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Wills--Incorporation by Reference--Incorporation of an Immaterially Amended Trust Allowed (In re Ivie's Will, 4 N.Y.2d 178 (1958))

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WILLS—INCORPORATION BY REFERENCE—INCORPORATION OF AN IMMATERIALLY AMENDED TRUST ALLOWED.—Testator made a bequest to the trustees of an amendable trust. Subsequently, the trust was amended twice. The bequest was attacked as being in violation of the rule against incorporation by reference. In unanimously affirming the decisions of the Surrogate and the Appellate Division, the Court of Appeals *held* that a bequest, referring to a trust in which minor administrative changes had been made subsequent to the execution of the will, did not offend the rule. *In re Ivie's Will,* 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958).

A devise or bequest is ordinarily invalid unless it is in writing, subscribed and attested in the manner provided by statute.[1] The doctrine of incorporation by reference, recognized in England[2] and in many states,[3] allows an instrument, whether or not it meets these requirements, to be incorporated into a will merely by making reference to it.[4] However, the testator's intent to incorporate must be certain[5] and the instrument must be in existence at the time the will is executed.[6] It must also be precisely and adequately defined therein.[7] Because of the danger of fraud[8] and circumvention of the statute of wills,[9] courts employ extreme care in their application of the doctrine.

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[1] See, *e.g.,* N.Y. DECED. EST. LAW § 21.

[2] See Bizzey v. Flight, [1876] 3 Ch. D. 269; Allen v. Maddock, 11 Moore P.C. 427, 14 Eng. Rep. 757 (1858).

[3] See, *e.g.,* Newhall v. Newhall, 280 Ill. 199, 117 N.E. 476 (1917); Shulsky v. Shulsky, 98 Kan. 69, 157 Pac. 407 (1916); Taft v. Stearns, 234 Mass. 273, 125 N.E. 570 (1920).

[4] See ATKINSON, WILLS 385-94 (2d ed. 1953); 1 SCOTT, TRUSTS § 54.1 (2d ed. 1956).

[5] See Matter of Piffard, 111 N.Y. 410, 18 N.E. 718 (1888); *In re* McCurdy's Estate, 197 Cal. 276, 240 Pac. 498 (1925).

[6] See Estate of Shillaber, 74 Cal. 144, 15 Pac. 453 (1887); Appeal of Sleeper, 129 Me. 194, 151 Atl. 150 (1930) (dictum).

[7] See Thayer v. Wellington, 91 Mass. (9 Allen) 283 (1864); Sheldon v. Sheldon, 1 Rob. Ecc. 82, 163 Eng. Rep. 972 (1844). For a general discussion of the conditions in relation to trusts, see 1 SCOTT, TRUSTS § 54.1 (2d ed. 1956). See also 1 PAGE, WILLS § 242 (lifetime ed. 1901) for a discussion of the distinction between incorporation by reference and the doctrine that a will may be written on separate pieces of paper.

[8] "Obviously an unrestricted recognition of incorporation of unattested papers into wills would open the door to fraud and in addition may be said to violate the spirit of the requirements of execution." ATKINSON, WILLS 386 (2d ed. 1953). However, even without the aid of the doctrine, courts go outside the will. See, *e.g.,* Dennis v. Holsopple, 148 Ind. 297, 47 N.E. 631 (1897), allowing a bequest to persons who might have nursed and clothed testator when he was in need; Metcalf v. Sweeney, 17 R.I. 213, 21 Atl. 364 (1891), determining whether plaintiff was within a bequest to servants in testator's employ at his death. Similarly an invalid will may be incorporated by a subsequently executed valid will, although New York limits this doctrine largely to cases in which the original will was invalid for reason of lack of testamentary capacity. *In re* Brown's Estate, 6 M.2d 803, 160 N.Y.S.2d 761 (Surr. Ct. 1957).

[9] See Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058 (1907); Philps v.

In New York, when the instrument itself meets the statutory requirements it may properly be incorporated.[10] The courts will also go outside the will merely to explain a term in the will.[11] In at least one case the court went outside the will to determine the amount of the bequest.[12] This would appear to be a recognition of the doctrine of "independent significance." Although it is said that the doctrine of incorporation by reference is not recognized,[13] non-recognition will not be carried to a "drily logical extreme."[14] Apparently the courts will sometimes[15] allow incorporation if by so doing the obvious intent of the testator will be effected. *Matter of Rausch*[16] established that an unamendable trust may be incorporated by reference.[17] The ultimate basis for that decision is not clear. In the opinion, Judge Cardozo stated:

> Here the extrinsic fact, identifying and explaining the gift already made, is as impersonal and enduring as the inscription on a monument. . . .
>
> A father bequeaths a legacy to his son by cancelling whatever indebtedness appears upon his books. No one doubts the validity of such a gift. . . . Yet to understand the extent of the legacy we must go beyond the will itself. "Signs and symbols" must be turned "into their equivalent realities. . . ."[18]

This language appears to approximate the "independent significance" doctrine. The opinion goes on to state that "the rule against incorporation is not a doctrinaire demand for an unattainable perfection."[19] It would appear that the doctrine of incorporation by reference or that of "independent significance" could support the decision.

