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Wills -- Incorporation by Reference -- Invalid Instruments

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itself with a basis upon which to hold that the trust purposes were endangered, thereby fulfilling the requirement necessary to allow deviation under existing law.

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Wills—Incorporation by Reference—Invalid Instruments

In *Godwin v. Wachovia Bank & Trust Co.*[1] husband and wife executed a trust agreement which the court conceded to be void as an inter vivos trust because of the draftsman's failure to obtain and certify a private examination of the wife as required by section 52-12 of the General Statutes. Both husband and wife executed wills of even date with the trust instrument, each disposing of his property as provided in the trust agreement. After the wife's death the husband executed a new will which differed substantially from the terms of the trust agreement. In an action by the trustee seeking specific performance of an alleged contract between husband and wife to will their property according to the terms of the trust agreement, the court held that the trust agreement was incorporated in the respective wills by reference; that the wills themselves established the existence of the alleged contract; and that the trustee was entitled to specific performance for the benefit of the beneficiaries named in the original wills.

The doctrine of incorporation by reference[2] is recognized in England and in a great majority of American jurisdictions.[3] Four fea-

[1] 259 N.C. 520, 131 S.E.2d 456 (1963).

[2] This doctrine should not be confused with the closely related doctrine of "facts of independent legal significance." Professor Scott states, in reference to the latter doctrine, that: "[A] disposition made in a will is not invalid although its terms do not fully appear in the will, if those terms can be ascertained from facts which have significance apart from their effect upon the disposition in the will. The existence of a trust at the time of the testator's death, created by him at some time prior to his death, is such a fact. *It is not the trust instrument, but the trust itself, which has independent significance.*" 1 SCOTT, TRUSTS § 54.3, at 367 (2d ed. 1956). (Emphasis added.)

Since a valid inter vivos trust was never created here, and the trust instrument cannot be a fact of independent significance, this doctrine would seem inapplicable.

[3] ATKINSON, WILLS § 80, at 385 nn. 4-5 (2d ed. 1953), and cases cited therein. The doctrine is stated thusly in Newton v. Seaman's Friend Soc'y, 130 Mass. 91, 93 (1881): "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed of indenture, or of a mere list or memoran-

tures are generally requisite to an application of the doctrine: (1) the extraneous document must have been in existence at the time of the execution of the will;[4] (2) it must be referred to in the will as being in existence at the time of execution;[5] (3) it must be identified by satisfactory proof as the paper referred to;[6] and (4) the intention of the testator to incorporate the paper or document in his will must clearly appear from the will.[7]

The doctrine is based upon a fiction that the unattested instrument, invalid as a testamentary disposition by itself, becomes in-

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dum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such."

[4] "An attempt to incorporate a future document is ineffectual, because a testator cannot be permitted to create for himself the power to dispose of his property without complying with the formalities required in making a will." Simon v. Grayson, 15 Cal. 2d 531, 533, 102 P.2d 1081, 1082 (1940).

[5] Magoohan's Appeal, 117 Pa. 238, 14 Atl. 816 (1887).

[6] See Bottrell v. Spengler, 343 Ill. 476, 175 N.E. 781 (1931). Varying degrees of strictness have characterized the decisions as to sufficiency of identification. A direction to pay legacies "according to the directions written in a book by [M. W. P.], . . . signed by me . . . and witnessed by said [M. W. P.] . . . ," was held a sufficient description in Newton v. Seaman's Friend Soc'y, 130 Mass. 91 (1881). The statement "this is a codicil to my last will and testament" was definite enough to refer to an improperly executed will where no other will was found. Allen v. Maddock, 11 Moo. P.C. 427, 14 Eng. Rep. 757 (1858). A reference to an amount owed "on my books" was sufficient where testator kept only one set of accounts. *In re* Bresler's Estate, 155 Mich. 567, 119 N.W. 1104 (1909). Where two papers were found in decedent's pocketbook, neither of which alone would constitute a valid testamentary disposition, but which would when construed together, and one referred to another paper "in my pocketbook," it was held to incorporate the other so as to constitute a valid will. *In re* Miller's Estate, 128 Cal. App. 176, 17 P.2d 181 (Dist. Ct. App. 1932).

