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Wills: Incorporation by Reference of an Amendable Trust

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sued" provision of the Florida Married Woman's Emancipation Act[23] does not authorize a married woman to sue her husband for a tort committed during the marriage. An earlier case, decided prior to enactment of the present statute, supported the common law rule that prenuptial torts abate upon the marriage of the parties.[24] Since the enactment of the present statute no prenuptial tort cases have come before the Court, but a dictum in the *Corren* case[25] clearly indicates that if the interspousal disability to sue is to be abrogated the change must be made by legislation. Since the policy arguments advanced by the adherents of the rule have little basis in fact, legislative re-examination of the rule is warranted.

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WILLS: INCORPORATION BY REFERENCE OF AN AMENDABLE TRUST

Forsythe v. Speilberger, 86 So.2d 427 (Fla. 1956)

On the day the decedent executed an amendment to change the beneficiaries of his amendable inter vivos trust he also executed a will, in which he identified the trust and the amendment and bequeathed his entire estate to the trustees. The beneficiaries named in the original trust instrument sought a declaratory decree to the effect that, *inter alia,* the incorporation of the amendment by reference was invalid. The trial court granted the trustee's motion to strike the relevant paragraph of the complaint on the ground that it did not allege sufficient facts to attack the incorporation by reference. On plaintiff's petition for certiorari, HELD, incorporation of an amended trust by reference can not be validly attacked unless it is shown that the amendment was made subsequent to the execution of the will and that the amendment was not executed in accordance with the Statute of Wills. Certiorari denied.

The doctrine of incorporation by reference is well recognized in

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[23]FLA. STAT. §708.08 (1955).
[24]See Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932).
[25]47 So.2d 774, 776 (Fla. 1950).

most states[1] and in England.[2] The courts employ this doctrine in order to effectuate the intent of a testator and thus to endow a nontestamentary instrument with testamentary probity. To be incorporated, an instrument must be in existence at the time the will is executed[3] and must be referred to and clearly identified by the will.[4]

At least one state[5] has held that no trust executed without the formality required of wills may be incorporated by reference into a will, since the Statute of Wills provides the only method of devising property at death and any testamentary instrument passing property must conform to this statute to be valid. Generally, however, when an irrevocable inter vivos trust is sought to be incorporated into a will little difficulty is encountered, assuming clear identification, since the requirement of prior existence is met.[6] If an amendable trust is the subject of the incorporation the possibility of later amendments, which would have neither prior existence nor clear identification in the will, raises more troublesome questions.[7] Most courts have allowed the incorporation of an amendable trust if it was never in fact amended,[8] or

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[1]*E.g.*, Simon v. Grayson, 15 Cal.2d 531, 102 P.2d 1081 (1940); Continental Ill. Nat'l Bank & Trust Co. v. Art Institute, 341 Ill. App. 624, 94 N.E.2d 602 (1950); Newton v. Seaman's Friend Soc'y, 130 Mass. 91, 39 Am. Rep. 433 (1881); Sciutti's Estate, 371 Pa. 536, 92 A.2d 188 (1952); 1 PAGE, WILLS §249 (3d ed. 1941). *Contra*, Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907); Murray v. Lewis, 94 N.J. Eq. 681, 121 Atl. 525 (Ch. 1923); *see* First-Mechanics Nat'l Bank v. Norris, 134 N.J. Eq. 229, 34 A.2d 746 (Ch. 1943).

[2]*E.g.*, Molineux v. Molineux, 4 Cro. Jac. 144, 79 Eng. Rep. 126 (1605); Allen v. Maddock, 11 Moore, P.C. 427, 14 Eng. Rep. 757 (1858); *Re* Edward's Will Trusts [1947] 2 All E.R. 521 (Ch.).

[3]Newton v. Seaman's Friend Soc'y, *supra* note 1; First-Mechanics Nat'l Bank v. Norris, *supra* note 1; Lawless v. Lawless, 187 Va. 511, 47 S.E.2d 431 (1948); Daniel v. Tyler's Ex'r, 296 Ky. 808, 814, 178 S.W.2d 411, 414 (1944) (dictum); 1 PAGE, WILLS §257 (3d ed. 1941).

[4]Simon v. Grayson, 15 Cal.2d 531, 102 P.2d 1081 (1940); Newton v. Seaman's Friend Soc'y, *supra* note 1; Lawless v. Lawless, *supra* note 3; Estate of Bauer, 51 Cal. App.2d 636, 637, 124 P.2d 630, 631 (1942) (dictum); 1 PAGE, WILLS §264 (3d ed. 1941). *But see* Bottrell v. Spengler, 343 Ill. 476, 175 N.E. 781 (1931) (testator's intent to incorporate must be shown by the reference).