Robbins, 40 Conn. 250, 271-72 (1873); Note, 17 MINN. L. REV. 527, 533-38 (1933); 12 MINN. L. REV. 769, 770 (1928); ATKINSON, WILLS 386 (2d ed. 1953).

[10] The most common example of this is the incorporation by reference of another's will. See Matter of Fowles, 222 N.Y. 222, 118 N.E. 611 (1918).

[11] See *In re* Latz' Estate, 95 N.Y.S.2d 584 (Surr. Ct. 1950); *In re* Utter's Will, 173 Misc. 1069, 20 N.Y.S.2d 457 (Surr. Ct. 1940).

[12] Langdon v. Astor's Executors, 16 N.Y. 9 (1857).

[13] See DAVID, N.Y. LAW OF WILLS § 436 (1923). "The New York law is well established that documents or instruments which have not been executed in accordance with the requirements of section 21 of the Decedent Estate Law cannot be incorporated in a will by reference." *In re* Snyder's Will, 125 N.Y.S.2d 459, 460 (Surr. Ct. 1953). For an earlier case in New York, see Booth v. Baptist Church, 126 N.Y. 215, 28 N.E. 238 (1891). *But see* Caulfield v. Sullivan, 85 N.Y. 153 (1881); Brown v. Clark, 77 N.Y. 369 (1879).

[14] Matter of Rausch, 258 N.Y. 327, 331, 179 N.E. 755, 756 (1932). Mr. Justice Holmes originated the phrase in Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911).

[15] See notes 5, 6 & 7 *supra* and accompanying text.

[16] 258 N.Y. 327, 179 N.E. 755 (1932).

[17] Although this is accepted as the holding of the case, nowhere in the opinion does Judge Cardozo mention that the trust is unamendable. However, that it is unamendable is shown in President & Directors of the Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940), and *In re* Snyder's Will, 125 N.Y.S.2d 459 (Surr. Ct. 1953).

[18] Matter of Rausch, 258 N.Y. 327, 332, 179 N.E. 755, 756 (1932).

[19] *Id.* at 332, 179 N.E. at 757.

In the subsequent case of *President and Directors of the Manhattan Co. v. Janowitz*,[20] a bequest to a trust which had been substantially amended subsequent to the execution of the will was not allowed. The court stated that the substantial change by amendment eliminated all independent significance. However, despite amendment, it would seem that the trust still had independent significance,[21] and therefore, if the underlying concept of the *Rausch* case was "independent significance," the *Janowitz* case would be difficult to reconcile. Subsequently, *Janowitz* was refined by *In re Snyder's Will*,[22] where a bequest was allowed to an amendable trust which actually had not been amended after execution of the will. Once again, the conclusion can be sustained under either doctrine.

In extending the *Snyder* case, the principal case affirms it. Since the amendment was found immaterial, it is not within *Janowitz'* rule. The Court of Appeals, however, would also seem to have tacitly accepted *Janowitz*, since the principal case could have been more easily decided if the Court had chosen to overrule it. Thus, in New York today, a trust that is unamendable, or one that is amendable but in fact has not subsequently been amended, may be incorporated. One which is subsequently substantially amended may not be; one that is immaterially changed may be. Just where the line is to be drawn is left unanswered.

No valid reason seems to exist for these distinctions. The reasons for upholding incorporation in one case uphold it in all. 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. Certainly with the solemnity surrounding this type of trust there is virtually no chance of fraud. As Judge Cardozo indicated, little difference exists between leaving money to a trustee who is bound by the trust agreement, and leaving money to a corporation which is bound by its corporate charter. Yet one would hardly doubt the validity of a bequest to a corporation, although a corporation may subsequently have its corporate charter amended.[23]

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[20] 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940).

[21] This situation seems analogous to a bequest to employees at death. There the bequest is allowed despite the fact that the identity of the employees might have changed between the making of the will and the death of the testator. See Dennis v. Holsopple, 148 Ind. 297, 47 N.E. 631 (1897). Likewise a gift to a corporation will be allowed although its charter may be substantially changed. See Matter of Rausch, 258 N.Y. 327, 331, 179 N.E. 755, 756 (1932) (dictum).

[22] 125 N.Y.S.2d 459 (Surr. Ct. 1953).

[23] In both instances there is legal obligation to use the money according to either the trust agreement or the corporate charter. See Matter of Rausch, 258 N.Y. 327, 331, 179 N.E. 755, 756 (1932). For general discussions of the *Rausch* case, see Notes, 17 MINN. L. REV. 527 (1933), 6 U. CINN. L. REV. 295 (1932); 9 N.Y.U.L.Q. REV. 507 (1932); 7 NOTRE DAME LAW. 541 (1932).