On the other hand, reference to "a sealed letter which will be found with this will" was held not to be a "clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed." Bryan's Appeal, 77 Conn. 240, 58 Atl. 748 (1904). Mention of furniture "which she has got a list of" was not sufficient. *In re* Goods of Greves, 1 Sw. & Tr. 250, 164 Eng. Rep. 715 (1858). A testamentary provision reciting that testator had executed deeds to named grantees, and that "said deeds" should become effective on testator's death as provided in the deeds, did not describe the deeds sufficiently to incorporate them in the will by reference. Brooker v. Brooker, 130 Tex. 27, 106 S.W.2d 247 (1937). And, where a will provided that "the balance be given to Kirwan on a special purpose," parol evidence was not admissible to show that the "special purpose" was fully described in a letter of even date with the will when the will made no allusion to such letter. Lawless v. Lawless, 187 Va. 511, 47 S.E.2d 431 (1948).

[7] Bottrell v. Spengler, 343 Ill. 476, 175 N.E. 781 (1931); Witham v. Witham, 156 Or. 59, 66 P.2d 281 (1937); Richardson v. Byrd, 166 S.C. 251, 164 S.E. 643 (1932).

corporated into the will at the place where the reference to it occurs; consequently, the instrument is supported by the statutory formalities regulating the execution of wills.[8] The policy considerations that underlie allowing such incorporation are basically uncomplicated. Primarily it is based upon the simple rule of convenience. The necessity of setting out in the will a lengthy trust instrument is eliminated. The testator may simply refer to the trust in one sentence, properly identifying and describing it, and declare that said trust is then in existence and that it is his intent to incorporate the same into his will. The courts will then refer to the terms of the trust in the administration of testator's will and estate.[9] Perhaps equally significant is the social desirability of permitting the testator's intention to be realized whenever possible.[10] When incorporation by reference is attempted, the courts are called upon to balance the intention of the testator against the technical requisites of the Statute of Wills;[11] when intention prevails, it may often be at a sacrifice of the basic statutory policy.[12]

Sacrifice of statutory policy seems to be the primary rationale for disallowing incorporation by reference. While three other states[13]

[8] 17 U. PITT. L. REV. 519, 520 (1956). See also Malone, *Incorporation, by Reference, of an Extrinsic Document Into a Holographic Will,* 16 VA. L. REV. 571, 572-73 (1930): "The basis of the prevailing view is, apparently, that when the will itself is properly signed and witnessed, the statutory safeguards against fraud and imposition have been given full effect."

[9] 2 PAGE, WILLS § 19.17 (Bowe-Parker rev. 1960).

[10] Evans, *Nontestamentary Acts and Incorporation by Reference,* 16 U. CHI. L. REV. 635, 636 (1949). "If the intent of the testator is certain and the possibility of fraud is eliminated, the incorporation of all formal trust instruments should be allowed." 33 ST. JOHN'S L. REV. 169, 171 (1958).

[11] The original English Statute of Wills was enacted in 1540. 32 Hen. 8, c. 1 (1540). In a session held in 1542 and 1543 parliament passed 34 & 35 Hen. 8, c. 5, clarifying loosely drawn parts of the earlier act. The present North Carolina statutory law governing wills is found in N.C. GEN. STAT. ch. 31 (1950).

[12] 6 ARK L. REV. 496, 498 (1952). It has been argued, however, that the majority rule effectuates the testator's intention, while keeping the spirit of the statute inviolate by means of the narrow limits within which the operation of the rule is confined. 11 COLUM. L. REV. 456 (1911).

