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Wills--Incorporation by Reference of Amendable Non-Testamentary Document Upheld (Matter of Snyder, 125 N.Y.S.2d 459 (Surr. Ct. 1953))

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WILLS — INCORPORATION BY REFERENCE OF AMENDABLE NON-TESTAMENTARY DOCUMENT UPHELD.—Petitioner sought a determination as to the validity of the incorporation of a trust agreement in a will. The Court *held* that since the document was in existence at the time the will was executed, clearly identified therein, and of such a nature as to preclude the possibility of fraud, mistake or chicanery, it was an effective part of the testament. *Matter of Snyder,* 125 N.Y.S.2d 459 (Surr. Ct. 1953).

The common-law courts of England, as early as 1607, permitted incorporation by reference of a non-testamentary document in a valid will,[1] if the document referred to was in existence at the time of the testamentary execution and was identified therein in such manner as to prevent judicial error.[2] The Wills Act of 1837,[3] which was passed to provide uniformity in the execution of wills,[4] specifically required the testator's signature and the attestation of the witnesses to be placed at the physical end of the document.[5] Nevertheless, a non-testamentary document, though not executed in accordance with this statute, might still be validly incorporated in a will.[6]

Early New York courts,[7] viewing the common-law rule of incorporation by reference as not inconsistent with statutory requirements,[8] adopted the doctrine. Subsequently, the rule was restricted in its application to limited circumstances [9] so as to prevent any possibility of mistake, fraud or chicanery.[10] This application of the rule permitted incorporation of non-testamentary documents solely for

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[1] See Molineux v. Molineux, Cro. Jac. 144, 79 Eng. Rep. 126 (K.B. 1605); Milford v. Smith, 1 Salk. 225, 91 Eng. Rep. 199 (K.B. 1693).

[2] *See* Croker v. Marquis of Hertford, 4 Moo. P.C. 339, 365-367, 13 Eng. Rep. 334, 343-344 (1844); Smart v. Prujean, 6 Ves. 560, 565, 31 Eng. Rep. 1195, 1198 (Ch. 1801); see 34 HALSBURY'S LAWS OF ENGLAND 167 (2d ed. 1940).

[3] 7 WILL. IV & 1 VICT., c. 26.

[4] *See* Brooke v. Kent, 3 Moo. P.C. 334, 345, 13 Eng. Rep. 136, 141 (1840).

[5] Wills Act, 1837, 7 WILL. IV & 1 VICT., c. 26, § 9. Prior to the passing of this statute, the Statute of Frauds, 1677, 23 CAR. II, c. 3, governed the form for devising real property by requiring conveyances in a will to be in writing, subscribed by the testator and attested to by witnesses. See 1 DAVIDS, NEW YORK LAW OF WILLS § 273 (1923).

[6] *See* Allen v. Maddock, 11 Moo. P.C. 427, 454-455, 14 Eng. Rep. 757, 767 (1858); Croker v. Marquis of Hertford, *supra* note 2 at 366, 13 Eng. Rep. at 344.

[7] *See* Brown v. Clark, 77 N.Y. 369, 377 (1879); Jackson *ex dem.* Herrick v. Babcock, 12 Johns. 389, 394 (N. Y. Sup. Ct. 1815); see Tonnele v. Hall, 4 N.Y. 140 (1850); 1 PAGE, WILLS § 255 (3d ed. 1941); 1935 LEG. DOC. No. 60(G), REPORT, N.Y. LAW REVISION COMMISSION 431 *et seq.* (1935).

[8] N.Y. REV. STAT. 1830, c. 6, tit. 1, § 40, Tonnele v. Hall, *supra* note 7; see 1 PAGE, WILLS § 255 (3d ed. 1941). The statutory provisions are presently embodied in N.Y. DEC. EST. LAW § 21.

[9] *See* Cook v. White, 43 App. Div. 388, 393, 60 N.Y. Supp. 153, 157 (2d Dep't 1899), *aff'd mem.*, 167 N.Y. 588, 60 N.E. 1109 (1901).

[10] *See* Matter of Fowles, 222 N.Y. 222, 232, 118 N.E. 611, 613 (1918). It should be noted that Judge Cardozo refers to the rule as the "rule *against* incorporation." *Id.* at 233, 118 N.E. at 613 (emphasis added).

purposes of identification,[11] and of documents of a testamentary nature.[12] The incorporated testamentary document was required to have been executed prior to the death of the testator so incorporating it, and in accordance with the governing statute.[13] Where another's will is incorporated, it is operative, ". . . not as transferring the property . . . [of the testator], but to define and make certain the persons to whom and the proportions in which . . . [the property is to pass]." [14]

Concededly, the primary concern of the court, in construing a will, is to determine the intent of the testator.[15] Thus, where the testator incorporates another's will in his own by reference, he intends that another, through that person's will, have the power of appointment over the testator's property.[16] It is immaterial that the incorporated will is subsequently altered or amended,[17] or even that it is not in existence at the time of the incorporation.[18] This is so, since the testator's continuing intent is that the provisions of the other person's will, whatever they might be, should control. The testator, himself, cannot act in any way so as to change his expressed intent, except by a codicil to, or revocation of, his own will.[19] However, where the document incorporated is of a non-testamentary character, as was the inter vivos trust agreement in the present case, it must, of necessity, be readily identifiable and in existence at the time of the execution of the incorporating will.[20] This is required because the intention of the testator, as construed by the courts, is to incorporate that document solely to identify the beneficiaries under his will, and

