trust or trust fund which is clearly identified in his will and which is in existence when his will is executed, such devise shall be valid and effective. Unless the will provides otherwise, the property so devised shall be subject to the terms and provisions of the instrument or instruments governing the trust or trust fund even though amended or modified after execution of the will.

MISSISSIPPI

[Senate Bill No. 1928, approved, May 6, 1958]

Be it enacted by the Legislature of the State of Mississippi;

Section 1. That a devise or bequest in a will duly executed pursuant to the provisions of Section 657 of Mississippi Code of 1942 may be made to the trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will. Such devise or bequest shall not be invalid because the trust is amendable or revocable or both by the settlor or any other person or persons; nor because the trust instrument or any amendment thereto was not executed in the manner required for wills; nor because the trust was amended after execution of the will. Unless the will provides otherwise, such devise or bequest shall operate to dispose of the property under the terms and provisions of the instrument creating the trust including any amendments or modifications in writing made at any time before or after the making of the will and before the death of the testator, and the property shall not be deemed held under a testamentary trust. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest.

Section 2. That the provisions of this Act shall apply to all devises or bequests made in any will duly executed according to Section 657 of the Mississippi Code of 1942, of any testator dying after the effective date of this Act, whether the will is executed before or after the effective date of this Act.

Section 3. That the term "will" in this Act shall include and refer to the term "codicil."

Section 4. That this Act shall be in force and effect from and after its passage.

NEBRASKA

[Neb. Rev. Stat. (1943; Cum. Supp. 1957) §30-1806]

A testator may by will, devise and bequeath real and personal property to a trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will, even though the trust is subject to amendment, modification, revocation, or termination. Unless the will provides otherwise, the estate so devised and bequeathed shall be governed by the terms and provisions of the instrument creating the trust, including any amendments or modifications in writing made at any time before or after the making of the will and before the death of the testator. Unless the will provides otherwise, the property so devised and bequeathed shall not be deemed held under a testamentary trust if the designated trustee is a corporate trustee authorized by law to act as an executor or administrator. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest.

NORTH CAROLINA

[N.C. Gen. Stat. (Supp. 1957) §31-47]

A devise or bequest in a will duly executed pursuant to the provisions of this chapter may be made in form or substance to the trustee of a trust established in writing prior to the execution of such will. Such devise or bequest shall not be invalid because the trust is amendable or revocable or both by the settlor or any other person or persons; nor because the trust instrument or any amendment thereto was not executed in the manner required for wills; nor because the trust was amended after execution of the will. Unless the will provides otherwise, such devise or bequest shall operate to dispose of property under the terms of the trust as they appear in writing at the testator's death and the property shall not be deemed held under a testamentary trust. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest.

OREGON

[Ore. Rev. Stat. (1957) §114.070]

Section 1. A devise or bequest in a will duly executed pursuant to the provisions of this chapter may be made in form or substance to the trustee of a trust in existence at the date of the testator's death and established by written instrument executed prior to the execution of such will. Such devise or bequest shall not be invalid because the trust is amendable by the settlor or any other person or persons, provided that the will or the last codicil thereto was executed subsequent to the time of execution of the trust instrument and all amendments thereto.

PENNSYLVANIA

[Pa. Stat. Ann. (Purdon, Supp. 1957) tit. 20, §180.141]

A devise or bequest in a will may be made to the trustee of a trust (including an unfunded life insurance trust, although the settlor has reserved any or all rights of ownership in the insurance contracts) established, in writing, by the testator or any other person before or concurrently with the execution of such will or to such a trust to be established, in writing, at a future date: Provided, That any such future trust instrument or amendment thereto shall be signed by the settlor. Such devise or bequest shall not be invalid because the trust was amended after execution of the will. Unless the will provides otherwise, the property so devised or bequeathed shall not be deemed held under a testamentary trust of the testator but shall become and be a part of the principal of the trust to which it is given to be administered and disposed of in accordance with the provisions of the instrument establishing such trust and any amendment thereof. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest unless the will directs otherwise.

WISCONSIN

[Wis. Stat. (1957) §231.205]

(1) Any instrument declaring or creating a trust, when otherwise valid, shall not be held an invalid trust, or an attempted testamentary disposition, because it contains any of the following powers, whether exercisable by the settlor or another or both:

- (a) To revoke, alter, amend or modify any or all provisions of the trust.
- (b) To exercise any power or option over any property transferred to or held in the trust.
- (c) To add to or withdraw from the trust all or any part thereof at one time or at different times.

(d) To direct during the lifetime of the settlor or another, the persons and organizations to whom or on behalf of whom the income shall be paid or principal distributed.

(2) A trust otherwise valid, created by a written instrument, whether or not it contains any or all of the powers specified in sub. (1), shall have existence independent of any will and be eligible to receive property bequeathed, devised or appointed by the settlor and others, whatever the size or character of its corpus or the terms of the instrument, unless the instrument specifically states otherwise. No reference to any such trust in any will shall cause the trust assets to be included in the property administered as part of the testator's estate.

(3) Any or all of the powers listed in sub. (1) may be exercised without affecting the validity of the trust, its nontestamentary character and its independent existence and eligibility for the receipt of property bequeathed, devised and appointed to it, and the exercise of a power, under sub. (1)(a) to amend, alter or modify the provisions of the instrument shall be effective to change such provisions as to property devised, bequeathed or appointed by will to the trust even though the settlor's will is not re-executed or republished after the exercise of such power.

* * * * *

(6) Any amendment, alteration or modification of a trust subject to this section shall be effective to change the provisions thereof as to property devised, bequeathed or appointed by will to the trust even though the will is not re-executed or republished after the effective date of the amendment, alteration or modification, if the settlor or testator is alive on or after July 26, 1957.

WYOMING

[Wyo. Comp. Stat. (Supp. 1957) §6-310]

1. By a will signed and attested as provided in this Act a testator may devise and bequeath real and personal estate to a trustee of a trust which is evidenced by a written instrument in existence when the will is made and which is identified in the will, even though the trust is subject to amendment, modification, revocation or termination. Unless the will provides otherwise the estate so devised and bequeathed shall be governed by the terms and provisions of the instrument creating the trust including any amendments or modifications in writing made at any time before or after the making of the will and before the death of the testator.