[13] Louisiana, New Jersey, and New York. The following dictum is often stated as representing the Louisiana position: "And it may be conceded at once that a will cannot be made by mere reference to another document not itself a will or to a former will that is invalid for want of proper form. All the French authorities agree on that." Succession of Ledet, 170 La. 449, 453, 128 So. 273, 274 (1930). Dicta opposing incorporation are cited from numerous New Jersey cases in 2 PAGE, WILLS § 19.21 (Bowe-Parker rev. 1960). But Swetland v. Swetland, 102 N.J. Eq. 294, 140 Atl. 279 (Ct. Err. & App. 1928), *affirming* 100 N.J. Eq. 196, 134 Atl. 822 (Ch. 1926), seems to

are often cited as denying incorporation by reference, only Connecticut has a square holding rejecting it.[14] The argument there was, in effect, that the doctrine "militates against the authentication of the entire will, makes possible the sort of fraud against which the Statute of Frauds and the Wills Act were aimed, and is inconsistent with the requirement that a will be signed 'at the end thereof.' "[15] A further consideration was that the doctrine of incorporation by reference was developed in England prior to enactment of the Statute of Wills. The court reasoned that the statement or public policy in the statute overruled the previously established judicial doctrine.[16]

Incorporation by reference is not expressly prohibited by the Wills Act. From the requirements that a will must be signed, published, and attested in a certain way, some courts have deduced that the testator's purpose must be gathered from the will and not from other documents which lack the prescribed marks of authenticity. Denial of incorporation by reference is a product of judicial construction, designed to prevent fraud and mistake, and to uphold the statutory policy.[17]

North Carolina has consistently held with the majority view allowing incorporation by reference.[18] The leading case, *Watson v. Hinson*,[18a] states the North Carolina position thusly:

> It is well recognized in this State that a will, properly executed, may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will, the conditions being that the paper

recognize the doctrine. The leading New York case rejecting the doctrine is Booth v. Baptist Church, 126 N.Y. 215, 28 N.E. 238 (1891). *But see In re* Fowles' Will, 222 N.Y. 222, 118 N.E. 611 (1918) and *In re* Rausch's Will, 258 N.Y. 327, 179 N.E. 755 (1932), where the court said the rule against incorporation by reference should not be carried to a "dryly logical extreme."

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

[15] Evans, *Incorporation by Reference, Integration and Non-Testamentary Act*, 25 COLUM. L. REV. 879, 880 (1925).

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

[17] *In Re* Fowles' Will 222 N.Y. 222, 118 N.E. 611 (1918).

[18] Bullock v. Bullock, 17 N.C. 307 (1832) (books of account held incorporated, used to construe subsequent provision of will); Siler v. Dorsett, 108 N.C. 300, 12 S.E. 300 (1891) (case lost by parties seeking incorporation for failure to put extrinsic document in evidence, but doctrine clearly recognized); *In re* Coffield, 216 N.C. 285, 4 S.E.2d 870 (1939) (codicil incorporated and revised revoked will); Watson v. Hinson 162 N.C. 72, 77 S.E. 1089 (1913) (propounders granted new trial where second instrument made clear reference to one former will, and this feature had been allowed no effect as to validity of first).

[18a] 162 N.C. 72, 77 S.E. 1089 (1913).

> referred to shall be in existence at the time the second will is executed, and the reference to it shall be in terms so clear and distinct that from a perusal of the second will or with the aid of parol or other proper testimony, full assurance is given that the identity of the extrinsic paper has been correctly ascertained.[19]

In two cases[20] North Carolina has refused to allow incorporation by reference; however, this refusal was based upon the failure to meet the requirement of sufficiency of identification of the document to be incorporated rather than upon any limitation of the doctrine itself.

The significant and somewhat unique aspect of the instant case is the allowance of incorporation of an instrument that in itself was invalid. The authority on the point is sparse,[21] and neither the courts nor the commentators have articulated with any thoroughness the philosophical bases for such a result. It would seem, on the one hand, that an instrument invalid as an inter vivos document should not undergo a change in character by mere incorporation into a will. To hold otherwise would seem to undermine the policy behind the initial invalidity. The invalidity in the principal case resulted from failure to obtain the private examination of the wife as required by section 52-12 of the General Statutes. The purpose of the statute is to prevent frauds by the husband upon the wife,[22] and our court has stated that the statute proceeds on the idea, "not that there *is fraud,* but that there *may be fraud.*"[23] Strict application of the

[19] *Id.* at 79-80, 77 S.E. at 1092 (1913).

