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Wills: Incorporation by Reference by Holographic Codicil

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carrying out the intent of the settlor as balanced by the community's interest in protecting the well-being of wife or minor child.

Some cases which have allowed the income of a spendthrift trust to be reached have predicated the decisions on the construction of the creating instrument by reasoning that the settlor did not *intend* that a wife or minor child be excluded.³³ Such decisions are strained. It would be more realistic to state that if the settlor had such intention he would have expressed it. The underlying bases of such decisions seem to be that of public policy in allowing the trust to be reached, and it would be more desirable for the courts to state frankly that spendthrift trusts are not immune from support or alimony claims.

The public policy argument should also apply even where the wife and minor child were specifically excluded. However, in *Schwager v. Schwager*,³⁴ the court refused to go this far and gave effect to the express intent of the settlor. In *Brant v. Brant*,³⁵ under a statute which allowed the income to be reached for support of wife or child, the court refused to allow the *corpus* of a spendthrift trust to be reached for support of minor child.

It is submitted that in jurisdictions where the question is still open or inconclusive, the courts follow the principal case and other cases which have allowed recovery for support or alimony. Especially should the courts be thoughtful where the welfare of a minor child is concerned. At least in the absence of express exclusions as in *Schwager v. Schwager*, the courts would tend to promote what seems to be justice by adopting the position of the American Law Institute which provides:

"Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary, (a) by the wife or child of the beneficiary for support or by the wife for alimony;³⁶ . . ."

Rudolph Limon.

WILLS: INCORPORATION BY REFERENCE BY HOLOGRAPHIC CODICIL.—Sometime prior to April 6, 1947, Dexter G. Johnson typed out his last will and testament but did not date it, sign it, or have it witnessed. On April 6, 1947, he added on the same piece of paper in his own handwriting a testamentary disposition to his brother. He concluded by writing "This will shall be complete unless hereafter altered, changed or rewritten," whereupon he dated and signed it.

Out of these facts arose the case of *Johnson v. Johnson*.¹ The court held that the typewritten paper was a will, but could not be probated because it lacked the formal requisites of attestation. However, they held that the written addition was a holographic codicil which incorporated by reference the invalid will and therefore the intentions of the testator, as stated in the typewritten and hand written papers, could be carried out.

This was a case of first impression in Oklahoma and added that state to the list of states which recognize the doctrine of incorporation by reference.²

³³ In re Stewart's Estate, 334 Pa. 356, 5 A.2d 910 (1939); *Thomas v. Thomas*, 112 Pa. Super. 578, 172 A. 36 (1934); *England v. England*, 223 Ill.App. 549 (1922); In re Moorhead, *supra* note 7; *Tuttle v. Gunderson*, *supra* note 9; *Eaton v. Eaton*, *supra* note 11.

³⁴ 109 F.2d 754 (C.C.A. 7th 1940); *cf.* Board of Charities v. Kennedy, 3 Pa. Dist. R. 231, 34 W.N.C. 83 (1894), where the court in dictum declared that an explicit provision excluding the spendthrift trust from claims for support would be totally void.

³⁵ — Mo. App. —, 273 S.W.2d 734 (1954); *accord*, *Buchner v. Buchner*, 34 D&C 597 (Pa. Mun. 1939) (beneficiary entitled to income, held corpus unreachable); *Erickson v. Erickson*, 197 Minn. 71, 266 N.W. 161 (1936); *cf.* *Zouck v. Zouck*, *supra* note 15.

³⁶ RESTATEMENT, TRUSTS § 157 (1948 supp.).

¹ 279 P.2d 928 (Okla. 1954).

² 1 PAGE, WILLS §§ 251-55 (3rd Ed. 1941); 4 BAYLOR L. REV. 211 (1952); Annot., 21 A.L.R.2d 821 (1952).

While the doctrine is not new, there has been a reluctance to extend it, especially where a holographic codicil, not requiring witnesses, is involved. This is caused not only by the fear of a greater opportunity for fraud,³ but also because of the confusion surrounding the doctrine. The problem is made more complex by the courts' indiscriminate use of the terms "incorporation by reference," "integration," and "republication." While these courts may come to a just result, the reasoning leading up to it is sometimes so confused that it affords no sound basis for an extension of the principles involved. As an example, the principal case speaks of republication throughout its opinion, yet holds that the codicil incorporated by reference the original testamentary document.

The doctrines of republication, incorporation by reference, and integration are separate and distinct rules which should be distinguished.