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[11] Booth v. Baptist Church, 126 N.Y. 215, 28 N.E. 238 (1891) (where the court refused to incorporate an unattested memorandum, listing securities and to whom they were bequeathed as it was testamentary in nature and not merely an instrument for identification purposes); *see* Matter of O'Neil, 91 N.Y. 516, 523 (1883); see Langdon v. Astor's Executors, 16 N.Y. 9 (1857) (where entries in testator's account books were referred to for purposes of indicating advancements made to beneficiaries under his will); Tonnele v. Hall, *supra* note 7 (where a map of the real property devised was incorporated so as to indicate the definite location of the property); 1 DAVIDS, NEW YORK LAW OF WILLS § 437 (1923).

[12] Matter of Piffard, 111 N.Y. 410, 18 N.E. 718 (1888); Matter of Fowles, *supra* note 10.

[13] See note 12 *supra.*

[14] Matter of Piffard, *supra* note 12 at 415, 18 N.E. at 719, followed in Matter of Fowles, 222 N.Y. 222, 231, 118 N.E. 611, 612 (1918).

[15] *See* Matter of Nelson, 268 N.Y. 255, 258, 197 N.E. 272, 273 (1935); Matter of Neil, 238 N.Y. 138, 140, 144 N.E. 481 (1924); see 3 JESSUP-REDFIELD, SURROGATES LAW AND PRACTICE § 1828 (Rev. ed. 1949).

[16] See Matter of Fowles, *supra* note 14; Matter of Piffard, *supra* note 12.

[17] See Matter of Fowles, *supra* note 14 at 233, 118 N.E. at 613.

[18] *See* Matter of Piffard, 111 N.Y. 410, 414, 18 N.E. 718, 719 (1888); President & Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 178, 21 N.Y.S.2d 232, 236 (2d Dep't 1940).

[19] N.Y. DEC. EST. LAW § 34.

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

to determine the extent to which, and the manner in which, they will take.[21]

In *Matter of Rausch*,[22] the leading New York decision permitting the incorporation of a non-testamentary document, the Court of Appeals stated that "[h]ere the extrinsic fact [the incorporated, non-testamentary document—an irrevocable trust agreement], identifying and explaining the gift already made, is as impersonal and enduring as the inscription on a monument." [23] This view expressly recognizes the statutory mandate which requires the testator's intent to remain immutable, unless altered or revoked by a testamentary act.[24] Following the comment of the Court of Appeals, the Appellate Division, in *President & Directors of Manhattan Co. v. Janowitz*,[25] refused to recognize the incorporation of an amendable trust agreement, which was amended subsequent to its incorporation in the will. In the *Janowitz* case, the court distinguished the *Rausch* case in that the document there was not subject to amendment or revocation.[26] If the court in the *Janowitz* decision had upheld the incorporation, the testator's intent would have been, at least, partly modified or completely revoked by the subsequent amending of the non-testamentary document. The instant case, in permitting the incorporation of the readily identified and existing amendable trust agreement, there being no amendment subsequent to the execution of the incorporating will, appears to be an extension of the prevailing law in this jurisdiction. The fact that the document in the *Janowitz* case was amended subsequent to incorporation, and not that it was merely amendable, seemed to the Court, in the case under consideration, to have been the controlling factor relied upon for that decision.[27]

To permit the incorporation of an amendable, non-testamentary document must, of necessity, require the court to determine whether or not the document was amended, and if found to have been so amended, to deny the incorporation since it altered the testator's intent by a non-testamentary act. The difficulty in conclusively determining whether or not the incorporated document was amended will probably vary to the extent that the document was in the control of the testator and thus susceptible to any subsequent changes by him. Consequently, by extending the rule of incorporation by reference to include amendable trust agreements, the Court, in the instant case,

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[21] *Id.* at 331, 179 N.E. at 756; Matter of Andrus, 156 Misc. 268, 294, 281 N.Y. Supp. 831, 864 (Surr. Ct. 1935); see 1 DAVIDS, NEW YORK LAW OF WILLS § 437 (1923).

[22] See note 20 *supra.*

[23] *Id.* at 332, 179 N.E. at 756.

[24] N.Y. DEC. EST. LAW § 34; *see* Matter of Whitney, 153 N.Y. 259, 264, 47 N.E. 272, 273 (1897).

[25] 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940).

[26] *Id.* at 179, 21 N.Y.S.2d at 236.

[27] See Matter of Snyder, 125 N.Y.S.2d 459, 463 (Surr. Ct. 1953).

appears to have opened the door to chicanery and mistake beyond the width originally intended by the Court of Appeals.[28]

In this manner, the Court has augmented its already difficult task of determining the testator's intent, not only by expanding the area of assault upon a testator's expressed intent by a disappointed devisee, legatee or distributee, but also by introducing the element of uncertainty as to the future determination of the validity of an incorporation provision in a will. Rather than have this undesirable situation arise, the courts should require, as a condition precedent to a valid incorporation, that such non-testamentary documents as trust agreements be irrevocable in nature, as well as readily identified therein and in existence at the time of the execution of the incorporating will.

[28] *See* Matter of Rausch, 258 N.Y. 327, 333, 179 N.E. 755, 757 (1932).