[20] Bailey v. Bailey, 52 N. C. 44 (1859); Chambers v. McDaniel, 28 N.C. 226 (1845).

[21] Our court cites the following in support of its holding: 94 C.J.S *Wills* § 163 (1956); Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950); Fifth Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 70 N.E.2d 920 (1946); *In re* Sciutti's Estate, 371 Pa. 536, 92 A.2d 188 (1952). Of these only *Montgomery* seems truly applicable. The writer found little else directly in point, despite an abundance of authority on incorporation by reference itself.

Apparently the only case refusing to allow incorporation of an invalid instrument is Clark v. Citizens Nat'l Bank, 38 N.J. Super. 69, 118 A.2d 108 (Ch. 1955). The court there held the existence of a valid trust on the date of the execution of the will to be essential to incorporation, and thus refused to allow incorporation of an invalid trust instrument. The case is criticized in 17 U. PITT. L. REV. 519 (1956).

[22] Stout v. Perry, 152 N.C. 312, 67 S.E. 757 (1910); Long v. Rankin, 108 N.C. 333, 12 S.E. 987 (1891); Sims v. Ray, 96 N.C. 87, 2 S.E. 443 (1887).

[23] Lee v. Pearce, 68 N.C. 76, 81 (1873).

statutory policy would have rendered the trust agreement void through no actual fraud is apparent. By allowing incorporation by reference, the court has given preference to the intention of the testatrix. Whether the court would have reached a similar result had the husband rather than the trust beneficiaries been asserting that the trust agreement embodied the wife's intention—a situation more directly involving the statutory policy—is a matter for speculation.[24]

The few courts which have allowed incorporation of an invalid instrument have done so on the grounds that the instrument embodies the intention of the testator, the theory being that it is the extrinsic writing itself, and not the legal effect, which should be looked to.[25] In *Skerett's Estate*[26] California allowed a deed which was invalid for lack of delivery to be incorporated into a testamentary writing. The intention of the testator was allowed to prevail over the formalities of conveyancing. "Any other conclusion," said the Pennsylvania court in a similar case, "would result in an unreasonable violation of testator's scheme of distribution."[27] Where testator devised his estate to a trust agreement which he had previously revoked, the Ohio court held that it was his "obvious intent" to employ the disposition in the trust agreement as the terms of his will, on the ground that a testator is never presumed to intend to die intestate as to any part of his estate to which his attention seems to have been directed.[28] In the *Godwin* case the allowance of incorporation would seem to implement the intention of the testators as embodied in the trust agreement and the original wills.

In balancing the policy behind a document's invalidity against a testator's intention, North Carolina has squarely held that the testator's intention may be given effect by allowing incorporation into

[24] The result reached would seem also to run counter to our "pour-over trust" statute, N.C. GEN. STAT. § 31-47 (Supp. 1961), which seems to contemplate a previously established, valid, existing trust as prerequisite to a valid devise or bequest.

[25] 17 U. PITT. L. REV. 519 (1956). Despite Professor Scott's contention that it is the trust itself and not the trust instrument that has independent significance, this argument sounds a great deal like the doctrine of "facts of independent significance." See note 2, *supra*.

[26] 67 Cal. 585, 8 Pac. 181 (1885).

[27] *In re* Hogue's Will, 135 Pa. Super. 543, 550, 6 A.2d 108, 111 (1939). See also Thompson's Ex'rs v. Lloyd, 49 Pa. 127 (1865).

[28] Fifth Third Union Trust Co. v. Wilensky, 79 Ohio App. 73, 70 N.E.2d 920 (1946).

a will of an invalid instrument. The *Godwin* case places North Carolina among a small group of states with decisions on the precise question, and helps to mark the state as a liberal jurisdiction on the doctrine of incorporation by reference.

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