The theory behind the rule that a codicil republishes a will is that by referring to a testamentary document it implies that the document still represents the desire of the testator as of the date of his latest writing. And therefore it is still meant to be his last will and testament in so far as not changed by the addition.⁴ It is because of this reasoning that a will, invalid because of undue influence, may be republished by a codicil made under conditions which were free from undue influence.⁵ The doctrine is technically applicable only to a valid will⁶ (i.e., one which is capable of probate) because a will cannot be republished if it has not already been published. But most courts when discussing the problem of republication make no distinction as to whether the original will is probatable or not. In addition, many of the courts talking of republication, as in the *Johnson* case, apply the rule erroneously, and when they do allow probate of the will, their decision can more easily be justified on the basis of incorporation by reference.⁷

The theory of incorporation by reference is that a will or codicil meeting all the statutory requirements for validity may incorporate into itself, by an appropriate reference, a document, or written paper, whether it is a will or not, and once incorporated takes effect as part of the will for the purpose of construction.⁸ The doctrine has the following requirements: (1) There must be an intent to incorporate the instrument; (2) the document to be incorporated must be in existence at the time of the incorporation and not just by the time of probate; (3) The document must be referred to with reasonable certainty; (4) The document must be in fact identified as the document referred to; and (5) The document must be the one in fact intended to be incorporated.⁹

It has been stated¹⁰ that the doctrine of incorporation by reference depends on "the existence of a valid will or codicil which can stand by itself as a probative instrument, and a non-testamentary paper of some kind" which is given effect by the codicil and acts as an "appendage" to the will. (Emphasis added.)

Conceding that the doctrine was originally only applicable to non-testamentary documents, it is believed that the courts have progressed too far in applying it to testamentary documents to be influenced to disregard it.

Integration, as distinguished from incorporation by reference, occurs when there

³ See note 1 *supra* at 937; 8 VAND. L. REV. 924, 927 (1955).

⁴ Taft v. Stearns, 234 Mass. 273, 125 N.E. 570 (1920).

⁵ Annot., 21 A.L.R.2d 821, 831 (1952).

⁶ ATKINSON, WILLS § 89 (2d Ed. 1953); Evans, *Testamentary Republication*, 40 HARV. L. REV. 71 (1926).

⁷ ATKINSON, *op. cit. supra* note 6, § 90; Evans, *supra* note 6, at 72-73.

⁸ ATKINSON, *op. cit. supra* note 6, § 80; Evans, *supra* note 6.

⁹ ATKINSON, *op. cit. supra* note 8; 1 PAGE ON WILLS § 250 (3rd Ed. 1941); Hahn, *Can a Valid Codicil Republish an Imperfectly Executed Will?* 17 JBADC 372 (1950); 17 MINN. L. REV. 527 (1932-33).

¹⁰ Hahn, *supra* note 9, at 378.

is no reference to a distinctly extraneous document, but it is clear that two or more separate pieces of paper take effect as the will.¹¹ Therefore all must be present and probated as the will.¹² Usually the separate writings are physically connected, but this is not absolutely necessary as long as there is some way to "tie-in" the different documents.

Since it is possible for these doctrines to overlap, it is easy to see how they can be confused.

It is now settled that a codicil, properly witnessed, may incorporate by reference a will not wholly in the handwriting of the testator.¹³ However, even among jurisdictions recognizing the doctrine, there is a split of authority as to whether such a privilege should be accorded to a holographic codicil.

In *Page on Wills*,¹⁴ it is stated:

"The holographic will is an apparent, though not a real exception to the general rule that a codicil, if properly executed, revives a prior will. Since a holographic will must be entirely in the handwriting of the testator, a holographic codicil which is not attested, does not republish a prior will which is not entirely in the handwriting of the testator."¹⁵

The leading case cited for the above quotation is *Sharp v. Wallace*.¹⁶ The Kentucky court applied a statute, similar to one in most states,¹⁷ requiring attestation of a will not wholly written by the testator, and the rule, also recognized in most states,¹⁸ that the will and codicil are to be construed as one instrument. It held that since the will and codicil, *taken as one instrument*, were *not wholly written by the testator*, it still required two witnesses to be valid. Most of the other cases denying a holographic codicil the power to incorporate or republish a non-holographic will are based on the same reasoning.¹⁹ It is because of this reasoning in the *Sharp* case that it is said that the court confused integration with incorporation by reference,²⁰ since in integration the writings are considered as one instrument for all purposes, while in incorporation by reference they are considered as one instrument for the purpose of construing the will.

Since Kentucky does recognize incorporation by reference,²¹ and also recognizes that an attested codicil can *republish* a holographic will,²² there is no valid reason why it should not also allow a holographic codicil to incorporate a non-holographic will. The Kentucky court uses the term "republication" when the term "incorporation" is proper and it would seem that the cases talking of "republication" where "incorporation" should be used are good authority for the incorporation by reference doctrine.²³ And indeed, some writers have used them as such.²⁴

That the *Sharp* case is not deserving of its position as a leading case can readily

¹¹ *In re Fritz's Estate*, 102 Cal.App.2d 385, 392, 227 P.2d 539, 543 (1951).

¹² ATKINSON, *op. cit. supra* note 8; see Malone, *Incorporation by Reference, of an Extrinsic Document Into a Holographic Will*, 16 VA. L. REV. 571 (1929-30).