[5]Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907).

[6]See Matter of Rausch, 258 N.Y. 327, 179 N.E. 775 (1932).

[7]President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940). *But see In re* Snyder's will, 125 N.Y.S.2d 459 (Surr. Ct. 1953).

[8]*E.g.*, Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950); Estate of Wiley, 128 Cal. 1, 60 Pac. 471 (1900); Merrill v. Boal, 47 R.I. 274, 132 Atl. 721 (1926).

if it was not amended after the will was executed.[9] Still other courts have permitted incorporation of the trust as it existed when the will was executed, ignoring any subsequent amendments.[10] This view has been attacked as defeating the testator's intent, for his plan of disposition necessarily included these subsequent amendments.[11] In one case a subsequent amendment was given effect, but the amendment in question was executed with the formality required of a will.[12]

Possible means of avoiding the problem are:

(1) Execute the trust and all subsequent amendments with the formality required of a will.
(2) If the trust is amended after the will is executed, execute a codicil to incorporate the amendment by express reference.
(3) Copy the entire trust instrument in the terms of the will, thus avoiding the use of the doctrine.
(4) Use a nonamendable trust if it adequately fulfills the testator's needs.

Some states have attempted to solve the problem through legislation.[13] One state[14] permits incorporation of any instrument in existence at the time of execution of the will, while another[15] expressly forbids incorporation of subsequent amendments unless the will is republished or a codicil is executed after the amendment. At least one state[16] permits incorporation only when the instrument is executed and acknowledged by the testator and signed by two witnesses. The

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[9]*E.g., In re* York's Estate, 94 N.H. 435, 65 A.2d 282 (1949) (no amendments after codicil was executed); *In re* Snyder's Will, *supra* note 7; Continental Ill. Nat'l Bank and Trust Co. v. Art Institute, 341 Ill. App. 624, 636, 94 N.E.2d 602, 609 (1950) (dictum).

[10]Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1935); *In re* York's Estate, *supra* note 9; Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934).

[11]See President and Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940); 1 SCOTT, TRUSTS §54.1 (2d ed. 1956). *But see* Stouse v. First Nat'l Bank, 245 S.W.2d 914 (Ky. 1951).

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

[13]*E.g.*, CONN. GEN. STAT. §2929d (Supp. 1955); ILL. ANN. STAT. c. 3, §194a (Smith-Hurd 1955); IND. ANN. STAT. §6-601h (1953); N.C. GEN. STAT. §31-47 (1955); OHIO REV. CODE ANN. §2107.05 (Page 1954); WIS. STAT. §231.205 (1955).

[14]OHIO REV. CODE ANN. §2107.05 (Page 1954).

[15]WIS. STAT. §231.205 (1955).

[16]CONN. GEN. STAT. §2929d (Supp. 1955).

recent statutes of two states[17] seem to go beyond any previous law in sanctioning the incorporation of subsequent amendments into a will, but they have not yet been construed. Both statutes allow incorporation of amendments to trusts made subsequent to execution of the will even though the amendments do not comply with the Statute of Wills.

In Florida the validity of the doctrine of incorporation by reference is as yet undecided. In one case[18] the question was raised, but the Court held the doctrine to be inapplicable to the facts under consideration. Although in the principal case the Court was not required to pass directly on the validity of the doctrine, it stated that in order to attack the amended trust the petitioner must allege that the amendment occurred subsequent to the execution of the will and that it was not executed with the formality required of a will.

To make the law more predictable and at the same time more enlightened, it would be desirable for Florida to enact legislation such as that of North Carolina,[19] which provides:

> "A devise . . . made . . . to the trustee of a trust established in writing prior to the execution of [the] will . . . shall not be invalid because it 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 . . . ."[20]

Such legislation would resolve many difficulties before they arise and would give Florida's probate laws a modern touch.

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[17]ILL. ANN. STAT. c. 3, §194a (Smith-Hurd 1955); N.C. GEN. STAT. §31-47 (1955).
[18]*In re* Gregory's Estate, 70 So.2d 903 (Fla. 1954).
[19]N.C. GEN. STAT. §31-47 (1955).
[20]See also ILL. ANN. STAT. c. 3, §194a (Smith-Hurd 1955).