¹³ ATKINSON, *op. cit. supra* note 7.

¹⁴ 2 PAGE, WILLS § 545 (3rd Ed. 1941).

¹⁵ *Id.* at 14.

¹⁶ 83 Ky. 584 (1886).

¹⁷ CALIF. PROBATE CODE § 50: ". . . (4) There must be two attesting witnesses, each of whom must sign his name at the end of the will at the testator's request and in his presence."

¹⁸ CALIF. PROBATE CODE §§ 101, 103; see AM. JUR., *Wills* § 608 n. 19 for a list of cases.

¹⁹ *Hinson v. Hinson*, 280 S.W.2d 731 (Texas 1955) (dictum); *Scott v. Gastright*, 305 Ky. 340, 204 S.W.2d 367 (1947); *Hewes v. Hewes*, 110 Miss. 826, 71 So. 4 (1916); *Gibson v. Gibson*, 28 Grat. (69 Va.) 44 (1877).

²⁰ ATKINSON, *op. cit. supra* note 8; Malone, *supra* note 12. *But see Mecham, The Integration of Holographic Wills*, 12 N. C. L. REV. 213 (1933-34).

²¹ See note 2 *supra*.

²² *Hurley v. Blankinship*, 313 Ky. 49, 229 S.W.2d 963 (1950); *Beall v. Cunningham*, 3 B. Mon. 390, 42 Ky. 390 (1843).

²³ See ATKINSON, *op. cit. supra* note 7.

²⁴ 2 PAGE, WILLS § 249 n. 1 (3rd Ed. 1941); 21 A.L.R.2d 823 (1952).

be seen when it is realized that the case is cited by one group as representing the view that a holographic codicil, not witnessed, cannot *republish* an unattested will, not wholly written by the testator;²⁵ by another group as authority for the proposition that a holographic codicil cannot *incorporate by reference* a non-holographic will;²⁶ and by a third that the case confuses the doctrines of *incorporation by reference* and *integration*.²⁷

In a California decision, *In re Soher*,²⁸ it is stated that there should be no exception when the codicil is holographic:

" . . . if an attested will can refer to a document which is not attested, we can see no good reason why an olographic will may not refer to a document which is not in the handwriting of the testator. The only difference between an olographic and an attested will is in the form of the execution. The statute has prescribed two forms in which written wills may be executed. In each case the instrument must be signed by the testator. But the formality of witnesses is dispensed with if the instrument is all in the handwriting of the testator himself. One form is the precise equivalent of the other. Whatever would be good as an attested will or codicil is good as an olographic one, if written, dated, and signed by the hand of the testator. *And whatever may be done in or by one may be done in or by the other.* Therefore, if the formalities of attestation are not required in a document referred to by an attested will or codicil, the corresponding formalities are not required in a document referred to by an olographic will or codicil."²⁹ (Emphasis added.)

The leading case in California is *In re Plumel's Estate*.³⁰ A will not wholly in the testator's hand (because of printed "190" in the date) was incorporated by reference into a holographic codicil written on the back of the will. While the same problem is involved, the court did not mention the *Sharp* case or any other case following the same reasoning, apparently feeling that these cases are irreconcilable with the doctrine of incorporation by reference.

In the *Johnson* case, no doubt the dissenting judges would not have been so disposed to exclude this instrument from probate had they been willing to concede that the completeness of the will was not important. Why should it matter whether the will was missing one witness, or did not have any of the requisites for probate? Should the doctrine of incorporation by reference be any the less applicable when the instrument to be incorporated is not dated, signed or attested than when the instrument is not even testamentary in character? Admittedly non-testamentary documents can be incorporated into a validly executed will or codicil.³¹

While the *Johnson* case may have confused the proper application of the two doctrines of republication and incorporation by reference, the result is compatible with the proper application of incorporation. And this decision should not lose its force just because of its loose talk.

The decision in the *Johnson* case, following as it does the result held in the *Plumel* case, should do much in removing from the law this *apparent exception*, spoken of by Page.³² The result should be an enforcement of the logic of allowing a holographic codicil to incorporate a non-holographic will, irrespective of attestation.

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²⁵ See note 14 *supra*.

²⁶ Malone, *supra* note 20; Mecham, *supra* note 20.

²⁷ ATKINSON, *op. cit. supra* note 8; Malone, *supra* note 20.

²⁸ 78 Cal. 477, 21 Pac. 8 (1889); see also Note, 17 MINN. L. REV. 527, 533 n. 36 (1933).

²⁹ 78 Cal. at 480, 21 Pac. at 9.

³⁰ 151 Cal. 77, 90 Pac. 192 (1907).

³¹ 57 AM. JUR. *Wills* 237; ATKINSON, *op. cit. supra* note 8 § 80 n. 5; Annot., 144 A.L.R. 716 (1943).

³² See note 14 *supra*.